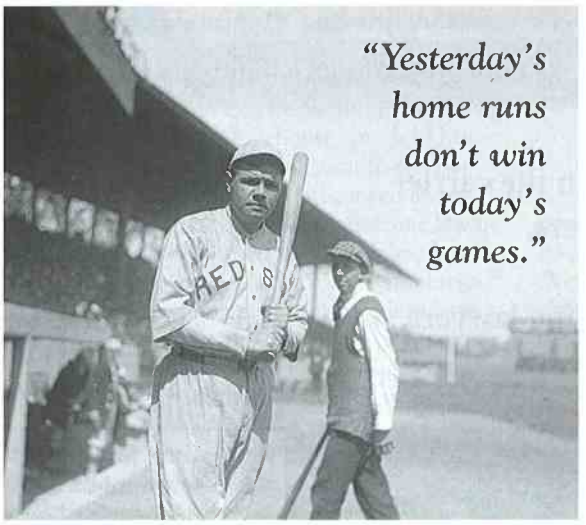
Five tips from a former clerk

Navigating your next appeal

Babe Ruth once said, "Yesterday's home runs don't win today's games." The same is true in litigation.

Whether you hit a home run in district court, or lost hard, every litigator will repeatedly face the question of whether and how to appeal that shutout, or how to defend that big win.

For many of you, that will require getting acquainted with the Minnesota Court of Appeals. In Minnesota, 95 percent of all appeals are resolved by that intermediary appellate court, without further review by the Minnesota Supreme Court.[1] That included approximately 2,000 appeals in 2017 alone.



BABE RUTH 1919, LIBRARY OF CONGRESS

For some, appeals are a black box full of unfamiliar rules and traps for the unwary. Less-experienced lawyers are right to be concerned about just how different appellate procedures can be from district court. Fortunately, Minnesota's appellate court rules are crystal clear, often long standing, and not subject to change by the judge-specific preferences or "practice pointers" encountered in district court. The Minnesota Court of Appeals presently has 18 judges (plus senior judges), and generally panels of three decide each appeal. But though your panel might vary from appeal to appeal, the rules (barring the occasional amendment or standing order) do not.

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I respectfully submit the following five tips, based on my more than two years clerking for the Minnesota Court of Appeals, and my later years of appellate practice.

TIP 1: *Preserve* your argument in district court! (But there's hope if you don't.)

This one starts way before your appeal: Raise your arguments in district court! An oft-cited rule that dooms arguments on appeal is that the appellate court will not address an issue not "presented and considered by the trial court."[2]

Take heart, however, if you get to your appeal and realize that you (or prior counsel) failed to make that winner argument in district court. All is not lost. The *Thiele* rule is not "ironclad."[3] It does not diminish what the Minnesota Court of Appeals has referred to as its "obligation as an appellate court 'to decide cases in accordance with the law, and that responsibility is not to be diluted by counsel's oversights, lack of research, failure to specify issues or to cite relevant authorities.'"[4] Nor does it foreclose addressing issues "plainly decisive of the entire controversy on its merits, and where, as in a case involving undisputed facts, there is no possible advantage or disadvantage to either party in not having had a prior ruling by the trial court on the question."[5]

Bottom line: There may be room for your un-preserved zinger of a legal argument. But that is a narrow door. Take the safe approach: Preserve your argument in district court.

TIP 2: *Timely* serve *everyone* with your notice of appeal.

This one is for all future appellants out there. Of all traps for the unwary, this one comes earliest on appeal, and carries the most dire consequences. Take seriously service of your notice of appeal (NOA). Failure to timely serve it on an adverse party deprives the Minnesota Court of Appeals of jurisdiction over that party, and potentially makes your entire appeal dead on arrival.

The NOA is one of several documents you need to serve to kick off your appeal, along with the more detailed Statement of the Case.[6] You generally have 60 days to do so.[7] Unlike the Statement of the Case, the NOA is pretty bare bones. It consists of just a one- or two-page, plain-vanilla statement of a few basics, such as who you are and what you are appealing. (You can find templates for NOAs, Statements of the Case, and other appellate documents at the court's website.[8])

But as to the dire consequences of failure to timely serve the NOA, Minnesota case law could not be more clear: "[F]ailure to serve the notice of appeal on an adverse party means that the appellate court cannot alter the judgment as to that party," and, if not timely served, "the judgment is final as to [that] party."[9] Even if you served all but one of the adverse parties, if the appealed decision is "indivisible" in its application to them, the entire appeal must be dismissed.[10]

You might be tempted, in a multi-party case that presents a crowded field, to parse through who you will and won't serve with the NOA, perhaps in an effort to limit the voices on appeal. To a very limited extent, the law allows that, if you still serve all "adverse" parties;[11] that is, parties who "would be prejudiced by a reversal or modification of an order, award, or judgment."[12] But, while reasonable minds might disagree, you would do best not to take that risk. You might believe that the not-served party is not adverse. Maybe you're right. But if

the Minnesota Court of Appeals disagrees, and if the appealed decision is "indivisible," that spells game over for your appeal.

TIP 3: In drafting your brief, make life easy for your judges (and their clerks!).

"The overarching objective of a brief is to make the court's job easier. Every other consideration is subordinate." Such is the advice of the late Justice Antonin Scalia and Bryan Garner in *Making Your Case: The Art of Persuading Judges* (an excellent book that I cannot recommend enough). And, as a former appellate clerk, I could not agree more.

In many appeals, the first analysis to be applied to the appellate briefs will not be that of the judges, but of one of the judge's clerks. Our job as clerks requires us to draft a bench memo reflecting our review of the briefing, analysis of the law and facts cited, and recommendation as to disposition. To be clear, we are not deciding your appeals in any way. But we often get the first shot at parsing your arguments, seeing whether cases X or Y say what you claim they say, and checking your factual citations to see where in the record Witness said A. And our judges might turn to us if they have questions or cannot find support for your propositions.

The last thing you want to happen is for your otherwise winning argument to be stymied by unclear briefing, failure to cite to the record, or squishy reliance on case law. Judges and their clerks work very hard to give every party the benefit of the doubt and careful analysis. But the fact remains: The harder it is to understand your argument or the basis for it, the harder it is to agree.

And so I urge you, hold fast to what Scalia and Garner recommend: Make it as easy as possible for the court to agree with you and resolve the appeal. As they wrote, "What achieves that objective? Brevity. Simple, straightforward English. Clear identification of the issues. A reliable statement of the facts. Informative section headings. Quick access to the controlling text."

TIP 4: Your oral argument will be the fastest 15 minutes of your life. Plan accordingly.

The hearing will last roughly 35 minutes. Appellant and respondent will each get 15 minutes for oral arguments, and appellant will get five additional minutes for rebuttal (in case of multiple respondents, they must generally share their 15 minutes). Appellants do not need to reserve time for rebuttal. (Yes, Rule 134.03 of the Minnesota Rules of Civil Appellate Procedure provides a different allocation of time, and requires reserving time. But Rule 2 of the easy-to-overlook Special Rules of Practice for the Minnesota Court of Appeals says otherwise.)

Your primary (or, for respondents, only) oral argument will be the fastest 15 minutes of your life. Your podium should have a timer with a green-yellow-red light system. Expect to get no more than the first minute or two to get to present anything like a rehearsed argument. After that, be ready for questions from the bench, and welcome them. Those questions can be the judges telling you why you might lose, which gives you a chance to persuade them to decide otherwise. Have a conclusion prepared, but don't be wedded to it. When that red light blinks, you may ask the court for an opportunity to *briefly* conclude (and you *should* ask if you want to go over time). But chances are, what will be most important to say is not that polished conclusion, but, rather, a response to the pending question or, perhaps, a bite-size key point that you were just dying to offer.

TIP 5: Ask for some money if you win. Right away!

Litigants often forget that, similar to district court, the party prevailing on appeal can collect up to $300 in costs, and your "disbursements necessarily paid or incurred."[13] Don't leave that money on the table. You can use Form 139 to request it.[14] But act fast: You have only 15 days to do so after the court's decision.[15]

Notes

[1] 2017 MJB Report to the Community, p. 53, at *http://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/Documents/2017-MJB-Annual-Report-to-the-Community.pdf*.

[2] The case most frequently cited for the proposition is *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (*Thiele* has been cited more than 5,000 times.)

[3] *Woodruff v. 2008 Mercedes*, 831 N.W.2d 9, 14 (Minn. App. 2013) (quoting *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 403 (Minn. 2000)).

[4] *Id.* (quoting *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 875 (Minn. 2010) (other quotations omitted))).

[5] *Oanes*, 617 N.W.2d at 403 (quotation omitted).

[6] Minn. R. Civ. App. P. 103.01; *see* Minn. R. Civ. App. P. 133.03 (specific to Statement of the Case).

[7] Minn. R. Civ. App. P. 104.01.

[8] *http://www.mncourts.gov/SupremeCourt/Court-Rules/Forms-Appendix-for-the-Rules-of-Civil-Appellate-Pr.aspx*

[9] *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 765 (Minn. 2005).

[10] *Banal-Shepherd v. Shepherd*, 829 N.W.2d 426, 428–29 (Minn. App. 2013) (relying on *Janssen*, 704 N.W.2d at 765).

[11] Minn. R. Civ. App. P. 103.01, subd. 1.

[12] *Banal-Shepherd*, 829 N.W.2d at 428. The law does not require "'contingent' appeal[s]." *See Andren v. White-Rodgers Co., a Div. of Emerson Elec. Co.*, 462 N.W.2d 860, 861 (Minn. App. 1990).

[13] Minn. R. Civ. App. P. 139.01-.02.

[14] *http://www.mncourts.gov/SupremeCourt/Court-Rules/Forms-Appendix-for-the-Rules-of-Civil-Appellate-Pr.aspx*.

[15] Minn. R. Civ. App. P. 139.03.