Per Curiam

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Appeals and Judicial Decision-making

This issue of *Per Curiam* tries something new: articles that concern the same general topic. The topic: What processes play a role in how appellate judges decide cases?

The three articles in this issue reflect different angles of judicial decision-making:

- The first article is an interview of Judge James Wynn of the U.S. Court of Appeals for the Fourth Circuit. Much praise is due to **Jonathan Marx**; the article reflects his skilled interview skills.
- The second article, written by **Kip Nelson**, is a deep dive into the role of amicus briefs in North Carolina's appellate courts.
- The final article presents insights on how law clerks to North Carolina's appellate judges read briefs. The author, **Lauren Bradley**, clerked on both the North Carolina Supreme Court and Court of Appeals.

Again, this is the first time that *Per Curiam* has centered on a theme. I am very interested in your feedback about whether this theme worked and, if it did, ideas for future issues. I expressly invite your feedback at ***stephen.feldman@elliswinters.com***.

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An Interview With Judge James Wynn

Judge James A. Wynn Jr. of the U.S. Court of Appeals for the Fourth Circuit graciously agreed to be interviewed by ***Jonathan Marx*** of McGuireWoods for the NCBA's Appellate Practice section. That interview on April 24, 2015, has been edited for length and clarity. Judge Wynn was also given an opportunity to review and clarify his remarks prior to publication.

Jonathan Marx: Judge Wynn, thank you for agreeing to be interviewed. The theme of this NCBA newsletter is judicial decision-making. You can tell a lot about how a judge approaches decision-making by who he patterns himself after. Is there another judge – living or dead, active or inactive – that you try to emulate?

Judge Wynn: As a young, working-class fellow growing up in eastern North Carolina, I didn't have a model of a judge or even a lawyer to look up to. I was in awe of judges and lawyers in general. What I've come to realize is that there has never been a perfect judge, but there have been some very good judges. There are many that I admire.

Certainly Thurgood Marshall comes to mind as someone who stands out as being courageous, both as a lawyer and a judge. He sought to put justice at the forefront of his decision-making process. And one of the most courageous judges in history was Judge Julius Waites Waring of South Carolina. There were others who during the civil rights era did what their duties required – that is, to be fair and impartial and carry out the ends of justice.

More personally, as the youngest judge when I got on the state Court of Appeals, I was in awe of all the judges there. The judge who influenced me the most was Clifton Johnston, first because he was the model of an ethical judge; he carried himself with fairness and impartiality. Second, he was greatly admired by his peers. He also happened to have grown up within 10 miles of where I grew up in Martin County, and I knew his family before I got on the Court. He stood out as the model for what I should emulate.

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Inside this Issue...

Building a Better Brief: 10 Tips from a Former Law Clerk

By Lauren H. Bradley

At the North Carolina Court of Appeals, more than likely, your brief is the only way for the panel of judges to understand your argument because very few cases are selected for oral argument. At the Supreme Court of North Carolina, your appellate brief is just as important because it is the justices' first encounter with your position. As a former law clerk to the Honorable Cheri Beasley both at the Court of Appeals and the Supreme Court, I read my fair share of appellate briefs and petitions. Based on my clerkship experience, here are a few ways to improve the quality of your written advocacy before our State's appellate courts:

1. Make sure the lower court had and appellate court has jurisdiction. The appellate court has a duty to examine jurisdictional issues, and the Court can raise subject-matter jurisdiction on its own motion. *E.g.*, **Musick v. Musick, 203 N.C. App. 368, 370, 691 S.E.2d 61, 62 (2010)** (appellate court's jurisdiction); **Obo v. Steven B., 201 N.C. App. 532, 537, 687 S.E.2d 496, 500 (2009)** (trial court's jurisdiction). Examining both the trial court's and the appellate court's jurisdiction before writing your brief will save you from the "ironic" situation in **Morehead v. Wall, 736 S.E.2d. 798 (N.C. Ct. App. 2012)**, where the parties thoroughly briefed the timeliness of the plaintiff's appeal from small claims court to the district court but failed to notice that the plaintiff's appeal to the Court of Appeals was untimely. *Id.* at 800-01.

2. File a motion to dismiss if there is an appellate jurisdiction issue. Numerous cases every year are dismissed by the Court of Appeals for lack of appellate jurisdiction. Indeed, the Administrative Office of the Court's Statistical and Operational Report for July 1, 2013, to June 30, 2014, indicates that 181 cases out of a total of 1,484 disposed cases were either dismissed or withdrawn. N.C. Admin. Office of the Courts, Statistical and Operational Report, July 1, 2013 – June 30, 2014 9, *available at* http://www.nccourts.org/Citizens/SRPlanning/Statistics/Operational.asp (then click on "Appellate Courts" below "2013-2014"). If a party has not filed a motion to dismiss, the Court of Appeals must issue a written opinion to dismiss the appeal. If there is jurisdictional default and a party *has* moved to dismiss, the Court can simply issue an order dismissing the appeal. The Court may allow merits briefing to be concluded before doing so, but a motion to dismiss provides the Court an opportunity to save its judicial resources and dismiss a textbook case that does not warrant a written opinion clarifying the jurisdictional aspects of appellate practice. Note that a separate motion to dismiss must be filed; it cannot be raised for the first time solely in the brief. **Kor Xiong v. Marks, 193 N.C. App. 644, 651, 668 S.E.2d 594, 599 (2008)**. The motion, however, can be filed at any time before the case is called for oral argument or "heard" without oral argument. N.C. R. App. P. 37(a); N.C. R. App. P. 30(f).

3. Pay attention to the organization of your argument section. A disorganized argument section makes the appellate court's job unnecessarily difficult. If there is an issue that, if decided in your client's favor, will obviate the other issues, argue that issue first. If your client is the appellee, and the appellant's organization is illogical or confusing, my recommendation is to follow the appellant's organization and point out in a footnote that you're only organizing your brief in this manner solely to aid the Court's review. Alternatively, you can organize the issues logically and cross-reference the corresponding sections of appellant's argument. It is far harder for the Court to know how your arguments respond to the appellant's arguments when there is no organizational uniformity between the two briefs. The way you *would* have organized appellant's brief might make more sense, but the quality of your advocacy suffers when the judges cannot find your position on an important issue.

4. Cite check legal and record citations and be truthful as to both. Inaccurate or distorted record and case citations in your brief are the surest way to tank your credibility with the appellate court. I once read a brief where a lawyer completely misread a United States Supreme Court opinion and cited the opinion for a proposition it clearly did not support. Did I bring that to my judge's attention? You bet. How much credibility did that brief have? Not much. Inaccurate record citations can also damage your credibility. (Note also the ethical obligations contained in Rule 3.3 of the North Carolina Rules of Professional Conduct.) The appellate courts, just as much as the trial court, need to know what the facts are and where in the record each fact is found. Draft opinions contain citations to the record that are removed prior to releasing opinions to the public. Providing accurate record citations for your statement of facts aids the judges in applying the law to the relevant facts. Just as specific page references to the transcript and record are required, N.C. R. App. P. 28(b)(5), pinpoint case citations should likewise be included and must be correct. Make it clear as day why the Court should grant or not grant relief.

5. Confront authority that is not in your favor. This may come as a shock, but law clerks will do their homework. Don't make the incorrect assumption that judges and clerks draft opinions solely based on the authorities presented by the parties in their briefs. If your opponent hasn't already found it, the law clerk will find that case that you're trying to hide from. Rather than letting your deafening silence on that case undermine your brief, present it in your brief and, if you can, persuasively (and accurately, see Tip No. 4 above) distinguish it.

6. Engage the standard of review as part of your substantive argument. It may take a single sentence to address the standard of review, but that sentence sets the framework for the Court's analysis.

An appeal is not a simple question of whether the trial judge was right or wrong; it is a question of how much deference is given to the trial judge's decision. Your argument is far more powerful and persuasive when you utilize the standard of review to emphasize how high your opponent must climb to obtain the requested relief or that you have satisfied the standard of review.

7. Use parentheticals in case citations to your advantage. Parentheticals can be a quick, concise way to key the judges into what is important about a case and why it applies to your appeal, which may be particularly helpful if you are constrained by the word count for the Court of Appeals. It also breaks you out of the doldrums of, "In *A* case, B happened. In *X* case, Y happened." A quoted sentence in a parenthetical is an easy way to summarize a legal proposition, while a participial phrase is better used when you want to pull in particular facts or procedural matters. The Bluebook also permits a short phrase to be used as a parenthetical when a participial phrase isn't needed, so don't feel tied to the formulaic practice of starting your parenthetical with a verb ending in "–ing" (see the citations in Tip No. 1).

8. Be specific about why your case meets one or more criteria for discretionary review. In most cases, N.C.G.S. § 7A-31(c) is effectively the standard of review for your case to enter the Supreme Court. Quoting the statute and asserting that your case "involves legal principles of major significance to the jurisprudence of the State" will not likely get your case past the Supreme Court's mailbox. The Supreme Court is not an error-correcting court, so leave those arguments on the other side of Morgan Street. The Supreme Court is concerned with the State's judicial policy, and subsections (1) through (3) in § 7A-31(c) are aimed precisely at that task. What segment of the public has a significant interest in the subject-matter of this case? Perhaps would-be adoptive parents and abused, neglected, or dependent juveniles have a significant interest in a particular termination of parental rights decision from the Court of Appeals that would threaten the finality of such decisions. Why are the underlying legal principles important to the State's jurisprudence? Simply calling your case one of "first impression" will not suffice. What other cases demonstrate the need for guidance on this particular issue? If the Court of Appeals' decision conflicts with a prior Supreme Court decision, which decision and what part? Be specific about how the consistency of this State's case law and the supremacy of the Supreme Court's decisions are affected by the Court of Appeals' opinion.

9. Cut to the chase. Various notable people have been credited with saying, "If I had more time, I would have written a shorter letter." Having been in private practice for almost two years, I now understand what the author meant by that. In the context of appellate briefs, you do not need to use your entire word limit at the Court of Appeals and should not abuse the absence of a word limit at the Supreme Court. In fact, the shorter and less redundant the brief, the more persuasive and impactful your argument can be. (The same can be said about oral arguments.) There may be a dozen ways the appellate court can affirm an order, but it likely will only affirm on one. Prioritize your best arguments and note others more briefly. The procedural history is another easy area in which to trim your brief. If you're appealing from a jury verdict, discussing the motion to dismiss that was denied two years ago is probably not necessary. Also, do not waste paper and file a reply brief that merely rehashes everything in your opening brief. *See* N.C. R. App. 28(h).

10. Educate the Court on novel issues. Your brief obviously should answer the question presented, but don't miss the opportunity to educate the Court about the legal landscape for the issue(s) presented. On any given calendar, appellate judges will decide cases from a wide variety of areas, with each case presenting a diverse set of issues, so a bit of education in very specialized areas or on unusual issues may be warranted. An *amicus* brief may serve this purpose as well. If the Court has overlooked or misapprehended the facts or law, then you can file a petition for rehearing, N.C. R. App. P. 31, but such petitions are rarely granted.

These tips, I hope, provide insight into how your written advocacy can better assist our appellate courts in ruling on appeals and providing guidance to the trial courts.

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