



Featured Articles

“May It Please the Court?”

by Tina L. Ralls



Spending time as a trial attorney will provide a lawyer with insights that can later be put to good use arguing appeals. While working in a district attorney's office before law school, I watched many criminal trials and became accustomed to hearing the phrase "May it please the court?" as a preface to the attorneys' arguments. The operative part of that sentence, I learned, is the question mark. It is a request for permission to speak – not an announcement that you intend to begin. Understanding this gave me an advantage when I participated in a moot court competition presided over by federal judges during law school. I noticed that, when I asked the question *as a question*, the presiding judge would invariably make eye contact with me and nod his assent for me to begin (I am using "he" in its neutral sense, to refer to either a male or female judge). What a fantastic way to focus an appellate court's attention on a case! I have my trial-attorney buddies to thank for that one.

Here are some successful tactics I learned presenting appeals, and which I find serve equally well at trial:

1) Never use a standardized motion (or brief) form for anything other than its bare bones, over which you will lay a fully-fleshed 'story of the case.'

Use the facts of your case to bring to life the legal tenets upon which your motion relies, as well as to make a compelling record for appeal, should you lose the point at trial.

Once, I wrote a Motion to Quash an Information charging my client with possession of a controlled substance with intent to distribute a tin of marijuana the police alleged he had tossed out of his car when they tried to stop him for running a red light. In this neighborhood were ten schools, including a tough high school and two 'alternative' seventh-through-twelfth-grade schools for children who had been removed from their home, often for miscreant behavior. The chase occurred at about 3:30 p.m. on a weekday afternoon. Can you see where this is going?

Now, a bare bones Motion to Quash might have read something like this:

1. The evidence introduced at the preliminary hearing was insufficient as a matter

of law to establish probable cause to believe that the defendant knowingly possessed a controlled substance with the intent to distribute same.

2. The tin containing the controlled substance did not belong to the defendant, nor was he aware of its contents
3. The tin was allegedly found on ___ Street in the City of _____, and not in defendant's possession, nor in close proximity to defendant.

But the officers hadn't seen the defendant toss anything out of the car; they had found the tin *near* the defendant's car. Wouldn't it be more effective, then, to argue that any one of the many students walking home from school, or one of their parents, had seen the police car and discarded the marijuana? I thought so, and attached a map of the streets on which the car chase took place to the motion, with each school's location highlighted; apparently, the court thought so, too, because the Motion to Quash was granted.

Too many trial attorneys learn the facts of the case, plan to use them at trial, but treat the pre-trial motions as only so many hoops to jump through before trial, omitting their best fact-based arguments from their pre-trial motions and making a trial all the more likely. Delve more deeply, present those facts to the court earlier, and increase your chances of success at trial astronomically, while making your record for appeal. After all, if your motion is boilerplate, have you given the judge anything to think about?

2) Investigate the judge you are appearing before and adjust your case accordingly. Appellate attorneys always like to know which benches tend to be "hot," *i.e.*, like to ask a lot of questions, and which benches are "cold," in that the judges want to hear as little argument as possible. In the Second Department Appellate Division of New York, for example, I once won a case in three sentences; after I stated my basic premise, the presiding justice asked, "Counselor, this case is just like *People v. Jones*, isn't it?" I paused to consider whether this was a trick question and, deciding it was not, I responded, "Yes. If there are no further questions?" There were none, so I sat down. Similarly, there are judges at the trial court level who prefer a more lengthy intellectual debate over points of law, and those who would rather decide a motion purely on the papers; if you do not know which sort yours is, check with more experienced practitioners.

More important, though, is to research a judge's record on appeal, so that you know if there are particular areas of the law that tend to trip him up at trial; if there are, you will want to a) try to prevent that judge from making his usual error in your case, and b) make a thorough record for appeal if he does.

Some years ago, there was a judge in New York who routinely commented extensively to the jury on a criminal defendant's decision not to testify. He was actually bending over backward to enlighten the jury as to the defendant's absolute right not to testify – he would often suggest that the defendant may have wanted to testify, but was advised by counsel not to do so – but the remarks violated a statute requiring that only a brief,

specific charge on the subject be given, to avoid any prejudicial attention being drawn to the defendant's exercise of his constitutional right to remain silent. Despite being reversed on appeal several times for this error, the judge continued to give this charge. Appellate attorneys, myself included, scouted this judge's trial transcripts for this error, and when I finally landed one, the presiding justice at my appellate argument queried, "I just have one question: is this judge on our mailing list?!"

There is no substitute for knowing who your judge is, and the errors he is apt to make.

3) Never, never insult, argue with, or interrupt the judge. This happens far more frequently than you might think. Once, a colleague of mine (who, for the sake of our friendship, shall remain nameless) became incensed with a ruling the court made on a critical motion during his murder case. When the court informed this prosecutor that its ruling would stand, the prosecutor replied, "You lose them most," then went on to say, "Later on I'll tell you what I think of you in this case."

That prosecutor won his trial, but lost on an appeal that snaked all the way up to the United States Court of Appeals for that circuit. That court's decision pointedly named the prosecutor, quoted him at length, and publicly rebuked him for his conduct. Even now, I am sure he wonders whether he would have lost that appeal, had he not lost his head at trial.

4) Think outside of your own box. As an appellate lawyer in a not-for-profit criminal appeals office, I was instructed to file a substantive brief in every possible case, rather than an *Anders* brief asserting that there were no issues for appeal. This led to some creative thinking; in a purse-snatching case I once argued that when the perpetrator dodged into traffic and the police lost sight of him, he must have dropped the purse and, seconds later, my client picked it up. (Hey, you can't win 'em all!) The same sort of creative thinking is needed at trial because, without it, you may find that you have overlooked something critical to your client's defense.

One heartbreaking case I handled on appeal involved a young man who was arrested in a Greenwich Village train station because he fit the general description for someone involved in a shooting that had just taken place blocks away: "Hispanic man in an orange jacket." (Actually, his jacket wasn't orange, but its lining was.) This young man must have been only a "Hispanic in an orange jacket" to his trial lawyer as well, because that lawyer conducted no investigation to speak of, and his (and later my) client spent four-and-a-half years in jail for a murder he had nothing to do with. See *People v. Luis Kevin Rojas*, 213 A.D.2d 56; 630 N.Y.S.2d 28 (1st Dept. 1995) (reversing conviction on grounds of, *inter alia*, ineffectiveness of counsel, noting that "trial counsel . . . not only made no effort to investigate the foregoing evidence or defendant's alibi, but further committed numerous errors during the course of the trial which tended to implicate defendant rather than to prove his innocence.").

Even more subtle presuppositions can alter the course of a trial. In New York, for example, there is a rule known as the *Rosario* rule, which requires that a prosecutor

turn over all written or recorded statements of a witness testifying at trial or risk reversal on appeal. See N.Y. Crim. Proc. L. 240.45. Consequently, appellate lawyers tracked down prior statements of the witnesses to look for *Rosario* violations. For years, prosecutors had routinely disclosed records from medical examiners in murder cases, but my supervisor suggested contacting the Medical Examiner's Office to ask what records are routinely kept in the file. Bingo! It turned out that there were numerous records that were not being disclosed to the defense. In some cases it made a huge difference – including one of mine, where the cause of death on the undisclosed report differed significantly from that recorded on a report that was handed over to the defense attorney at trial.

Step out of the box that has been created by your habitual thinking, and look at your case again, with fresh eyes.

5) Prepare your case at a leisurely pace. Appellate attorneys have the luxury of nitpicking over a transcript, then opposing counsel's brief, then their reply brief, and then they cogitate for months before arguing the appeal. As a trial attorney, you are often thrown into court after relatively little preparation. I know. I understand.

Nevertheless, your trial preparation will benefit if you prepare your case at the most leisurely pace you can manage, taking time to see it from various angles, like a Rubik's Cube you are trying to solve.

Once, I assisted another attorney on a homicide by DUI case in which his client claimed to have swerved off of the road to avoid a deer. The lead counsel began focusing upon the issues with which he was most familiar: the blood alcohol content of his client (borderline), the road condition (wet), the speed of the vehicle (fast). All well and good, but as the weeks passed and I ruminated on it, something I had learned in another life (as a fact-checker for *Reader's Digest* magazine) came to mind: Pennsylvania leads the country in deer-related car accidents. The combination of the deer statistics, and data about the tendency of our client's car to roll over, led the prosecutor to offer the young man a compassionate plea agreement (the website for the National Highway Safety Transportation Administration (NHTSA) is a wonderful resource in this regard. See www.nhtsa.gov).

Long, slow consideration of a case pays off, so to the extent I can carry this tendency into my trial practice, I intend to do so, and I hope you will, too. At least it makes for a more relaxed trial practice!

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