VIEWS FROM THE BENCH

Justice James W. Hardesty
Nevada Supreme Court
by Matthew P. Digesti
The Digesti Law Firm - Reno

Justice Hardesty is entering his ninth year as a Nevada Supreme Court Justice. Having had the privilege of clerking for Justice Hardesty in 2005 and 2006, the first question I am almost always asked is whether I was worked to near death in my clerkship. My response never changes—it was the best appellate training an attorney could ever receive.

Knowing the value of appellate training, I am excited to share some of Justice Hardesty’s best appellate tips and tricks with my fellow young lawyers. These lessons were cultivated during an unrivaled legal career—eight years on the Nevada Supreme Court bench, six years on the Second Judicial District Court bench, and 23 years in a successful private practice.

The best piece of advice I received from Justice Hardesty about appearing before the Nevada Supreme Court may surprise you. “Put your oral argument on an envelope and walk up and argue from it.”

Justice Hardesty went on to explain, “When I first started out, I used to take my binder up to the podium. I had books, I had documents, I had legal research. Over time, I discovered that I should have followed the advice of a great professor in law school—put your oral argument on an envelope and walk up and argue from it.”

Now, it is natural to question this rather mild approach to preparing for oral argument. However, as most of us know, attorneys are best prepared when months of preparation are distilled down to a single piece of paper. It’s not that we have little to say. It’s that we are so prepared, we don’t need the security blanket of multi-page outlines, binders full of documents or printouts of case law.

Therefore, the question becomes: how can a young lawyer become so prepared that all he or she needs to argue before the Supreme Court is an envelope? Here are some excellent tips from Justice Hardesty to guide you.

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Navigating Requests for Extensions as a Young Lawyer

by Courtney Miller O’Mara
Lionel Sawyer & Collins - Reno

Procedure is a means to an end, not an end in itself—the handmaid rather than the mistress of justice.1

Young lawyers are sometimes hesitant to ask for or grant extensions to opposing counsel. Whether this hesitancy is out of fear that asking for an extension will be viewed as a sign of weakness by opposing counsel or that granting such extensions gives up some leverage from a litigation strategy standpoint, the bottom line is that all practitioners sometimes need extensions of litigation deadlines, whether to manage their case load or manage their personal obligations. Requesting and extending these types of professional courtesies will, in most circumstances, make your practice more pleasant and assist your client’s likely goal of conducting the litigation in an efficient manner. Make your requests prompt and infrequent and they are likely to be granted by opposing counsel.

Not only should you grant reasonable extensions (and not be afraid to request them) because it is the polite thing to do, but there is case law supporting the proposition that counsel are obligated, professionally, to grant such reasonable extensions. Ahanchian v. Xenon Pictures, Inc., 624 F.3d 1259 n. 7 (9th Cir. 2010) (where there is no indication of bad faith, prejudice, or undue delay, attorneys should not oppose reasonable requests for extensions of time brought by their adversaries). In Ahanchian the 9th Circuit criticizes the hardball tactics of a lawyer who gamed the local rules to cut short his opponent’s time to file a responsive brief and then refused to grant an extension needed both because of his opponent’s calendaring mistake and his opponent’s planned vacation. Id. at 1259 n. 7 (“Attorneys, like everyone else, have critical personal and familial obligations that are particularly acute during holidays. It is important to the health of the legal profession that attorneys strike a balance between these competing demands on their time.”) If opposing counsel denies your reasonable request for an extension, Ahanchian is a good case to cite in your motion requesting such extension or in meet and confer correspondence regarding same.

All extensions should be confirmed in writing. A simple email to confirm your conversation with opposing counsel will suffice for state court matters, but for extensions of briefing deadlines in federal court you will need to prepare a stipulation and order to submit to the court, pursuant to Local Rule 6-1. You should be mindful to negotiate any extensions as far in advance of the deadline as possible to allow plenty of time for the court to review and approve the stipulation. Young lawyers should also note that some deadlines cannot be moved (such as the deadline to appeal), require the court’s approval of the newly negotiated deadline (such as the deadline to move for reconsideration), or are hard deadlines made necessary by an

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Flying Solo

“A virtual office...gives you a physical business address and access to conference rooms and day offices on an as-needed basis for an affordable monthly fee.”

The “Flying Solo” column will feature guidance, suggestions, and tips from experienced solo practitioners for young lawyers considering starting their own practice and to improve the practice of those who already have.

Formation of the Firm
by Gina Bongiovi
Bongiovi Law Firm - Las Vegas

Starting any type of business can be complex and doing so involves making a number of major decisions with very little information. Starting a law firm is no different. The following is a checklist of considerations in the order I wish I'd tackled them when I first hung my shingle.

1. What’s your exit strategy? Will you build up the practice to oversee a team of associates and staff as senior partner? Will you limit your growth to a niche boutique practice and simply charge higher fees in order to meet your financial goals? Will you stay in solo practice? Do you have a working spouse or a family and want or need the flexibility that comes with having a part-time practice? Do you ultimately want to sell your practice? It seems counterintuitive to decide how you’re going to get out of your firm before you even start it, but this decision will inform nearly every other major business decision you make.

2. Choosing a Name. Many states require attorneys to use their own names as the firm name, limiting your options. If your state doesn't have such a restriction and you eventually want to sell your practice, you might want to use something other than your personal name. Depending on your state bar rules, “Success Law Group” may be easier to sell down the road than “Smith and Jones.” In Nevada, refer to NRPC 7.5.

3. Address. Determining your business address this early in the process makes things a lot easier because it's the one piece of infor-
Views From the Bench (cont.) - Justice Hardesty

(Q: What is the best starting point for an attorney when the Supreme Court grants oral argument?

Use the Supreme Court’s identification of specific issues of interest.

“Approximately two years ago, the court supplemented its oral argument notice process to include, in some cases, an order identifying issues the court would like to have the lawyers address during oral argument. In doing this, we have reduced some of the mystery surrounding what the court is interested in hearing more about from the lawyers.”

Focus your presentation on the facts and case law surrounding the noticed issues.

“If I were a practicing attorney and received one of the court’s orders, I would pay particular attention to the issues the court has identified in the order because those are the specific issues the court wants the attorney to discuss further. I would focus my preparation on thoroughly researching the legal side of those issues and knowing those portions of the record that deal with those issues.”

(Q: Now that the attorney has thoroughly prepared to argue the issues in the appeal, how would you craft your oral presentation?

Have the first two minutes of your presentation down cold.

“In the Nevada Supreme Court, unlike some other appellate courts, I think the lawyers can trust that they are going to own the first minute and a half to two minutes of their argument. They most likely are not going to get interrupted by a question from a justice in those first two minutes. So with those first two minutes, I would identify the issues, state what I consider to be key points in the record or legal authorities that address those issues, and then summarize my best points.”

Listen to previous oral arguments for guidance on how argument is conducted.

“I would also try to gain a feel for how panel justices, or the en banc court, handle oral argument by listening to previous oral arguments that are archived on the court’s website. In addition, there are some practitioners in this state that have extraordinary capabilities and skills, developed from their frequent appearances before the court, and I would monitor cases those lawyers have pending that are coming up for argument.”

(Q: How big a role does practicing oral argument play?

Moot court is critical.

“In today’s environment, I cannot imagine arguing before the Nevada Supreme Court without having conducted a moot court. To me, that is absolutely critical to one’s preparation for oral argument.”

Navigating Requests for Extensions (cont.)

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Impending trial date. When you have been granted an extension it is a good practice to email or hand deliver the document in question as a courtesy to your adversary. When I grant extensions I typically ask opposing counsel to do this.

Young lawyers should also keep in mind that it is often possible to grant an extension without sacrificing your position, especially when trial or dispositive motion deadlines are a long way off or you know you will not be able to review the discovery response or brief in question on the due date even if it is timely filed. Unreasonable refusals of extensions might ultimately damage your professional reputation or come back to haunt you when you are in need of a reasonable accommodation later in this case or another one. After all, as the Ahanchian court makes clear, lawyers have lives too.

1 Ahanchian v. Xenon Pictures, Inc., 624 F.3d 1253, 1254-55 (9th Cir. 2010) (quoting Charles E. Clark, History, Systems and Functions of Pleading, 11 Va. L.Rev. 517,542 (1925)(internal quotations omitted)
ment. I would reach out to people that I trust and that have experience in arguing before the court. I would ask that they listen to my presentation, interrupt me with questions they think are pertinent, and attempt as best I could, to replicate the environment. You need to have someone throw you off your game and take you away from your focus. That is the nature of oral argument and you must experience it in moot court to be fully prepared.”

Q: Let’s fast-forward to oral argument. What are some suggestions for an effective presentation?

Listen carefully to the justice’s questions and answer the questions posed.

“Listen as much as you are speaking. I find it very interesting that time and time again, lawyers fail to answer questions posed by the justices. This isn’t a knock on anybody. I think lawyers just get distracted or maybe they don’t hear the question correctly. It is really important to hone your listening skills as much as your oratory skills when preparing for oral argument. Be sure to answer the question posed.”

Avoid making these common mistakes:

“There are also a couple things I would not do. First, it is an utter waste of time in most cases to read verbatim from a statute or a holding in a case. Second, oral argument is no time to be making speeches, so quoting Abraham Lincoln or George Washington isn’t going to be the most effective form of oral advocacy. Third, if the issues involve something very complex, like a contract lease provision or easement language, it is critical that the lawyer reduce pertinent paragraphs or language to the smallest number of words that correctly and accurately communicate the issue.”

Q: What are some common traits of excellent oral advocates?

Three oral advocacy traits to emulate:

“Three come to mind. First, the lawyer’s familiarity with the case, the applicable jurisprudence and case law, and an understanding of the matter he or she is arguing. Second, the lawyer who walks to the podium with minimal or no notes underscores the preparation he or she has put into the case. Third, a lawyer who is mindful of the points he or she wants to make, but flexible enough to adjust his or her arguments to questions received from the justices. The lawyer doesn’t leave that podium without having answered all questions posed by the justices.”

Q: Any final thoughts on young lawyers and appellate opportunities?

Nevada has excellent appellate opportunities for young lawyers.

“One role of a lawyer is to make law in this state. It is really the lawyers in this state who make and advance the law because it is their creativity, ingenuity, and effort that formulates the arguments, which in turn expands the law into what it is and can be. Frankly, for young lawyers in Nevada, this is a great time to be practicing law. You have a state where most of the law has been formulated in the last 25 years. And a substantial portion of the law will be formulated in the next 25 years. So I can’t think of a better state for young lawyers to have a greater opportunity to contribute to the advancement of state law.”
Flying Solo (cont.) - Formation of the Firm

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When you receive a client retainer, you must deposit it into the trust account because it isn’t your money until you do the work to earn it. The interest the money earns while it sits in your IOLTA account goes to legal aid. Only after you do the work and invoice the client can you transfer the money FROM the trust account INTO your operating account. Your operating account contains your firm’s money, so you pay all your expenses out of it. Never EVER pay your firm’s expenses out of your trust account. Also, never EVER commingle funds between your two accounts. Probably the fastest way to get disbarred is to mess with your trust account.

5. To Incorporate or Not to Incorporate? Whether professionals benefit from forming an entity like an LLC or corporation is up for debate. If you’re really on a budget, you can save some money by operating as a sole proprietor. However, I strongly recommend you form an entity when possible. If you're operating as a sole proprietor, you’d better have malpractice insurance. More on that later.

6. Banking. In many states, including Nevada, you are required to have two bank accounts – an interest-bearing client trust account (IOLTA or Interest on Lawyer Trust Accounts) and an operating account. When you receive a client retainer, you transfer the money INTO your operating account. Your operating account contains your firm’s money, so you pay all your expenses out of it. You might be able to use a P.O. box, either. The best alternative I've found is a virtual office, which gives you a physical business address and access to conference rooms and day offices on an as-needed basis for an affordable monthly fee.

7. Insurance. Not all states require lawyers to carry malpractice insurance, but to operate without it is very risky. Premiums can be very expensive, so be sure to shop around. Deal only with brokers who have experience working with professionals. Professional liability insurance is completely different from general liability insurance and you want your broker to understand the differences.

In the next issue, I’ll explore office needs versus office wants.

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JOIN YLS FOR SERVING SENIORS

The Young Lawyers Section, in collaboration with Nevada Legal Services and Southern Nevada Senior Law Program, is hosting “Serving Seniors,” a free legal assistance clinic for senior citizens. “Serving Seniors” is a great opportunity for young lawyers with little to no estate planning and pro bono experience to help their community and gain valuable knowledge and experience.

Through this project, young lawyers can receive a full day of CLE (7.5 hours, including 1.0 ethics), training them on the basics of simple estate planning law and other issues commonly faced by Nevada’s seniors. After receiving this training, you will be prepared to provide senior citizens with legal information regarding basic estate planning tools at a free legal assistance clinic for seniors.

Part of the mission of the YLS is to provide charitable service to the community, as well as to provide young lawyers with the education and opportunities they need to become active and involved in pro-bono services. The “Serving Seniors” project fulfills this mission and is an amazing opportunity for all.

The training CLE will take place on March 22, 2013 from 9 a.m. to 5 p.m. at the law offices of Gordon Silver in Las Vegas. Anyone interested in registering for the CLE should contact Kristin Tyler (ktvyler@gordonsilver.com) or Carmela Reed (creed@njislaw.net).

The Serving Seniors event will take place in Las Vegas on April 26, 2013 from 10:30 a.m. to 4 p.m. at the West Charleston Library in Las Vegas. Again, please contact Kristin or Carmela for more information.

Take pictures at your next YLS event and submit them for inclusion in the next newsletter!