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JOY AND HEARTBREAK IN THE COURT UPSTAIRS: THREE APPELLATE LAWYERS TALK SHOP

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Appellate lawyers George Somerville of Harman Claytor Corrigan Wellman in Glen Allen, Frank Friedman of Woods Rogers in Roanoke, and Steve Emmert of Sykes Bourdon Ahern & Levy in Virginia Beach discuss topics related to practice in Virginia's appellate courts. The three took turns posing questions and comparing their answers.

What Is the Single Most Essential Step That a Lawyer Must Take in Preparing for Oral Argument?

EMMERT:

For me, it's to brainstorm the most difficult questions I could possibly receive when I'm at the lectern. The process of writing a speech takes me about 1/4 the time I'll spend on my tough-questions list.

The best source of questions is usually a careful, dispassionate reading of my opponent's brief. I also focus on the contours of the doctrine I'm advocating, to find issues that the Justices might raise sua sponte. They care as much about the next case and the one after that as they do about mine, so I try to see where they might have concerns about the precedent they're setting. I prepare by changing the facts of my case just a bit and seeing if that might lead to trouble.

With that list, I prepare what I think will be the best answer to each question. I make those answers as concise as possible; a long-winded response sends the wrong message, and I might not get to the end before I'm interrupted again. I prepare a page or more in my oral-argument binder that lists those questions and the carefully framed answers.

FRIEDMAN:

I agree that the most essential step for oral argument preparation is anticipating difficult questions and preparing good, concise answers to them—but this "step" is tied to a series of other important undertakings that constitute a long process. The hard-questions list is developed while the record and joint appendix are reviewed, cases are analyzed, a presentation is woven or road-mapped, and opposing briefs are digested.

I do not prepare the same way for every argument. Some cases are more fact intensive than others, some are more policy oriented, others involve large casebooks. The single biggest factor that influences how I prepare is whether I represent the appellant or appellee. As appellant, I spend more time preparing comments and working on a delivery than if I am the appellee. As appellee, I try not to be too tied to a script; those who are find that when they get to the podium, they are proceeding as if they missed everything that just happened in the appellant's presentation.

SOMERVILLE:

Re-read—*everything*—and figure out all of the hard questions and the best answers to them.

I Have Witnessed Really Helpful Moot Courts–as Well as Moot Court Fiascos That Did More Harm than Good. What Safeguards Do You Employ to Make Sure That the Moot Court Experience Is Productive and Helpful?

SOMERVILLE:

I may just be lucky because I have never been part of a moot court fiasco. I have participated in some that were more helpful than others, to be sure, but none whose net impact was negative.

I think the first and most essential key to a productive moot court practice is to identify and recruit the right "judges." I then ask them to read the briefs, review the key authorities, and prepare hard questions. I do not tell them which authorities I consider most important; I want them to exercise independent judgment. I also make the appendix available, to the extent that they want to use it.

Identification of the "right judges" obviously depends on a variety of intangibles. The right judges don't *necessarily* have extensive appellate experience, but that is definitely a plus. An *ideal* moot court judge is someone with relevant experience—a retired appellate judge or, alternatively, a former appellate law clerk. (Retired judges whose current careers are in arbitration and mediation are good candidates.) If the subject matter is well off the beaten track—interpretation and application of some obscure federal statutory scheme, for example—then one subject matter expert is highly desirable, if not essential (but only one; the actual judges will not be experts in the subject matter, and skilled and intelligent lawyers who are not experts are generally better predictors of judicial behavior). The right judges *must* have both the available time and the interest necessary to study and prepare. Other lawyers who have worked on the case should be present at the session, but not as "judges." I have already tapped their wisdom and insights, and on top of that they cannot approach the case "cold" as the real appellate judges will do.

My practice is to recruit no more than three "judges," and I have had productive sessions with as few as one. I also have participated in such practices with as

many as a dozen "judges" (mostly as a "judge" myself), but on one occasion I was roped into a session arranged by another firm in a case where I had agreed to share the argument with a lawyer from that firm, with a similarly overloaded panel. Sessions like that work only if one individual presides and manages the proceedings with a strong, firm hand.

I have found that the format of a moot court practice is considerably less important than the substance. Such a practice can be either a full-blown rehearsal, with practice arguments and questions from the "judges," or an informal back and forth discussion. Both formats work if the participants are qualified and prepared.

The timing, on the other hand, is a significant factor. I aim to schedule practice arguments approximately five days to a week before the actual argument. I also prefer to do the scheduling well in advance, to give both myself and my "judges" ample opportunity to prepare. Early scheduling pressures me to be prepared well in advance. The 5- to 7-day interval allows ample time to react to input that I received at the practice session, but it is not so early in the game that I will be tempted to approach it less than fully prepared.

EMMERT:

I read once that about 85% to 90% of appellate lawyers use moot courts to prepare. I'm in the minority; I never moot an argument. That means that I can't provide a meaningful answer based on my own experience.

But my approach depends on the way I was trained as a speaker. I believe that most lawyers would be well advised to follow George's advice on how to set it up. This is especially true for lawyers with few previous oral arguments.

One last point: I'm in good company in declining to use moot courts. An authority whom George and I greatly respect, the late Judge Ruggero Aldisert, insisted that moot courts are "mandatory." But he allowed for a dissenting view by no less than the late Charles Alan Wright:

> I would not dream of rehearsing an argument. Indeed I refuse even to discuss a case in the period leading up to when I am going to argue it. At least for my style of argument, freshness and spontaneity are vitally important. I think long and hard about what may be said at oral argument, but I do not put words on paper nor do I discuss the case with others.

R.J. Aldisert, *Winning on Appeal* (2d ed. 2003) at 329. I don't go as far as Prof. Wright did; I'm happy to discuss with my colleagues the issues I plan to address and the questions I expect. But once I give a speech, it's dead.

FRIEDMAN:

I am actually not a huge fan of moot courts myself—I prefer "brainstorming" sessions where the team throws out hard questions and best answers and talks about weaknesses and strengths of competing positions.

With that said, sometimes a moot court is required—and, for those who have not argued often, it is a very good idea to practice getting interrupted a lot and perhaps being led "off message" (or off what you think your message ought to be) and transitioning to important points. So I see value in doing them—and have done my share of them.

If a moot court is required, timing is important: doing it too early makes the advocate stale, and doing it the day before can lead to chaos if it does not go well. I like to do them two or three days before the argument date with a group that can be trusted to be constructive and insightful—and knowledgeable about the court.

Although I am not necessarily a fan of mooting—that does not mean I do not practice a presentation in the days leading up to the argument. I do practice a lot. Sometimes I even record the presentation on my phone and listen to it. Hearing/listening to yourself can be a valuable means of spotting things you do not want to say—or that you can improve upon.

MOST APPELLATE JURISTS INDICATE THAT ORAL ARGUMENT RARELY CHANGES THEIR VIEW OF HOW A CASE SHOULD COME OUT. THAT MEANS THAT THE OVERWHELMING MAJORITY OF MODERN APPELLATE PERSUASION IS IN THE BRIEFS. IN DRAFTING YOUR BRIEFS, WHAT ARE YOUR FAVORITE TOOLS TO GRAB AND HOLD THE PRECIOUS COMMODITY OF JUDICIAL ATTENTION?

SOMERVILLE:

1) Read and follow the Rules of Court. (Wasting paper and ink arguing the facts may be the only blunder that will more quickly forfeit judicial attention than obvious failures to comply with the Rules.)

2) Play straight and level with all courts at all times. Over time, the expectation that you will do so, which accompanies every lawyer to a court when he first appears (in the minds of most judges, at least), will ripen into a confident presumption. But if you play fast and loose with either the facts or the law, even once, that mistake will haunt you for the rest of your career. Judges have minds like elephants, and they discuss the lawyers who appear before them.

    2a) Don't try to hide "bad facts." If possible, turn them around and make them appear to be good facts. At minimum, ease the sting and maintain your credibility by disclosing them up front.

3) Don't make a jury argument to an appellate court. When I represent the appellant, I am obligated to state the facts in the light most favorable to the party who prevailed at the trial. I state explicitly that I am doing so, and then I do it. (The opposite is true, of course, if I am challenging a decision dismissing a case on demur-

rer or granting a motion to dismiss under Rule 12(b)(6) or summary judgment under Rule 56.)

4) Get to the point. (This may be the most important piece of advice, but it is likely to be wasted if I don't observe the others as well.)

   4a) In appropriate cases, set the stage with an introduction—which should never exceed one page—describing the context and the consequences.

   4b) Don't waste the Court's time and forfeit its interest by describing facts (e.g., inconsequential dates) and proceedings that are not material to the issues on appeal.

FRIEDMAN:

Holding attention with any reader means you have to write in an interesting way. If possible, I like to tell a good story—and have a theme. The theme, in a perfect world, is subtly inserted on page one and recurs throughout the brief. The story, if told properly, explains why you should win. If you aren't "winning" after a reading of the facts—you probably aren't going to win.

The law can be complicated—and if you set it out in a complicated way, your readers will suffer and so will your client. I try not to write the law until I can summarize why I am right in 90 seconds or less. If it takes me five minutes of background explaining before I can get to why I win—I am not ready to win or write.

I also believe strongly in structure for legal writing: lots of headings, and headings that guide your position like a roadmap so the reader does not get lost. Put the best arguments up front—and try to do everything you can to prevent a reader from falling asleep—or getting lost in the weeds. This is all the more important with the transition to screen reading—which is harder than reading on paper.

Things that make screen reading even harder need to be avoided—e.g., really long sentences, really long paragraphs, enormous block quotes, too many footnotes (footnotes are less likely to be read on screens), meandering arguments, and arguments that build to a non-foreshadowed conclusion. Screen reading makes clarity all the more important. Essentials include: good headings, thorough editing, and a logical presentation that is easy to follow. Let the reader know why you win—and then illustrate why you win in a compelling, interesting way.

EMMERT:

I love to insert a preliminary statement at the very beginning of a brief. This is what George describes in his point 4a above. Here are my rules for a preliminary statement:

- It must occupy no more than 70% of the page, and it must be the only thing on that page. This is to make it obvious *at a glance* how short it is, making it more likely that the reader (staff attorney, law clerk, judge, or Justice) will read it and maybe even reread it. Run it too close to the bottom of the page, and the reader might suspect that it goes on to page 2. Don't be afraid of brevity; the best preliminary statement I ever wrote was just two sentences.

- It must state the primary issue—not all of your issues; but the most important one—succinctly, in easy-to-understand terms, as Frank advises.

- If I represent an appellant, my statement must frame the issue in such a way that, upon reading it, the reader thinks, *Hey, WAIT a minute . . .*

- The goal is to have the reader come away from page 1 with a suspicion that you're likely right.

The Days of Daniel Webster and Multi-Day Oral Arguments Are Long Past, and the Federal Appellate Courts Are Increasingly Rationing the Oral Argument Privilege. What Do You Think Is the Relative Importance of Briefs and Oral Arguments? Does Oral Argument Continue to Serve Any Good Purpose at All?

EMMERT:

I sometimes ask appellate jurists about the ultimate, Darwinian measure of oral argument's importance: "How often do you find that oral argument changes your vote on how the case should come out?" Almost all the answers fall between 10% to 20%; I generally use 15% as a rule of thumb. That means that in six cases out of seven, argument doesn't change the outcome.

But in MCLE presentations, jurists relate what sounds like a different story; things like, "I find oral argument to be extremely important, especially in helping me to crystallize my views of the issues." How can both of these be true? How can appellate success be 85% written and 15% oral, *and at the same time* oral argument be a vital part of the process?

It's because the jurist perceives oral argument differently from the way you and I do. For us, it's a chance to convince a majority of the Justices that we're right and the Bad Guys are wrong and thus win the case. For the Justice, it's an opportunity to shape the eventual opinion. (This is why you see hypothetical questions with the facts shifted ever so slightly.) While an argument might produce a dramatic turnaround, it's more likely to refine the holding that the jurist already had in mind. It may help a judge or Justice convince undecided colleagues.

FRIEDMAN:

In listening to appellate judges talk about how often oral argument changes their minds—I agree with Steve that it is briefs that carry the day at least 80% of the time—and probably more. And in many appellate courts, if you are trounced in the briefs, you do not even get oral argument.

Nonetheless, I think oral argument is still important in most cases—because it is the only chance the people deciding your case have to tell you what is troubling them about your position. Probably the number of times argument changes an "outcome" is under 20%—but I suspect oral argument changes *how an opinion is written* much more often.

This is why it is wrong to go into an oral argument dead set on regurgitating your brief and restating your position point by point—this is often a hard lesson for inexperienced attorneys to learn (or, at least, it was for me.) Early on, I wanted oral argument to be a highlight reel for my case—and clients in attendance always want that, too. But, the court has your brief and, hopefully, you have laid out your position in the most positive way possible already. The court wants to challenge your theory and think about the collateral damage it might cause in related cases down the road. So, it is particularly important to be flexible on argument day—and to prepare a brief that puts you in the driver's seat heading into the argument.

SOMERVILLE:

Many years ago, I served as a law clerk for a distinguished federal appellate judge who pounded into his clerks the point that the great majority of cases are decided on the briefs. I have seen nothing since to dispel that belief, and I agree with what Steve and Frank have said. But I will add a few caveats:

1) Some lawyers are better on their feet than on paper. For those lawyers, oral arguments are the best opportunity to persuade courts to their position. They typically enter the endeavor in a distant second place, but occasionally they may be able to turn a court around by the use of analytical (not necessarily rhetorical) brilliance at the podium. The key, I think, is to express an argument that has been preserved in the trial court and on the briefs in a way that the appellate judges had not previously been called to consider (and that is persuasive, of course).

2) I strongly suspect that more cases are lost than won at oral argument. A variety of tactics are available for the lawyer who is unconsciously determined to snatch defeat from the jaws of victory. Chief among those, in my opinion, are inadequate preparation (especially failure to anticipate hard questions) and continuing to argue after making all necessary points and answering the court's questions, thus wandering into nonessential (and possibly less fa-

miliar) territory and inviting questions that otherwise would never have been asked.

3) Law clerks are usually instructed to identify and explain the best arguments in support of each party's positions, a duty that is more demanding when a brief does a poor job of making those arguments. Most law clerks are relatively bright young people, and they do their best, but many or most of them are fresh out of law school. Most appellate jurists will not pay attention to an argument that is identified for the first time in either a law clerk's memorandum or an advocate's argument at the podium. But a law clerk's restatement (or spin) of an argument made by counsel may find its way into a question from the bench. The lawyer who recognizes it as a softball question and hits it out of the park may be on her way to a victory that could not have been predicted from the briefs. But if the same lawyer whiffs on that question, her case may be dead. The obvious challenge is to recognize softball questions, in the heat of the "battle," and that is not always an easy task.

WHAT DO YOU DO IN THIS SCENARIO? MR. TRIAL LAWYER CALLS YOU TO SAY THAT HE JUST CAME FROM A HEARING IN CIRCUIT COURT. THE JUDGE ANNOUNCED A DECISION, WHICH HE (MR. LAWYER) BELIEVES IS WRONG, AND HE WANTS YOU TO HELP HIM WITH AN APPEAL. OVER THE NEXT FEW DAYS, YOU REVIEW THE PLEADINGS, MOTIONS, BRIEFS, AND A PROPOSED FINAL ORDER THAT HAS BEEN CIRCULATED BY THE OPPOSING PARTY. YOU REALIZE THAT MR. LAWYER NEVER MADE AN ARGUMENT THAT HAS AT LEAST A FIGHTING CHANCE OF WINNING ON APPEAL.

EMMERT:

Since the only thing the judge did was to announce (render) judgment, the case is still active and appellate deadlines haven't begun to tick yet. Those deadlines are measured from *entry* of judgment, which is the date on which the judge signs a final order. Rule 1:1.

If the only thing his honor has done is announce, "You lose," you still have options, even for the argument you've only now identified. File a motion to rehear and cite the new argument in it. Briefing an issue in a motion to rehear should be sufficient to preserve it for appellate review, *Majorana v. Crown Central Petroleum*, 260 Va. 521, 525 n.1 (2000), but this advice comes with a huge asterisk. In *Brandon v. Cox*, 284 Va. 251 (2012), the Justices refused to consider a killer issue that had been raised in a timely motion to rehear. The trial judge had not ruled on the motion, so the court held that this issue was waived, since the record didn't show that the judge had an opportunity to rule on it.

FRIEDMAN:

Before the entry of the final order, time remains to preserve or refine murky arguments. Even after the final order is entered, there are merits to filing a motion to reconsider and getting a ruling within 21 days. Even if you lose, if the court "considers" your arguments, they are generally preserved. Like Steve, I do not think that merely filing a motion to reconsider is enough to preserve a new or unclear argument—I think you do need to obtain a ruling (and even then it may not be enough to preserve certain types of arguments). But for many arguments—especially purely legal ones—a well-played motion to reconsider can save the day if a ruling considering the argument is obtained. However, obtaining a ruling on a post-trial motion is often easier said than done in some localities. Obtaining a ruling after 21 days has run from the final order can be dangerous—and can be meaningless, unless the final order has been properly suspended, modified, or vacated pursuant to Rule 1:1.

A further hangup is that Rule 4:15 specifically says that a judge need not hear a post-trial motion unless the judge chooses to do so. Motions to suspend make me nervous—there is an entire cottage industry built up around the 21-day rule and whether a given order attempting to suspend the proceedings is sufficient or not. However, when you have no choice, a proper motion to suspend can give you extra time to get your arguments heard and ruled upon. There is also no rule against setting a hearing on a motion to suspend, and I have occasionally set such hearings successfully—and sometimes a judge has also been willing to take up the motion for reconsideration while everyone is present. Best-case scenario: have a hearing on a motion to reconsider within 21 days of the final order and be sure an order is entered ruling on the motion before the 21 days expire.

SOMERVILLE:

Steve and Frank have correctly focused on the differences between the situations that exist before and after entry of a final order, and I offer no elaboration on those matters. I will suggest, however, that no lawyer can force a judge to rule on a motion for rehearing or reconsideration. But I do not believe that a ruling is necessary to preserve a new issue for appeal. An actual ruling will remove all doubt, to be sure; but what is necessary is a record that demonstrates that the judge was *asked* for a ruling and had an *opportunity* to make a ruling. *See*, *e.g.*, *Graham v. Cook*, 278 Va. 233, 247, 682 S.E.2d 535, 543 (2009) ("The main purpose of requiring timely and specific objections to testimony is to allow the circuit court an *opportunity* to address the issues presented, thereby avoiding unnecessary appeals and reversals of the circuit court's judgment."); Va. Code § 8.0-384(A) ("for all purposes for which an exception has heretofore been necessary, it shall be *sufficient* that a party, *at the time the ruling or order* of the court *is made* OR SOUGHT, *makes known to the court* the action which he desires the court to take or his objections to the action of the court and his grounds therefor . . . .") (emphases added). *See also Scialdone v. Commonwealth*, 279 Va. 422, 437, 689 S.E.2d 716, 724–25 (2010), and cases cited. The

apparent problem in *Brandon v. Cox* was that nothing in the record negated the hypothesis that the judge was never made aware of the motion for reconsideration.

> Because the purpose of Rule 5:25 is to ensure that the trial court has the opportunity to rule upon an argument, the record must affirmatively demonstrate that the trial court was made aware of the argument . . . . Because there is no evidence in the record that the trial court had the opportunity to rule upon the argument that Brandon presents on appeal, it cannot be said that the case can be heard in this Court upon the same record upon which it was heard in the trial court and, therefore, the purpose of Rule 5:25 is defeated. Thus, we must hold that she has waived her argument by failing to preserve it.

Brandon, *supra*, 284 Va. at 697. *See also id*. at 697 n.2: "Although Rule 4:15(d) provides for a hearing only at the request of the court, it is incumbent upon the party seeking an appeal to provide us with a record that shows, beyond a mere filing in the clerk's office, that the court had an opportunity to rule."

I researched this question pretty extensively about a year ago, and I was unable to identify even a single decision holding that an argument was not preserved for lack of a ruling, where the court did not also explain that holding in terms of the absence of an opportunity for the trial court to rule. I do not think trial judges have the power to frustrate appellate review by ignoring or refusing to rule on matters brought before them for decision, and I doubt that our Supreme Court would allow them to do so.

The question remains, however, in light of Rule 4:15(d) and *Brandon*, what is an attorney to do to provide a record that "affirmatively demonstrate[s] that the trial court was made aware of the argument"? The following tactics worked for me in one recently decided case, but other variations surely are available. In that case, I was brought on board after entry of a final order, but similar measures should serve in the pre-final order context. I prepared and trial counsel filed a motion for reconsideration or new trial that raised several new arguments (arguments that bore a remarkable resemblance to my assignments of error on appeal). Copies of the motion and a broad menu of sketch orders were hand delivered to the trial judge, with a letter noting the Rule 1:1 deadline and requesting either a ruling on the motion by that date or entry of an order suspending the final order pending a decision on the motion. Trial counsel also submitted a copy of that letter and its enclosures to the clerk, with a cover letter specifically requesting that a copy of the letter to the judge be included in the record. (The judge's only response was to direct his secretary to attach a Post-It note to the cover letter stating that he was not going to do anything further. That also made its way into the record.) Neither opposing counsel nor the writ panel nor the full court questioned preservation of the new arguments for the appeal, and a writ was granted on several of the issues raised initially in the motion for reconsideration.

Postscript:

After the authors submitted this article for publication, the Supreme Court handed down a potentially significant new decision, *Cherry v. Lawson Realty Corp.*, 812 S.E.2d 775 (2018). In *Cherry*, the trial court dismissed two counts of a four-count complaint *sua sponte*, for reasons of its own devising. The appellant asked the trial court to certify an interlocutory appeal, and it did so; but the appellant never asked the trial court to change its ruling. He stated his objections *only* in his endorsements of the interlocutory order. Confounding the expectations of the appellees' counsel (one of your authors), the Supreme Court held unanimously that the objections were preserved.

The court pointed to the plain language of Code § 8.01-384—"Arguments made at trial via . . . recital of objections in a final order . . . shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal." But it stopped short of announcing a *rule* that recital of objections in a final order alone will henceforth be sufficient to preserve an argument that was never made in a motion, brief, objection or argument at trial, or otherwise.

Immediately after quoting from the statute, the court stated that "the plaintiffs submitted a number of objections that they appended to the trial court's order dismissing the negligence counts. *The court had the opportunity* to consider these objections." It also commented that "[p]reservation of an issue for appellate review is a context specific exercise . . . . *In this instance,* noting objections on the final order sufficed to preserve the questions of statutory interpretation for our review." The Court added that "*some* objections require counsel to ask for corrective action." (Emphases added.) Examples of this last category are objections to the arguments of counsel, which must be raised before the jury retires to deliberate; and objections to the foundation for an expert's opinions, which objections must be made when the opinions are offered.

In short, the rule *may* now be that recital of objections in a final order alone is enough to preserve some new arguments for appeal. Whenever possible, however, the far safer course is to present arguments at a time and in a way that more clearly gives trial judges the opportunity to consider and rule on them and, even more importantly, to *ask* for rulings.

Lately It Seems More Petitions for Rehearing Are Being Filed. What, If Any, Tips Do You Have on Writing a Successful One?

SOMERVILLE:

I am not sure if my tips will be especially valuable because I don't have a great track record on petitions for rehearing. (But then who does?) My best advice, however, is to keep it short, hard-hitting, and focused on the one—or at the *very* most two—critical arguments. I am inclined to doubt that the Justices (or even their law clerks) take the time to fully digest 10-page petitions for rehearing (the

maximum allowed both by Rule 5:20(c) for petitions after writ denials, and Rule 5:37(d) for petitions after a decision on the merits). I will go further and hazard a speculation that if the first page does not capture their attention, a petition is effectively dead.

If the petition is filed after a writ is denied, there is an unspoken but strong presumption that the writ panel's decision correct, and it is difficult to persuade two Justices that a case that a writ panel has refused should be heard. A petition filed after a merits decision probably has no chance at all unless there is a strong dissent. *Possible* exceptions exist in cases where the court has overlooked a critical point that is undisputedly established by the record or where there has been an intervening change in controlling law.

EMMERT:

Despite George's modesty, he's spot-on. The most important thing he says here is that the first page matters more than the ones that follow. In a PFR, I want to metaphorically grab the reader by the lapels before the end of page 1 and convince him or her that it's worth turning the page to read more.

Unlike other briefs, the rules don't list what you must say in a PFR. I often joke that if you think you can get a writ with a chicken soup recipe, include it. You can use any format that'll get your reader's attention and hold it.

If you've assigned several errors, and the court has granted fewer than all of them, check to see whether the refused issues might affect the court's resolution of the granted ones. If the court will be constrained in reviewing its granted issue, file a PFR and point that out, so the court can take a second look at the issues that the panel refused.

At any stage of the case, the odds are that PFRs won't succeed. The court grants writs around 2.5% of the time after a refused petition for appeal. That's one out of 40. At the merits stage, there have been none granted since *RGR, LLC v. Settle* in 2014. It's a long shot, but if you don't at least try, your odds go from tiny to exactly 0.00%.

FRIEDMAN:

I share the general consensus here that a very good reason for granting a rehearing needs to be stated right on the first page. This does not mean a lot of flowery language about the Constitution—or a dissertation on the grave injustice created below. A good petition needs to lay out the legal conflict or problem created by the ruling in question, front and center. Using a petition for rehearing to vent about grievances is not only unhelpful but is sometimes counterproductive. My best advice is keep these very "legal." You are paddling against the current when you file for a rehearing in an appellate court. With that said, I have seen several of these granted over the years—and a couple of decisions reversed.

SOMERVILLE:

A side note on Steve's point that the rules don't specify what you must say in a PFR: assignments of error are neither required nor necessary in a PFR, at least in the SCV. That's one of the unwritten rules of practice in that Court. The assignments from the petition for appeal (but not the petition itself) are distributed to the Justices along with the PFR.

Let's Take a Trip to the Wishing Well. What One Practical Change Would You Make to the Appellate System Here in Virginia, If You Had the Ability to Impose It Immediately?

SOMERVILLE:

There is a quirk in the Rules that gives appellants an unintended and at least arguably undesirable advantage at the petition and briefing stages of an appeal. (I disclose it here despite my awareness that giving it publicity is more likely to lead to increased usage than to reform, although reform is desirable—in my opinion anyway.)

"A brief amicus curiae will be accepted only if filed on or before the date on which the brief of the party supported is *required* to be filed." Rule 5:30(d) (emphasis added). Rule 5A:23 is similar. Those Rules use the words "brief of the party supported"; but Rule 5:30(a) provides that amicus briefs may be filed, inter alia, "during the petition, perfected appeal or rehearing stages of the appellate proceedings in this Court," and Rule 5A:23(a), again, is similar. The Supreme Court interprets "brief of the party supported" as including petitions for appeal. (The court of appeals probably does so as well, but I do not have that specific experience.)

In the Supreme Court, a petition for appeal must be filed within 90 days after entry of the judgment or order appealed. The deadline for a brief in opposition is 21 days after the petition for appeal is served (or 24 days if service is by mail). An appellant who files her petition for appeal 50 days after judgment, for example—an entirely realistic time frame for most lawyers in most cases—thus fixes the deadline for any briefs in opposition at 71 (or 74) days after the judgment. But an amicus supporting the appellant has another 19 (or 16) days after that deadline to file a brief in support of the petition, and the appellee is not entitled to respond. The appellant effectively gains an opportunity to file a reply brief in support of her petition (at least if we indulge the rash assumption of coordination between the appellant's and amicus' attorneys), without waiving the right to a writ panel argument, frustrating the spirit and intent but not the letter of Rule 5:19.

Beyond the writ stage, an appellant's opening brief and an amicus brief supporting the appellant must be filed within 40 days after the date of the certificate of appeal (the writ). An appellee's brief must be filed within 25 days after the appellant's opening brief was filed (without any additional allowance for service by mail). The appellant's advantage at that stage is smaller and the window is

narrower, but there the effect is at least to increase the page limit that applies to her reply brief.

My modest proposal is to revise Rules 5:30 and 5A:23 to require amicus briefs to be filed no later than seven days after the brief of the party supported or on the date on which the brief of the party supported is required to be filed, whichever is earlier. Other and better solutions may be available, but I put that one on the table.

Having disclosed the availability of this dodge, I would be remiss if I did not add that a solution of sorts is at least potentially available to appellees under the current rules. Amici other than the Commonwealth or the United States must move for leave to file their briefs, and of course they must first request the parties' consents. An appellee who finds himself on the short end of the described tactic may condition his consent on the appellant's and amicus' consents to a motion allowing him to file a reply to the amicus brief. (In one recent case of which I am aware, the amicus declined to consent to such a motion. The appellee then filed a response in opposition to the amicus' motion for leave to file its brief; but in the same document it moved alternatively for leave to file a response, limited to the number of pages in the amicus brief and addressing only the arguments made in the amicus brief, within 14 days after entry of an Order granting such leave. The court granted both motions.)

FRIEDMAN:

As noted above, I think the rules governing "timing" after a suspension of a final order could use some clarification. It can be very confusing—and confusion in this area can be fatal to an appeal. It would be very helpful if a universally approved form were developed that followed Rule 1:1's "modify, vacate or suspend" language and clearly established relevant deadlines. As things stand now, different courts use different forms and language—and this can cause real problems.

EMMERT:

I wish our appellate courts would use focus orders, to tell the advocates in advance what issues the court would like the lawyer to address in oral argument. Right now, an oral argument is like a pop quiz: the court can ask any question on any subject from the remotest corners of a complex record, and the advocate is charged to come up with the right answer on the spot. Is appellate decision making supposed to come down to which lawyer thinks better on his feet?

If the court really wants the *best* answer to its most critical questions, instead of the best *impromptu* answer, it should let the lawyers know in advance what interests the court. This wouldn't prohibit the court from asking any questions it wants to ask; oral arguments can take unexpected detours. But a better prepared advocate allows the court to make better informed decisions.