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Child Welfare Appellate Advocacy

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CHILD WELFARE LAW AND PRACTICE

Representing Children,
Parents, and State Agencies in
Abuse, Neglect, and Dependency Cases

3rd Edition

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Donald N. Duquette, Ann M. Haralambie & Vivek S. Sankaran
General Editors

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Aurora, Colorado

Chapter 28

CHILD WELFARE APPELLATE ADVOCACY

Vivek S. Sankaran¹

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§ 28.1 • INTRODUCTION

The appellate system serves important functions in child welfare cases. It ensures that the relationship between a child and his or her parent is not unjustly terminated. It forces juvenile courts and child welfare agencies to strictly follow statutes, court rules, and agency policies. And it preserves public faith in the system by serving as an independent check to correct mistakes that occur.

But the appellate system is only as good as the advocates who appear before it. This chapter is intended to be a resource for those advocates, both those who have practiced child welfare law for many years and those who are new to the area. This chapter will cover the basics of the appellate process, will discuss basic issues related to writing briefs and presenting oral arguments, and will highlight some of the common issues that arise in child welfare appeals.

However, this guide is not a comprehensive primer on how to write persuasive briefs or make effective oral arguments. Much has already been written on these topics. Resources to help advocates improve these skills are listed in § 28.8.

§ 28.2 • APPEALABLE ORDERS

When confronted with the possibility of appealing a trial court's decision, an appellate attorney must first determine whether the client has a right to appeal the decision or whether he or she would have to appeal by leave.

§ 28.2.1—Appeals As A Matter Of Right

In most jurisdictions, only two orders are appealable as of right: 1) the initial order of disposition placing the child under the supervision of the court, and 2) the final order terminating a parent's rights. However, in some jurisdictions, litigants have the right to appeal additional orders, such as an order removing a child from his or her home or an order stemming from a permanency planning hearing. Advocates must familiarize themselves with local rules governing their right to appeal orders.

§ 28.2.2—Discretionary Appeals

In most jurisdictions, all orders that are not appealable as of right can be appealed by leave, also referred to as writs in some jurisdictions. For example, this can include orders related to parenting time, discovery, or any other issue that occurs at a pretrial, dispositional review, or permanency planning hearing. But in these appeals, the reviewing court has the discretion on whether to accept jurisdiction and reach the merits of the appeal.

§ 28.3 • ASSISTING A CLIENT IN DECIDING WHETHER TO APPEAL TO THE COURT OF APPEALS

The decision on whether to appeal a trial court's decision rests with the client, who determines the goals of the representation. But appellate attorneys can play an important role in helping clients make that decision by researching the merits of a potential appeal and counseling clients on the impact that an appeal may have on their cases. There may also be ethical limitations constraining the attorney from filing appeals that are not supported by the facts and laws.

§ 28.3.1—Client Interview

When possible, the appellate attorney should always meet with the client to explain his or her role and to inquire about the underlying proceedings. At the first meeting, the attorney must explain how his or her role differs from the role played by trial counsel. The attorney should also tell the client that the appellate

process often takes a long time to resolve issues and that the chances of prevailing are typically slim. This information will help the client manage his or her expectations about the process.

The attorney should ask the client to bring any paperwork related to the case in his or her possession, in particular the order that may be appealed. The attorney should give the client the opportunity to discuss the proceedings and to identify the mistakes that he or she believes the court or his or her trial attorney made. During the conversation, the attorney should be thinking of potential appellate issues raised by the client's narrative that may necessitate further investigation.

In the meeting, the attorney should also spend time assessing the specific goals of the client in seeking an appeal. Does the client hope that an appeal will expedite the return of his or her children to his or her care? Does the child wish for his or her parent's rights to be restored? Or does the client simply want an opportunity to be heard before another court on the merits of his or her case? Without identifying the specific goals the client wishes to advance, the attorney will not be able to develop a recommendation for the client about whether to pursue an appeal.

§ 28.3.2—Factual Investigation/Legal Research

While in some cases an attorney may be able to advise a client immediately whether an appeal likely would be successful, in most cases the attorney will need to do additional investigation before making a recommendation to the client. At a minimum, the attorney should review the trial court's file, and should consider reviewing the transcripts, depending on the client's ability to pay for them or obtain them at no cost from the court and the deadlines for a potential appeal. The attorney should also have an in-depth conversation with the trial attorney about his or her assessment of the case and whether he or she thinks any grounds for appeal exist.

While investigating the facts of the case, the attorney should also review controlling and persuasive authority governing child welfare cases — statutes, court rules, agency policies, and secondary authority like publications from state and national groups. Reviewing these materials will help the attorney determine what, if any, legal issues could be raised on appeal and the likelihood of winning. Depending on the impending appellate deadlines, the attorney may not have much time to engage in this preliminary fact-finding and legal research. But some investigation will be necessary to determine whether an appeal may be warranted.

§ 28.3.3—Client Counseling

After the attorney has had the opportunity to conduct a preliminary investigation and initial legal research, he or she should meet with the client to discuss whether to proceed with an appeal. In addition to reviewing the merits of potential legal arguments and the likelihood of success, the attorney should address other considerations, including the costs of the appeal, how long the appeal would take, and what is likely to happen on remand in the trial court if the appeal is successful. For example, a parent may not wish to appeal an adjudication decision if the only remedy after a lengthy appeal would be a new trial. Instead, the parent may simply wish to forego the appeal and begin complying immediately with his or her service plan to expedite the return of his or her children to the parent's home. Additionally, a parent may not wish to disrupt a child's stable placement when winning on appeal may not result in the child's return to the home. Rarely will an appellate court order that a child be immediately returned home after a successful appeal unless it finds that the trial court lacked jurisdiction.

After being counseled and advised by his or her attorney, the client must make the decision on whether to appeal the trial court's decision. The next sections discuss the steps necessary to perfect the appeal.

§ 28.4 • FILING AN APPEAL

§ 28.4.1—Initiating The Appeal

In appeals as of right, the first step in initiating the appeal will involve filing a document, such as a claim of appeal, within a time period specified by state law. In discretionary appeals, appellate courts often require attorneys to file a persuasive pleading, like an application or a writ, setting forth both the reasons why the appellant should prevail and why the issue is of such importance that the appellate court should hear the case. Again, state law will dictate when to file such a pleading.

§ 28.4.2—The Record

The record in an appellate case consists of the papers filed in the trial court, transcripts of proceedings, and exhibits introduced into evidence. Appellate lawyers must review the docket in the case to determine whether all of the relevant transcripts have actually been ordered. In appeals involving the termination of a parent's rights, transcripts of all hearings from the beginning of

the child protective proceeding should be ordered, since errors occurring at earlier stages of the case may impact the termination of parental rights decision. If counsel determines that additional transcripts must be ordered, then he or she should immediately draft a letter to the court making the request, listing the dates of hearings and the name of the court reporter, if available. If, for whatever reason, the trial court is unwilling to order the additional transcripts, counsel should file a motion with the appellate court requesting an order compelling the trial court or court reporter to produce the transcripts.

In addition to securing the transcripts, counsel should also ensure that he or she has access to the complete court file, containing all of the documents the trial judge considered. If a trial court denies counsel the ability to review the file, counsel should immediately file a motion with the appellate court requesting an order granting access to the file. At a minimum, due process entitles lawyers to examine every document reviewed by the judge.

§ 28.4.3—Filing The Brief

Local court rules will dictate the specific requirements related to the brief, including when the brief must be filed and how long it can be. Typically speaking, the brief contains a number of different parts, each of which is discussed below.

Title Page

The title page should state the full title of the case and in capital or boldface type. Some states may have standard title pages that must be used.

Table of Contents

The table of contents lists the subject headings of the brief, including the principal points of argument, in order of presentation, with the numbers of the pages where they appear in the brief.

Table of Authorities

The table of authorities must list all case authorities cited, with the complete citations including the years of decision, and all other authorities cited, with the numbers of the pages where they appear in the brief. The attorney should divide the index into categories such as cases, constitutional provisions, statutes, court rules, and other authority. Within each category, counsel should subdivide the authority as appropriate (e.g., federal cases, state cases, secondary authority, etc.). Case cites in the index need not include the pinpoint cites of particular pages within each case.

Introduction

Typically, an introduction is not required by the court rules. But rarely is an introduction precluded by the rules. An introduction is essential in helping the appellate court grasp your argument immediately. It will help the court place everything else you write in the brief within the larger framework of your argument.

The introduction should be brief, not more than a page in most cases and even as short as a paragraph in some. It should focus on three issues: 1) what happened in the case; 2) what should have happened; and 3) how can the appellate court fix the problem. Advocates should focus on these three questions throughout the brief.

Statement of the Basis of Jurisdiction

The statement of the basis of jurisdiction identifies the statute, court rule, or court decision that confers jurisdiction on the appellate court and sets forth facts showing that the appeal was timely filed.

Statement of Questions Presented

The statement of questions presented must set forth the questions involved in the appeal.

There are various ways to present the question(s) in a case. In most states, the court rules do not prohibit a multi-sentence statement of questions presented. In fact, Bryan Garner, a leading expert on brief writing, recommends that advocates use the “deep issue” method of presenting questions in a brief. Rather than simply drafting one long question with multiple subparts, Professor Garner suggests breaking up the question into separate sentences totaling no more than 75 words. Typically, this can be done in three sentences. The first sentence is the statement of the uncontested legal rule. The second sentence is the statement of facts relevant to the legal rule. And the third sentence is the final question.

Consider the difference between the old method of presenting questions and the “deep issue” method.

Old method:

Whether the agency failed to make reasonable efforts to reunify Father and Child.

Deep issue method:

Under federal and state law, the agency is required to make reasonable efforts to reunify parents and children and to provide timely services to this end. Here, the agency failed to schedule parenting time between the father and his son, never provided the father with parenting classes, and never informed him of his son's mental health needs. Did the agency fail to make reasonable efforts to reunify the father with his son?

Using the “deep issue” method allows advocates to present the key issues in the brief in a manner that clearly and succinctly highlights their arguments.

Statement of Facts

The statement of facts must be accurate and must contain all relevant facts, both good and bad. Every fact in the statement must be supported by a citation to the record, which includes both transcripts and the documents introduced into evidence at the trial court. Counsel may not argue within the statement.

But the statement of facts must do more than present a dry, chronological rendering of the trial court proceedings. It must tell a compelling story to capture the attention of appellate judges who likely read the equivalent of *War and Peace* (over 2,200 pages!) every week. It must present the client as a person and tell a narrative that a judge would want to read.

To do this, counsel should consider the following questions:

- From whose perspective should the story be told? Possible perspectives include the child, the parent, the agency, and the court.
- What labels should be used to identify the different players in the case? What messages do those labels send? For example, should the parent be referred to as “Mother,” “Respondent,” or “Ms. XXXX.” Once a label is selected, it should be used consistently through the statement of facts. For example, in a TPR appeal, do not refer to your client as the Appellant at one point, then as Ms. Jones, only to call her a Respondent later on. The court may assume that each of these phrases means different things.

- What are the different scenes in the story? What are the different events that are critical to understanding the case? Each of these events may be separated by subheadings.
- What are the relevant facts to the story you wish to tell? If a fact is not relevant to your case, then you need not include it in the Statement of Facts. Presenting the appellate court with excessive irrelevant facts will only distract the court from the key issues in the case.

Argument Section

The argument section lays out the legal arguments in the brief. Advocates must carefully determine how many arguments to raise in a brief. Generally speaking, a brief with more than three or four arguments will not be effective. In other words, throwing the kitchen sink at the court may result in the court disregarding all of your arguments. In contrast, a brief with one or two strong arguments will command the attention of the appellate court.

Standard of Review

For each issue that is presented in the brief, typically, counsel must state a standard of review, which is the lens through which the appellate court looks at the trial court's decision. The standard of review tells the reviewing court how much deference it must afford the lower court's decision. Because the standard of review tells the court how to look at the lower court's decision, the court must know which standard applies before it evaluates an argument.

In child welfare cases, appellate courts usually apply three different standards of review, depending on whether the issue being reviewed is a question of fact or law. But advocates must look to state law to ascertain the relevant standard of review.

Clear Error. Findings of fact are typically reviewed under the clear error standard. A decision is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.

De Novo. Constitutional questions and issues of statutory interpretation, as well as court procedures set forth in court rules, are usually reviewed *de novo*.

Abuse of Discretion. A trial court's evidentiary rulings are most often reviewed under an abuse of discretion standard. A trial court abuses its discretion when it admits inadmissible testimony or documents into evidence at a trial.

Issue Preservation

Before discussing any issue, counsel must also indicate whether trial counsel preserved the issue in the proceedings below. Trial counsel can preserve an issue for appeal by filing a motion in limine or objecting on the record and by clearly stating the legal basis for the objection. If the error involves the trial court's refusal to allow evidence to be introduced at a hearing, counsel should also make an offer of proof as to what the evidence is and its relevance. In some cases, counsel should also file a written motion stating the grounds for objection. *Even if trial counsel believes that he or she will lose an argument at the trial court, it is vital that he or she still preserve the issue to allow appellate counsel to raise the issue on appeal.*

Whether trial counsel preserved the issue will affect how an appellate court will treat any errors that exist. If an error was not preserved, some appellate courts may not review the error. Others may only review the error under a "plain error" standard, typically used in criminal cases. But such a standard is hard to meet because it requires the error to be both plain or obvious and to have affected the substantial rights of the party.

Argument

The argument section is the crux of the brief, in which counsel must persuade the appellate court that the law requires the reversal of the trial court's decision. For each issue raised, counsel should begin with a general overview of the law and then move to the specific portion of that law that is at issue in the appeal. Once counsel reaches a specific issue, he or she should provide concrete examples of how the general rules have been applied in specific cases. For example, here is a sample legal overview for an ineffective assistance of counsel claim, taken from a brief filed by an appellate lawyer in Michigan:

Indigent parents in child protective proceedings are entitled to court-appointed counsel, MCL 712A.17c(5); MCR 3.915(B) (1)(b), which, in turn, guarantees the right to effective assistance of counsel. *In re CR*, 250 Mich App 185, 198; 646 NW2d 506 (2001) ("[T]he principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings."); *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988) ("The right to counsel includes the right to competent counsel."); *In re Trowbridge*, 155 Mich App 785, 786; 401 NW2d 65 (1986) ("It is axiomatic that the right to counsel includes the right to competent counsel."). To prevail on

an ineffective assistance of counsel claim, an appellant must show that his trial counsel's performance was deficient – that counsel's performance fell below an objective standard of reasonableness – and that the representation so prejudiced him that it denied him a fair trial. *In re CR, supra* at 198.

In determining an objective standard of reasonableness, appellate courts may look to standards of practice established by the American Bar Association. See *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (“Prevailing norms of practice as reflected in American Bar Association standards . . . are guides to determining what is reasonable.”). For parents’ attorneys, the standards adopted by the American Bar Association require, among other things, that attorneys “conduct a thorough and independent investigation at every stage of the proceeding,” “develop a case theory and strategy to follow at hearings,” “research applicable legal issues and legal arguments when appropriate,” “identify, locate and prepare all witnesses,” “present and cross-examine witnesses,” and “request the opportunity to make opening and closing arguments.” See ABA Standards, *supra*. Additionally, the standards mandate that parents’ attorneys “be aware of unique issues an incarcerated parent faces and provide competent representation to the incarcerated client.” *Id.*

Here, counsel’s behavior did not meet these standards . . . [insert facts here]

The argument section must contain *supporting authority* for *each* legal statement being made. And the attorney must provide a citation to the record for every factual statement he or she makes. If the attorney fails to cite to the relevant portions of the factual record or if he or she does not cite legal authority to support his or her argument, some courts will consider the issue waived.

Once a legal rule has been stated, then counsel must apply it to the facts. Counsel cannot just state facts and let the appellate court figure out how the rule or rules apply! Counsel’s ultimate task in writing a brief is to ensure that his or her audience (the client, the opposing party, the judges, the judicial law clerks, other court staff) can read it once and understand exactly what it is that he or she wants the court to do. To do this effectively, counsel should consider using

headings that summarize the argument and allow the reader to understand the complete story.

Statement of Relief

At the conclusion of the argument section, counsel must include a statement of what he or she would like the court to do. This should be done precisely and concisely. Counsel may make alternative requests, *e.g.*, request an order reversing the lower court's decision and dismissing the case, or an order reversing the lower court's decision and ordering a new trial. Precedent will help identify permissible remedies. After concluding his or her brief, counsel must sign it.

§ 28.4.4—Supplemental Authority

If new, controlling published opinions are released that affect the case after the brief has been filed and before the court has decided the case, some courts may allow counsel to file a memorandum regarding the supplemental authority with the court. As a result, appellate counsel must keep himself or herself updated on any developments in case law or statutes.

§ 28.4.5—Answers

If counsel represent the appellee, he or she should always file an answer to the appellant's brief. The answer should set forth the factual narrative from the perspective of the appellee and should reframe the questions presented so that the appellate court understands the other side of the case. The answer must also identify all issues that the appellant failed to preserve at the trial court, which will affect whether the appellate court can consider the issue, or at a minimum, the standard of review that will be applied by the appellate court. Additionally, if the appellant challenges the trial court's factual findings, the answer must remind the appellate court that it must defer to findings of facts made by the trial court, given the trial court's unique ability to assess the credibility of witnesses and evaluate the evidence.

§ 28.4.6—Reply Briefs

Most states permit counsel to file a reply brief responding to the appellee's arguments. In the brief, counsel may only rebut the arguments in the answering brief. Counsel may not raise new arguments in the reply brief. Usually, arguments raised for the first time in a reply brief are waived. State law will dictate the length of the reply brief.

§ 28.4.7—Amicus Curiae Briefs

In child welfare cases involving unresolved issues of important legal significance, outside groups, such as the National Association of Counsel for Children, the American Civil Liberties Union, and the American Professional Society on the Abuse of Children, may be interested in filing amicus curiae briefs. Typically, an amicus curiae brief may be filed only on motion granted by the appellate court and is due after the appellee files its brief or after all briefs of parties have been filed. If counsel has a case that is groundbreaking, he or she should reach out to state and national advocacy groups immediately to ascertain their interest in getting involved.

§ 28.5 • SPOTTING LEGAL ERRORS

§ 28.5.1—Categories Of Errors

Among the most challenging aspects of appellate advocacy is finding legal errors that warrant the reversal of a trial court's decision. Generally speaking, counsel should focus on identifying four types of error when reviewing an appellate record

Factual Errors — did the trial court commit clear error when determining that the facts in a specific case support the decision that was made (*e.g.*, the termination of a parent's rights)?

Constitutional Errors — did the trial court violate the constitutional rights of the appealing party?

Statutory Errors — did the trial court violate federal or state child welfare statutes?

Evidentiary Errors — did the trial court make an evidentiary ruling in violation of the rules of evidence?

To be able to spot these errors, advocates must be current in their understanding of child welfare law, which is rapidly changing. In addition to periodically reviewing updates to state law, counsel should consider joining the state bar sections dealing with children's law and state and national child welfare listservs through organizations like the National Association of Counsel for Children and the American Bar Association's Center for Children and the Law,

signing up for appellate case law updates through state organizations, and reviewing comprehensive child welfare treatises, like this book. Without a solid understanding of the legal framework governing these cases, appellate advocates will struggle to spot important appellate issues.

§ 28.5.2—Questions To Help Counsel Identify Potential Errors In TPR Appeals On Behalf Of Parents

Below is a list of questions to help advocates think through legal errors that may exist in TPR appeals. State law will dictate the answer to these questions and will determine whether they are outcome-determinative.

General

- Was the parent properly served with notice of the TPR hearing?
- Did the parent invoke his or her right to counsel? If so, did he or she receive the assistance of counsel at every hearing after counsel was requested?
- Was the parent incarcerated? If so, was he or she permitted to participate at each hearing either via telephone or in person?
- Do the rules of evidence apply at the TPR hearing? Did the trial court apply the rules of evidence properly at the TPR hearing?
- Did the trial court have any reason to believe that the child in the matter was an “Indian child”? If so, did the agency provide notice to the tribe in compliance with the Indian Child Welfare Act?

Statutory Grounds

- Did trial counsel challenge *every* statutory finding made by the trial court supporting the termination of the parent’s rights?
- Did the agency make reasonable efforts to reunify parent with his or her child?
- Was the parent incarcerated? If so, did the agency make reasonable efforts to reunify the parent with his or her child? Did the agency provide the parent with a case service plan?
- If the parent was incarcerated, did he or she provide proper care and custody to his or her child by arranging for a suitable relative to care for the child?
- Did the parent substantially comply with his or her case service plan? How did he or she demonstrate benefit from those services?

- Was the parent a non-respondent? If so, did the agency demonstrate his or her parental unfitness other than through non-compliance with a service plan?
- Did the trial court suspend parenting time between the parent and the child without a finding of harm?
- If the child was an Indian child, did the trial court apply the proper legal standards?
 - Did the trial court determine, beyond a reasonable doubt, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child? 25 U.S.C. § 1912(f).
 - Did the trial court receive testimony from a qualified expert witness in support of its decision? 25 U.S.C. § 1912(f)
 - Did the agency provide active efforts to prevent the breakup of the Indian family? 25 U.S.C. § 1912(d).

Best Interests

- Was the child placed with relatives? If so, did the trial court consider the impact of the relative placement on whether the TPR was in the child's best interest? Were other options for permanency, such as a guardianship or a custody order, available?
- If the case involved siblings, did the trial court determine whether the TPR was in the best interests of each individual child?
- Was adoption a viable goal in the case, or did the termination of parental rights leave the child in a state of impermanence? This question is especially relevant for older youth in foster care, who may be left as "legal orphans."

§ 28.6 • ORAL ARGUMENT

§ 28.6.1—Requesting Oral Argument

Oral argument gives appellate counsel the opportunity to persuade the appellate court of the merits of his or her argument, clarify positions counsel took in his or her brief, and answer questions the court may have about the case. While some states will give appellate lawyers a right to oral argument in child welfare cases, others may not. Additionally, the length of time an appellate court will give a lawyer to present an argument will vary by jurisdiction.

§ 28.6.2—How To Prepare For Oral Argument

Counsel should prepare extensively for any oral argument. Once the judges on the panel are known, he or she should become familiar with them by reading their biographies on the court of appeals' website, researching information about them through the Internet, and reviewing relevant opinions written by them, which can be accessed through the court of appeals' website and other search engines such as Lexis-Nexis and Westlaw. This background information can be crucial in helping counsel decide how to frame his or her arguments.

Prior to the oral argument, counsel should review the entire record in the case (documents admitted into evidence and transcripts) as well as each brief submitted to the court of appeals. Once he or she has done this and prepared an outline of how he or she would like to present the argument, counsel should schedule at least one moot court session where colleagues can evaluate his or her argument and give him or her feedback. Ideally, each moot court presentation should have 3-4 "judges" and should replicate the actual experience at the court. Counsel should pick colleagues who have a good understanding of how the actual argument may proceed. Counsel can either limit the moot court to the time allotted for oral arguments or can continue the argument until the panel has exhausted its questions. Many appellate advocates schedule more than one moot court session before an oral argument. By the end of a good moot court session, counsel should be able to anticipate most of the questions that will be asked of him or her during the actual argument.

On the day of the argument, counsel should arrive at the court of appeals at least 30 minutes prior to the scheduled time for argument. Counsel should make sure that he or she is comfortable with the courtroom and any technology in the room. If he or she has never argued before the court, counsel should consider watching an oral argument beforehand on a different day. The next section outlines some tips on how to present an effective oral argument.

§ 28.6.3—Tips On How To Present An Effective Oral Argument

- Start with a short and catchy introduction to capture the attention of the panel (*e.g.*, "Reversal is required because the trial court prevented the parent's lawyer from cross-examining the petitioner's witnesses").
- Do not start by reciting the facts of the case. The judges on the court of appeals most likely are familiar with the case and will ask for background or clarifications when they need it.
- Get to the point quickly!

- If a judge asks you a question calling for a “yes” or “no” answer, begin your answer with a “yes” or “no” and then make the point you’d like to make.
- If a judge asks you a hypothetical question, answer it. Don’t dodge the question by simply saying that your case is different. Answer the question. Then explain how your case is different.
- Stay within the record on appeal. Don’t introduce facts during the oral argument that are outside the scope of the appellate record (*e.g.*, what is currently happening with the child).
- Don’t be afraid to address bad facts. But acknowledge them and explain how those facts are not fatal to your case.
- Listen to each question carefully so that you understand what the judge is asking. If you do not understand a question, then respectfully ask the judge to clarify what he or she was asking.
- Never postpone answering a question asked by a judge. Remember that the primary purpose of an oral argument is to answer questions the judges have about your case, not for you to present a prepared speech. You should have already made all of your important points in the written brief.
- If you don’t know the answer to a question, admit it and offer to research the question and provide the panel with an answer through a supplemental brief if the panel desires.
- Focus on one or two arguments in your brief. In all likelihood, you won’t have time to address every argument.
- After answering a judge’s question, transition back to the argument. Don’t wait for another question.
- Be prepared for a cold bench — that is, an oral argument in which few or no questions are asked by the judges. If this happens, just go through your argument, ask if the judges have any questions, and if not, sit down.
- End strongly. After concluding your argument, end by succinctly stating what you would like the court to do.

§ 28.6.4—After The Oral Argument

After the oral argument, the court will issue a written decision. The time it takes for a decision to be written varies from case to case and may depend on a host of factors, including the complexity of the case, whether the decision will be published, and whether there is a dissenting or concurring opinion. Once counsel receives the written decision, he or she should immediately send a copy to the client and schedule a time to explain the decision to the client.

Most states permit counsel to file a motion for reconsideration. Counsel should consider filing this if he or she believes that the appellate court incorrectly reached its decision, misconstrued an argument or statute, or made a mistake.

§ 28.7 • STATE SUPREME COURT PRACTICE

If counsel does not prevail at the court of appeals and the case involves issues of jurisprudential significance, he or she should consider requesting the highest court in the state to consider the case. In most cases, this can be done by filing an application or petition with the state supreme court demonstrating why the case is jurisprudentially significant. For example, a case may be significant where there is a split in the case law at the court of appeals level, where the decision conflicts with precedent created by the state supreme court or the United States Supreme Court, or where the case presents an important legal issue of first impression in the state. The state supreme court will then determine whether to grant the request, and if so, will order further briefing and an oral argument.

If counsel does not prevail at the state supreme court (or if the state supreme court denies the request to hear the case), he or she can consider filing a petition for writ of certiorari with the United States Supreme Court. This petition must be filed within 90 days of the decision. But in order for the United States Supreme Court to accept the case, the case must present federal questions of law — that is questions involving federal constitutional law or federal statutes. As such, over the past century, the United States Supreme Court has accepted very few child welfare cases. Further, the Supreme Court accepts only a very tiny fraction of the petitions for certiorari that are filed. That being said, since child welfare cases involve federal constitutional rights and statutes, counsel should persist in bringing relevant cases before the Court.

§ 28.8 • HELPFUL RESOURCES

Bryan Garner, *The Winning Brief* (2004).

Bryan Garner, *Legal Writing in Plain English* (2001).

Ross Guberman, *Point Made: How to Write Like the Top Advocates* (2011).

Noah Messing, *The Art of Advocacy* (2013).

Antonin Scalia and Bryan Garner, *Making Your Case: The Art of Persuading Judges* (2008).

Donna Furth, “Appeals and Writs” in Ann M. Haralambie, 3 *Handling Child Custody, Abuse & Adoption Cases* 3d ch. 23 (2009, 2015).