

CLE: Six Tips for the Record that All Appellate Lawyers Should Know

By Eder Castillo

The Eighth Circuit Bar Association presented a panel about the record on appeal on May 19. Adam Hansen of Apollo Law and Kyle Kroll of Winthrop & Weinstine moderated the CLE. Circuit Judges Ralph R. Erickson and David R. Stras, as well as Michael Gans, the Clerk of Court, provided six tips.

1. Use the addendum to highlight key parts of a transcript

Judge Stras pointed to his iPad, calling it his “bible.” For each case, the iPad contains copies of the record on appeal, the briefs, the addenda, and the Judge’s bench memorandum. The bench is “moving sharply toward digital,” said Judge Stras. Since the addendum is always available to the judges in electronic form, Judge Erickson and Judge Stras recommend including the key parts of a transcript in the addendum. Mr. Gans added that the Court is considering a rule that would require parties to file an electronic version of the appendix along with the paper version. This new rule would not go into effect without a 30-day public comment period, which is likely to occur in 2022.

2. Correct the record as soon as possible

“The final prep for argument week gets pretty hectic,” said Judge Erickson. The Court prefers timely corrections or additions, preferably by stipulation from both parties. Additions to the record may be required when an important trial exhibit that was presented to the district court was not uploaded to PACER. To supplement the record with an exhibit in your possession, order the transcripts that show the exhibit being received by the district court and submit the transcript and the exhibit to the Clerk’s Office. If trial counsel is anticipating an appeal, Judge Stras advised leaving trial exhibits with the district court. Judge Erickson recommended asking the district court to upload paper exhibits into PACER to avoid delay and maintain the exhibits’ integrity. If you are supplementing the record with a video exhibit, Mr. Gans suggests sending three copies of the video in a common format on thumb drives or CDs.

3. Don’t include briefing that was submitted to the district court in your appendix

The members of the panel agreed that including briefing from below is strongly discouraged, unless preservation of an argument is an issue on appeal. On

a separate note, the judges only expressed a slight preference for a joint appendix over separate appendices from each party.

4. Graphics help the judges visualize the facts of your case

“Some people may say, ‘[Including graphics] is condescending to the judges. The judges can figure it out.’ We could, but it’s going to take us a long time,” said Judge Stras. Graphics can be used effectively to establish a location, and charts can be used to illustrate financial aspects of your case. However, any drawings made for the purpose of the appeal, , will be ignored unless both parties have stipulated to them. Judge Stras advised that you should place your graphics in the facts section; just don’t make your brief “a picture book.”

5. The Court has a high threshold for sealing records and closing arguments to the public

Don’t redact information that judges need to see to decide your case. Judge Erickson recommended using initials or generic labels when redacting names. If you are requesting an oral argument that is closed to the public, Mr. Gans advises that you wait until you know the panel of judges that will hear your case. The panel will decide whether to close the courtroom. If the panel denies your motion for a closed argument, the Clerk’s Office may offer to move your argument until the end of the day when the courtroom tends to be empty.

6. When you cite a case, a hyperlink to the case is automatically created

The Court looks forward to a future when citations to the record result in automated hyperlinks. For now, Judges have to open and scroll through the appendix to find your record citations. Proper case citations, however, are automatically hyperlinked. Therefore, brushing up on your Bluebook skills will ensure that a judge can move efficiently between your argument and the cases you cite.

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