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10 Things to Know About the W.Va. Supreme Court of Appeals

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If you have ever been inside the U.S. Supreme Court, stepping into the West Virginia Supreme Court of Appeals will give you a sense of déjà vu. It may not be well known outside West Virginia — and fan groups of famed architect Cass Gilbert — but Gilbert based the courtroom at 1 First Street on the one he had designed a few years earlier for West Virginia's highest (and at the time of this writing only[1]) appellate court, and the two are still strikingly similar. In both courts, four marble columns tower behind the bench in front of long red curtains, through which the justices emerge to take their seats. Both benches are engraved similarly with a repeating circle-in-square design. Marble columns and red curtains continue on the left and right of each courtroom. And overhead, both ceilings are divided into square panels, each inset with four smaller square panels that feature intricate floral or sunburst designs. I recently finished four and a half years as the solicitor general of West Virginia and had the privilege of arguing more than a dozen cases before the West Virginia Supreme Court of Appeals. Appearing in that courtroom never got old.

If you have never been to the West Virginia Supreme Court of Appeals, however, there are a few other things, beyond its architectural pedigree, that are unique about practicing before that court. The court's website provides useful information, including descriptions of the court's five elected justices and a clerk's guide that should definitely be consulted. Below, I highlight two points covered in that guide that are particularly important. But I also discuss a few additional lessons that I picked up in my years as the state's chief appellate lawyer.

Ten Lessons From Practicing Before the West Virginia Supreme Court of Appeals

(1) The issues identified in the notice of appeal are not binding. Under the Rules of Appellate Procedure, a party appealing to the West Virginia Supreme Court of Appeals must complete a notice of appeal form, available on the court's website. That notice requires identification of the alleged errors in the lower court's decision. But as the clerk's guide notes, "the assignments listed in the Notice of Appeal are not binding on the petitioner when the brief is filed." That follows directly from Rule 10(c)(3) of the Rules of Appellate Procedure, which states that "[t]he assignments of error [in the brief] need not be identical to those contained in the notice of appeal." Discussing that rule, the court has said that it "certainly ... permits some variation from the assignments of error denoted in a notice of appeal and those presented in brief."[2] According to the clerk's guide, the requirement in the notice of appeal is intended to ensure "that the petitioner has performed a review of the case and has a good faith belief that the appeal is warranted."

(2) "Perfecting your appeal" simply means filing your brief. The Rules of Appellate Procedure and the

court's scheduling orders speak in terms of "perfecting" an appeal. A notice of appeal must be filed within 30 days of the judgment being appealed, but the appeal itself need not be "perfected" until four months after that judgment (unless an extension is granted). All that means is that a properly prepared brief and appendix record must be filed.[3] But bear in mind that all filings must be received by the clerk on or before the due date, and the Supreme Court of Appeals does not yet have electronic filing. The clerk's guide includes important instructions on acceptable methods of filing.

(3) In contrast to the U.S. Supreme Court, the syllabus in an opinion of the West Virginia Supreme Court of Appeals has significant legal import. Frequent readers of U.S. Supreme Court opinions will be familiar with the admonition that "[t]he syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader." Not so in West Virginia. The West Virginia Constitution makes it "the duty of the court to prepare a syllabus of the points adjudicated in each case in which an opinion is written and in which a majority of the justices thereof concurred, which shall be prefixed to the published report of the case."[4] "As a result, the syllabus in every published opinion is an integral part of the decision itself."[5] In preparing for oral argument, it is important to work up an answer to the question, "What syllabus point or points should the Court adopt?" That said, "[t]he syllabus is not intended to be an exhaustive recitation of every item decided in [a] case, and must be read in light of the opinion as a whole."[6]

(4) The West Virginia Supreme Court of Appeals has a "three-tier system of precedent," recently explained in its McKinley opinion in 2014.[7] The evolution of that court, set forth in detail in State of West Virginia v. Marcus Patrele McKinley, has at times created confusion about the binding nature of its various types of opinions. The most recent (and significant) change was in 2010, when the court revised its rules to "switch from appeals by permission to appeals by right," resulting in a written decision on the merits in every perfected appeal.[8] To accommodate the sharp increase in written opinions, the rule change created "memorandum decisions," which are unpublished, do not contain syllabus points, and "occupy a lower station on the scale of precedent when compared to published opinions."[9]

In McKinley, the court adopted the three-tier system of precedent "to clarify the weight of opinions issued by th[e] Court."[10] Of "highest precedential value" are signed opinions containing original syllabus points.[11] Second are signed opinions that include only syllabus points quoted from previous cases. Both of these types of opinions are published. The third tier of precedent consists of memorandum decisions, which "may be cited as legal authority, and are legal precedent, [but] their value as precedent is … more limited."[12] "[W]here a conflict exists between a published opinion and a memorandum opinion, the published opinion controls."[13] Anyone with a case before the West Virginia Supreme Court of Appeals should give McKinley a close read.

(5) After McKinley, the court has issued several decisions that shed further light on the precedential value of memorandum decisions. In Hammons v. West Virginia Office of the Insurance Commissioner, the court overruled a series of relatively recent memorandum decisions.[14] Noting the "abbreviated factual and legal discussion set forth in this Court's memorandum decisions," the court explained that "[a] precedent-creating opinion that contains no extensive analysis of an important issue is more vulnerable to being overruled … ."[15] Then in State v. Deel, the court again overruled several recent memorandum decisions.[16] But in SWVA Inc. v. Birch, the court declined to do the same, reasoning that "'[a]n appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of stare decisis."[17]

About a year ago, the court acknowledged in In re T.O. the growing uncertainty surrounding memorandum decisions, and sought to "reassure the legal community and the public that 'there is no question that memorandum decisions are pronouncements on the merits that fully comply with the constitutional requirements to address every point fairly arising upon the record and to state the reasons for a decision concisely in writing.'"[18] The court explained that the comments in Hammons were not addressed to memorandum decisions "generally," and "reaffirm[ed] the precedential value of … memorandum decisions."[19] Though a published opinion will always control over a conflicting memorandum decision, the court stressed that memorandum decisions are otherwise subject to the same principles of stare decisis that apply to published opinions. They should not be overturned "'without evidence of changing conditions or serious judicial error in interpretation.'"[20]

(6) On an issue of first impression, advocates should know how courts around the country have ruled on the same or similar issues. Though it may not be dispositive, the justices want to know how other state courts have decided a question that they are seeing for the first time. This is apparent both from questioning at past oral arguments and in numerous written opinions.[21]

(7) If oral argument is granted, it is important to note whether argument has been granted under Rule 19 or Rule 20 and to understand the difference. In general, a grant of oral argument suggests that the court believes a published opinion is appropriate. (I am not aware of the court ever publishing a decision in a case without oral argument, though some argued cases end up being resolved by memorandum decision.[22]) But understanding the specific rule under which oral argument has been granted can be helpful in preparing for argument. Rule 19 arguments tend to be set for "cases involving assignments of error in the application of settled law" or "cases involving a narrow issue of law."[23] In contrast, Rule 20 arguments tend to concern "issues of first impression," "issues of fundamental public importance," and "constitutional questions."[24] In a case with multiple issues, the court's designation of Rule 19 or 20 may help identify which of those issues is likely to come up at oral argument. That designation also affects the amount of time allotted for argument, which I discuss further below.

(8) Though the court technically imposes time limits on oral argument, those allotments are more guidelines than firm rules. The default is 10 minutes per side in Rule 19 cases and twenty in Rule 20, but the court does not use any mechanism to enforce those time allocations. One of the bigger surprises for experienced appellate attorneys may be that the podium in the courtroom has neither a timer nor a set of lights. Consistent with that informality, the appellant's advocate also is not expected to reserve time specifically for rebuttal; the chief justice will always offer the opportunity to give rebuttal, though he or she may suggest that the advocate be brief. Though this arrangement may seem freeing, it might actually demand more skill from an advocate. Without a timer and a definite stopping point, it can be challenging to judge when it is time to move on to a new point, and when it is time to start wrapping up. Arguments often end when the chief justice indicates that the court has heard enough, which can sometimes happen unexpectedly early, leaving an advocate scrambling to sum up quickly without testing the court's patience. One strategy I developed was to have prepared a two- or three-sentence conclusion, reiterating my major themes, that I could offer at any time.

(9) Oral arguments are streamed live on the court's website, but the court maintains no publicly available record of the argument in any form. There is no transcript, audio file, or archive of the video. As a result, advocates preparing for argument should bear in mind that the justices appear to have no way to review later what was said in open court. Argument is likely to be more effective if designed to stress just a few salient points. When discussing an important case or portion of the record, offer the citation or relevant

page numbers, which the justices will sometimes write down. Finally, even though there is no formal record, be aware that the court will hold parties to statements made at oral argument, including any concession of a point or argument.[25]

(10) Many advocates approach oral argument before the West Virginia Supreme Court of Appeals as they would a jury argument, and then find themselves gently redirected by the chief justice. If you have not done many appellate arguments, take the time to review some of the common dos and don'ts of appellate advocacy. Here are just a few that I've observed before the court. Although you must be prepared to answer questions relating to all the arguments in the briefs, do not go to argument intending to cover everything. And do not start your argument with a recitation of the facts. Rather, tell the court the few points that you think drive your case, and move right into discussing the first one, if a justice has not interrupted you with a question. Stop talking, even mid-sentence, if a justice asks a question, and answer it directly. Know the record. The night before argument, check the cases you have cited for more recent developments. Finally, address the justices as "Your Honor," unless you are absolutely certain you know who is who, and how to pronounce their names. (A tip: current Chief Justice Allen Loughry's name is pronounced "LAW-free.")

Conclusion

Even for experienced appellate advocates, appearing before the West Virginia Supreme Court of Appeals for the first time might pack a few surprises. From its architectural grandeur to its relaxed approach to time limits during oral argument, West Virginia's highest court has many unique features that make it a special place to practice. I was proud to consider it my home court for nearly five years and hope that your first trip there is a successful one.

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[1] After numerous attempts over the past two decades, an effort to create an intermediate court of appeals appears to be gaining momentum in the West Virginia legislature. See Brad McElhinny, Intermediate court of appeals gets another legislative review, MetroNews (Jan. 28, 2018), http://wvmetronews.com/2018/01/28/intermediate-court-of-appeals-gets-another-legislative-review/; Jeff Jenkins, Carmichael calls intermediate court fiscal note "comical," MetroNews (Feb. 7, 2018), http://wvmetronews.com/2018/02/06/supreme-court-estimates-cost-of-intermediate-court-at-11-7-million/. If the bill is passed and signed into law, the new court could begin hearing cases in the middle of 2019.

[2] Taylor v. W. Va. Dept. of Health & Human Res., 237 W. Va. 549, 557 n.12 (2016).

[3] See W. Va. Rule of Appellate Procedure 5(g).

[4] W. Va. Const. art. VIII, § 4.

[5] State v. McKinley, 234 W. Va. 143, 149 (2014).

[6] Id.

[7] Id. at 153.

[8] Id. at 151.

[9] Id.

[10] Id. at 153.

[11] Id.

[12] Id.

[13] Id.

[14] 235 W. Va. 577, 594 (2015).

[15] Id. (internal quotations omitted).

[16] 237 W. Va. 600, 607 (2016).

[17] 237 W. Va. 393, 397 (2016) (quoting Syl. pt. 2, Dailey v. Bechtel Corp., 157 W. Va. 1023 (1974)).

[18] 238 W. Va. 455, 463 (2017) (quoting McKinley, 234 W. Va. at 151).

[19] Id.

[20] Id. at 464 (quoting Syl. pt. 2, Dailey, 157 W. Va. 1023).

[21] See, e.g., Highland Min. Co. v. W. Va. Univ. Sch. of Med., 235 W. Va. 370 (2015) (noting in case of first impression that "[t]he parties do not cite any precedent interpreting other states' FOIAs directly on point"); State v. Yocum, 233 W. Va. 439, 446 (2014) ("As this is the first case that has reached us under our anti-terrorism statute, we find it useful to consider how New York has addressed analogous concerns … ."); Jenkins v. City of Elkins, 230 W. Va. 335, 349 (2012) (because case involved "an issue of first impression," "we will look for guidance to other jurisdictions that have addressed the matter"); Vieweg v. Gatson, 209 W. Va. 268, 271 (2000) ("Although this issue is one of first impression for this Court, we note that courts of other states have applied similar disqualification provisions in the same way as we have West Virginia Code § 21A-6-3(1).").

[22] See, e.g., Standard Oil Co. v. Consolidation Coal Co., No. 15-0655, 2016 WL 6078570 (W. Va. Oct. 17, 2016).

[23] W. Va. Rule of Appellate Procedure 19(a).

[24] W. Va. Rule of Appellate Procedure 20(a).

[25] See, e.g., Williams v. CMO Management LLC, 803 S.E.2d 500, 502 (W. Va. 2016) ("Based on the petitioner's concession during oral argument … , we find it unnecessary to review the denial of a new trial as to the wrongful death claim."); State ex rel. McCabe v. Seifert, 220 W. Va. 79, 80 (2006) (noting that counsel stated "during oral argument" that certain issues on appeal "are now withdrawn").