

**DO'S AND DON'TS
AT THE COURT OF APPEALS:
A VIEW FROM THE BENCH**

Judge Mark A. Davis
Associate Judge
North Carolina Court of Appeals

Judge Donna Stroud
Associate Judge
North Carolina Court of Appeals

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Judge Mark A. Davis was appointed to the North Carolina Court of Appeals in 2012 and elected to serve a full term in 2014. Prior to that, he served as General Counsel in the Office of the Governor for two years. Between 2006 and 2011, he was a Special Deputy Attorney General in the North Carolina Department of Justice. From 1993 until 2006, he worked as an attorney at Womble Carlyle Sandridge & Rice, where he was a member of the firm in the Litigation Section. Prior to his appointment to the Court of Appeals, he handled over 65 appeals in state and federal appellate courts.

Judge Davis received his law degree from the University of North Carolina School of Law and his undergraduate degree from the University of North Carolina at Chapel Hill.

Upon his graduation from law school, he served as a law clerk to the Honorable Franklin T. Dupree, Jr. in the United States District Court for the Eastern District of North Carolina.



Judge Donna S. Stroud was elected to the North Carolina Court of Appeals in November 2006 and re-elected without opposition in 2014. She is a graduate of Campbell University, summa cum laude, with a BA in Government in 1985, and a graduate of the Campbell University School of Law, with a J.D. magna cum laude in 1988. Judge Stroud was ranked first in her law school class each year of law school and upon graduation and served as the Notes and Comments editor of the Campbell Law Review. She practiced law as an associate and later as a partner with Kirk, Gay, Kirk, Gwynn & Howell in Wendell, Wake County, N.C. from 1988 until 1995; she was then a founding partner of Gay, Stroud & Jackson, LLP, where she continued to practice until her election as a District Court Judge in Wake County in 2004. While in private practice, Judge Stroud was also a certified Superior Court mediator and a District Court arbitrator. Judge Stroud served as a Family Court Judge while on the District Court. After joining the Court of Appeals in 2007, Judge Stroud began teaching as an Adjunct Professor at Campbell University School of Law in 2008, teaching Judicial Process and Juvenile Law. In May 2014, she graduated from the Duke University School of Law LL.M. program in Judicial Studies as a member of its charter class.

Do's and Don'ts at the Court of Appeals: A View From the Bench consists of tips from North Carolina appellate judges on a wide variety of topics designed to improve the briefwriting and oral advocacy skills of practitioners in the North Carolina Court of Appeals.

DO'S AND DON'TS AT THE COURT OF APPEALS: A VIEW FROM THE BENCH

The purpose of this CLE is to provide tips to practitioners on effective practices at the North Carolina Court of Appeals both at the briefing stage and at oral argument. While following all of these suggestions obviously will not guarantee that you prevail in your appeal, it will enable you to avoid the most common mistakes made by appellate practitioners.

1 GENERAL

1. DO: KNOW YOUR AUDIENCE

The judges on the Court of Appeals collectively issue approximately 1500 opinions per year. They are constantly reading briefs. Your goal as an advocate should be to lead them to the right result as directly as possible.

2. DO: KEEP YOUR CREDIBILITY GAUGE “ON FULL”

As a practitioner, the most important quality you have is your credibility. Never do anything that will diminish your credibility in the eyes of the judges before whom you are appearing.

3. DO: UNDERSTAND WHAT WE CAN AND CANNOT DO

Appellate judges do not have the power to correct results they feel are wrong upon their review of the record. Instead, with only a few exceptions, they can only send cases back to the trial court if (1) the appellant is able to show the trial court erred; and (2) the appellant is able to establish prejudice.

4. DO: CRAFT YOUR ARGUMENT BASED ON THE APPLICABLE STANDARD OF REVIEW

Appellate judges are always focused on the standard of review that governs their analysis of the particular case before them. As lawyers, know what that standard of review is and tailor your arguments accordingly. Where appropriate, explain to the court in your brief if there are multiple standards of review that apply to different issues in your appeal.

5. **DO: FRAME EACH ISSUE IN YOUR CASE AS A SYLLOGISM**

A helpful practice is to convert each issue in your appeal to a logical syllogism in which you state – at the beginning of your argument -- the major premise, the minor premise and then the conclusion that logically follows. Doing so will help the judges analyze the argument that follows in your brief.

6. **DON'T: EXAGGERATE THE APPLICABILITY OF PRECEDENTS**

Fortunately, very few lawyers in North Carolina would deliberately misstate the holding of a case cited in their briefs. However, it is not unusual for attorneys to exaggerate the applicability of a precedent. This is a mistake for two reasons: First, both the judge and the judge's law clerks will read the cited case carefully and then realize you have overstated its importance to the appeal under consideration. Second, you will have reduced your credibility with the judges both in the appeal at hand and in future appeals. Similarly, if your case is truly a case of first impression in North Carolina, say that at the outset. You will boost your credibility with the court by doing so.

7. **DO: AVOID TYPOS IN YOUR BRIEFS**

While you cannot control the facts of your case or the applicable law, one thing you can control is whether your brief is adequately proofread before filing. In addition to yourself, ask colleagues, assistants, and family members to proofread the brief to eliminate typos and misspellings. While you won't lose an appeal based on these types of errors, you do not want to get the reputation of being sloppy and for not taking your appeals seriously.

8. **DON'T: ASSUME THE JUDGES ON YOUR PANEL ARE EXPERTS IN THE LEGAL AREAS GOVERNING YOUR APPEAL**

Given how specialized the law has become, it is unrealistic to assume that every judge on your panel will bring to the case expertise in the legal subjects at issue. It is helpful to assume the opposite and to "spoon feed" the judges in your brief by walking them through the applicable legal principles, moving from the general to the specific.

9. **DON'T: MAKE YOUR BRIEFS ANY LONGER THAN THEY NEED TO BE**

Every now and then, an appeal comes along in which the issues are complex enough (either factually or legally) to warrant a brief that uses the maximum page (or word) limit. In such cases, do not feel defensive about filing a brief of that length. However, most appeals do not fall into that category. If you are able to make all the points you want to make and you find yourself with extra pages to spare under the

page/word limits, do not add to your brief simply because the Appellate Rules entitle you to do so. Judges appreciate lawyers who fully address the issues but do so in a concise way. Doing so also signals to the judges your confidence that your position is meritorious.

10. DO: MAKE YOUR BRIEFS AS ORGANIZED AS POSSIBLE

Given the volume of reading that we do, well-organized briefs are greatly appreciated by appellate judges. It also helps us to understand your arguments better if subheadings are utilized. You should also consider adding a summary of your argument for each issue analyzed in your brief.

11. DON'T: REPEAT ARGUMENTS

Try to resist the temptation to repeat the same points over and over both in briefs and in oral arguments. Repetition can sometimes weaken an otherwise strong argument.

12. DO: RESERVE FOOTNOTES FOR WHEN THEY ARE REALLY NECESSARY.

It is unrealistic to say that footnotes should never be used. Sometimes it is more appropriate to drop a footnote conveying information that would be out of place or distracting to the judge reading the brief if it was placed in the main text. However, most pages of your brief should not contain footnotes. It becomes distracting if they appear on virtually every page.

13. DON'T: LET THE COURT SEE FRICTION BETWEEN YOU AND OPPOSING COUNSEL

All appellate judges were once lawyers who occasionally had to deal with difficult opponents. If you are in that situation, resist the temptation to make statements (in briefs or at oral argument) designed to make us dislike that attorney (or the attorney's client). While we recognize the fact that some unreasonable lawyers are out there, judges hate to see fighting among the lawyers. A caveat to this rule is that if your opponent has engaged in conduct that is not only unpleasant but that is actually relevant to the issues for determination in the appeal, you should, of course, make the judges aware of that conduct. However, do so in a professional manner rather than as a personal attack.

14. DO: MASTER THE RECORD ON APPEAL

In some instances, the attorney who handles the appeal will not be the same attorney who handled the case at the trial level. This, by itself, is not a problem as

there may be compelling reasons for new appellate counsel. However, it is crucial that the appellate attorney be totally familiar with the record on appeal at the time of oral argument. It is frustrating for the judges on your panel when they ask a question about the record and the lawyer making the argument does not know the answer. Never respond to a question about the record by simply stating that you were not the lawyer who tried the case.

15. DON'T: MAKE ARGUMENTS BASED ON SYMPATHY

Appellate judges pride themselves on making decisions based on the law rather than based on sympathy for parties to the case. If your client's situation is one that elicits sympathy, it is certainly appropriate to mention the pertinent facts (without overdoing it) in the appropriate section of your brief – usually the Statement of Facts section. However, you do not want to give the judges the impression that you are suggesting they rule for your clients based on sympathy rather than legal principles.

16. DO: FILE PETITIONS FOR REHEARING ONLY IN EXTRAORDINARY CASES

The Appellate Rules allow parties to file petitions for rehearing. However, such petitions are rarely granted. If you have received an opinion ruling against your client from the Court of Appeals, think carefully before filing a petition for rehearing. Unless the court made a clear error of fact or law on which the decision hinged (as opposed to simply being more persuaded by your opponent's argument than your argument), it is likely a waste of the court's time and your client's money to file such a petition.

17. DO: AVOID UNNECESSARY DATES AND FACTS IN YOUR BRIEFS

Many briefs are cluttered with extraneous information that is irrelevant to the issues for resolution by the court. For example, in the Statement of the Case section of the brief, it is not necessary to list every single event that has occurred in the case. Only the ones that are directly relevant to the appeal should be listed. Also, dates should only be referenced when they are important to the issues to be resolved by the court.

18. DO: FILE MEMORANDA OF ADDITIONAL AUTHORITY AS SOON AS YOU BECOME AWARE OF THE NEW AUTHORITY

It is not unusual for lawyers to become aware of a case that was not cited in their briefs that bears on their appeal. In such instances, the submission of a memorandum of additional authority is appropriate. However, we too often see such memoranda that are filed on the day of the oral argument. These "eleventh hour" filings force us to revisit the case at the last minute in a hurried fashion. Moreover, sometimes it appears that the late filing is an example of gamesmanship between

the attorneys. Unless the new case you're bringing to our attention is one that was literally handed down the day before your oral argument, try to file memoranda of additional authority well in advance of the date your case is calendared for hearing.

19. DO: MAKE SPECIFIC CITATIONS IN YOUR BRIEF TO THE RECORD ON APPEAL (OR EXHIBITS THERETO)

When you are discussing factual evidence in the record on appeal or in exhibits that have been filed therewith, always give a page number citation. It is frustrating for judges to read in your brief a reference to evidence purportedly in the record and have to search through the entire record to locate the evidence at issue.

20. DO: MAKE SURE YOU ARE USING THE CORRECT VERSION OF A STATUTE

Because it is not unusual for statutes to be amended, always be careful to ensure that you are quoting from and discussing the version of the statute that actually applies to your case. Otherwise, not only do you look sloppy in your research but you have also denied yourself the opportunity to make a proper argument based on the statute the panel will be applying to decide your appeal.

21. DO: CITE CASES FROM OTHER JURISDICTIONS WHEN APPROPRIATE

When there is no controlling North Carolina law on an issue, you should not be hesitant to cite cases from other jurisdictions. In an issue of first impression, we like to see how other jurisdictions have handled that same issue. Moreover, with regard to federal cases, many of North Carolina's Rules of Evidence and Rules of Civil Procedure are modeled after their federal counterpart. For this reason, we often look to federal case law for guidance. However, keep in mind that cases from other jurisdictions are purely persuasive authority with regard to an issue arising under North Carolina law.

22. DO: SHOW YOUR MATH

In cases involving numbers, it is always wise to assume that the judges on your panel are not mathematicians or economists. Even if you are lucky enough to be gifted in those areas, explain the numbers you are using in your argument so that you can be sure we follow your reasoning.

23. DON'T: MAKE ARGUMENTS THAT WERE NOT MADE TO THE TRIAL COURT

With very few exceptions, your arguments on appeal are limited to the arguments made on behalf of your client in the trial court. The cases are replete with prohibitions on "swapping horses" on appeal.

24. DO: USE BLOCK QUOTES SPARINGLY IN BRIEFS

The use of block quotes can be effective in a brief if used selectively. It is perfectly appropriate to use a block quote for language in a prior case or statute that is directly on point with an issue in your appeal. However, briefs too often use block quotes that are far too long or for language that is not particularly relevant.

25. DO: TRY TO AVOID HYPERBOLE

Very few appeals involve landmark cases. While all appeals are important to us and are taken very seriously, it is a mistake for lawyers to exaggerate the jurisprudential effect of the case or the magnitude of the issue involved. Excessive exaggeration only diminishes your credibility.

26. DON'T: TALK OVER THE JUDGES WHEN THEY ARE ASKING QUESTIONS

Even putting aside the courtesy component, when both you and the judge are talking at the same time, neither one of you is hearing what the other is saying. You want to hear the judge's questions and comments so you can address their concerns and you want them to hear clearly everything you are telling them.

27. DO: CONSIDER VISUAL AIDS AT ORAL ARGUMENTS

Visual aids are rarely used in oral arguments at the Court of Appeals. Not every case is appropriate but some are. As you prepare for oral argument, consider whether your presentation would benefit from the use of exhibits or even some form of computer presentation. The Court of Appeals courtroom has monitors at the counsel tables and on the bench and an ELMO, which is a device which will display any sort of document or photograph on these monitors. No fancy preparation is required — just put your document on the ELMO and everyone can see it.

28. DO: INCLUDE A LEGIBLE MAP IF YOUR CASE INVOLVES ANY ISSUE REGARDING REAL PROPERTY OR ROAD BOUNDARIES OR LOCATIONS.

Often the maps in the records are copies of large plats that have been reduced in size and the print is so small that it is almost impossible to read. And most people, including judges, have a difficult time understanding exactly where real property is located based on a written description of distances and directions. Make sure the record includes a legible map and consider using it as a visual aid at oral argument also.

29. DON'T: SPEND THE BEGINNING OF YOUR ORAL ARGUMENT STATING THE

FACTS

You can approach oral argument confident that we are familiar with the facts of the case. By the time you stand up to argue, we will have read and reread the briefs and will be knowledgeable about the factual events giving rise to the appeal. Obviously, during your discussion of the issues in your argument, you will need to talk about certain key facts that relate to that issue. However, you should avoid a general summary of the entire set of facts.

30. **DO:** BE FLEXIBLE IN YOUR PREPARATION FOR ORAL ARGUMENT

It is human nature for lawyers preparing for oral argument to plan to give their presentation in a certain order. However, when you get up to speak, the judges may ask you, for example, to jump to the third issue you had planned to discuss before you have had a chance to present your argument regarding the first and second issues. Be flexible enough not to be thrown off-stride when this happens.

31. **DO:** TRY TO ANTICIPATE QUESTIONS YOU ARE LIKELY TO BE ASKED AT ORAL ARGUMENT

During your preparation for oral argument, you should be able to predict most, if not all, of the questions you are likely to be asked. Virtually all of the judges' questions are going to be based on the arguments contained in your opponent's briefs. While hypothetical questions are sometimes hard to anticipate, they usually consist of the judges' attempt to see if your argument holds up if the facts are taken to their logical extreme. Therefore, if you have a strong sense of how far your argument can logically be taken, you should be able to handle most hypothetical questions.

32. **DO:** BRING A "CHEAT SHEET" TO THE PODIUM

Occasionally, you will be asked a question during oral argument about where a key piece of evidence is in the record on appeal or about the holding of a case cited in the briefs. Unless you have a photographic memory (which most of us lack), bring a piece of paper up with you during your argument that has key information you can quickly access in response to such a question.

33. **DO:** USE ORAL ARGUMENTS TO CORRECT ANY MISTAKES YOU HAVE MADE IN YOUR BRIEF

All of us are human and it is not uncommon to discover during preparation for oral argument that your brief contains an error. Confess the error at the earliest opportunity during your oral argument. It is far better for you to bring the error to the

panel's attention than for a judge on the panel to bring it to your attention. In addition, you may also seek leave to file a corrected brief with the Clerk's Office.

34. DO: ANSWER QUESTIONS FROM THE BENCH DIRECTLY

You would be amazed at how often lawyers are asked a direct question at oral argument yet fail to give a direct answer. You will always be allowed to explain your answer, but judges get frustrated sometimes when the explanation is not prefaced by a "yes" or "no." Similarly, it is painfully obvious to the judges when lawyers are trying to evade a difficult question, and you should never try to do that. Instead, answer the question directly (no matter how difficult) and then explain why your client should still prevail. Always remember that a judge's questions reveal what that judge considers pivotal in how the case should be resolved. If you do not provide a clear answer, the judge may well end up answering the question based on the arguments of your opponent.

35. DO: ADMIT IF YOU DON'T KNOW THE ANSWER TO A QUESTION POSED BY THE PANEL

Even diligent lawyers who thoroughly prepare for oral argument are sometimes asked a question as to which they simply do not know the answer. When that happens, it is far better to admit your lack of knowledge on that question than it is to try to bluff your way through the answer. You will also gain credibility with the judges by admitting you do not know the answer.

36. DO: KNOW HOW TO E-FILE.

Some lawyers resist the technological changes brought to us by computers and electronic filing; some embrace them. But either way, electronic filing is here to stay and will no doubt be expanding throughout North Carolina's courts in the future. Our clerk's office gets many calls from people who are having difficulties with e-filing. While our staff is happy to help, here are some tips to try before calling:

- Make sure that you have registered your email address for e-filing and that you are using your registered email address to file.
- Check your password! Update if needed.
- Please upload brief and appendix as ONE document (not separately).
- If you receive a message that your login failed (your account has been locked) – Call the Appellate Courts IT Dept. at (919) 831-5708.

37. **DO:** CONSIDER APPELLATE MEDIATION.

The N.C. Court of Appeals has provided a mediation program since 2002 offering parties an opportunity to participate in mediation of cases pending before the Court of Appeals, but many attorneys still don't know that the court offers mediation. The mediation program has been very successful, since nearly half of the cases in which the parties have agreed to mediate are resolved. Several of the judges on the Court of Appeals have received mediation training, and they provide mediation services at no charge in eligible cases in which all parties agree to mediation. The focus is on encouraging settlement and reaching an agreeable disposition of the appeal among the parties. Civil cases are eligible for mediation, with the exception of termination of parental rights cases, juvenile cases, and cases addressing registration or monitoring of sex offenders. A case will not, however, be assigned for mediation unless all the parties to the appeal have agreed to the mediation. If a case is assigned to mediation, the appellant will receive a 60 day extension of time to file the appellant's brief to allow adequate time for the mediation session to be held before the brief must be filed.

For additional information about N.C. Court of Appeals mediation services, please send e-mail to: mediate@coa.nccourts.org.

2 TIPS FOR APPELLANTS

1. **DON'T:** ARGUE CREDIBILITY

Assessment of a witness' credibility is almost always exclusively reserved for the trial court. For this reason, appellate judges are unable to reverse credibility determinations by trial courts. Therefore, do not make credibility arguments on appeal.

2. **DO:** CHALLENGE SPECIFIC FINDINGS OF FACT AS APPROPRIATE

If the trial court has made specific findings of fact that you believe are unsupported by the evidence, expressly challenge them (by number) in your brief. Otherwise, on appeal, the trial court's findings are binding.

3. **DO:** USE GOOD JUDGMENT IN DECIDING WHICH ARGUMENTS TO RAISE ON APPEAL.

Do not feel compelled to assert on appeal every argument you made in the trial court. Do everything possible to resist the urge to become emotionally attached to certain arguments that are objectively weak. It is helpful to ask a colleague you trust

to assess whether a particular argument you are considering raising should be abandoned. A weak argument contained in a brief diminishes the effectiveness of stronger arguments contained elsewhere in the brief.

4. **DO: CONSIDER FILING A REPLY BRIEF**

The Appellate Rules have recently been changed to allow reply briefs as a matter of right. In most cases, the appellee will have made arguments in its brief that you will want to rebut, and a reply brief allows you that opportunity. One caveat is that the reply brief should not be used to simply rehash what you said in your principal brief. It should be reserved for a concise rebuttal of the arguments made by your opponent.

5. **DO: RESERVE REBUTTAL TIME AT ORAL ARGUMENT**

The best thing about being the appellant is the opportunity to “get in the last word.” At the beginning of your argument, you should always reserve at least five minutes of rebuttal time. This will ensure that your opponent’s arguments are not the last words the judges hear and that you have an ability to rebut the arguments your opponent has just spent the last thirty minutes making.

6. **DO: USE REBUTTAL TIME WISELY**

A rebuttal argument is not the time to simply repeat everything you said in your principal argument or to quarrel with every minor issue on which you disagree with your opponent. Rather, it should be limited to two to four major points in which you are able to concisely rebut an argument your opponent made. Where appropriate, you should also use the time to give your own response to significant questions asked of your opponent by the panel.

7. **DO: BE AWARE OF THE LIMITS ON APPELLATE JURISDICTION**

We are always very mindful of the question of whether we possess jurisdiction over an appeal. In most appeals, jurisdiction is not in dispute because the appeal is from a final judgment of the trial court. However, in cases where the appeal is interlocutory, it is incumbent on the appellant to explain why appellate jurisdiction exists. As a practical matter, that means either the trial court must have made a certification under Rule 54(b) of the Rules of Civil Procedure or the case must affect a substantial right.

3 TIPS FOR APPELLEES

1. **DO:** MAKE SURE YOUR ORAL ARGUMENT PRESENTATION TAKES INTO ACCOUNT YOUR OPPONENT'S PRESENTATION

During her argument, your opponent will make a number of statements and elicit questions from members of the panel that you will need to address when it is your turn. While it is obviously important to prepare in advance what you intend to say, be flexible enough to adapt your argument to what transpired during your opponent's argument.

2. **DO:** FOLLOW IN YOUR BRIEF THE ORGANIZATIONAL STRUCTURE OF APPELLANT'S BRIEF

Most appellate judges read a section of the Appellant's brief and then immediately open the Appellee's brief expecting to find the Appellee's response to that argument in the same organizational place that it appears in the Appellant's brief. When the Appellee's brief is organized differently, it can be frustrating for the judges. Even if the Appellant's brief is not well-organized, address the arguments in the same order as they were presented, and then add any additional arguments or responses as needed.

3. **DO:** ADDRESS EVERY ARGUMENT MADE BY YOUR OPPONENT

Occasionally, counsel for the appellee will see a specific argument contained in the appellant's brief and think the argument is so weak that no response is necessary. This is a mistake. Even if you are convinced the argument is totally off-base, always keep in mind that while you may have been living with the facts and the law applicable to your case for one or more years, we are seeing it for the first time. Instead of mentally dismissing such an argument as unworthy of a response, explain to us why the argument lacks merit. But this rule may not always apply at oral argument. In oral argument, you should focus on the stronger arguments and you do not need to try to address every issue, especially issues the Appellant has not argued. Since you addressed all of the Appellant's arguments in your brief, you can save your time in oral argument for the most important issues.