

**Musings from the Bench – Appellate Practice
Judge Richard Doyle, Iowa Court of Appeals**

**Polk County Bar Association Spring Seminar
April 28, 2017**

***Assimilation of EDMS Rules into the Iowa Rules of Appellate
Procedure***

All appeals are now filed through the electronic document management system (EDMS).

The rules governing EDMS, the Iowa Rules of Electronic Procedure (“Iowa R. Elec. P.”) became effective February 1, 2017. The rules were recently published by the Legislative Services Agency. *Iowa Court Rules* (Chapter 16, Vol. I, Fifth Edition 2017). These rules may also be found on the Iowa Judicial Branch website: www.iowacourts.gov (Home>Court Rules & Forms>Iowa Court Rules>Chapter 16).

Amendments assimilating EDMS rules into the Rules of Appellate Procedure became effective March 1, 2017. The current Iowa Rules of Appellate Procedure incorporating the amendments may be found in the recently published *Iowa Court Rules* (Chapter 6, Vol. I, Fifth Edition 2017). The amended rules may also be found on the Iowa Judicial Branch website: www.iowacourts.gov. (Home>Court Rules & Forms>Iowa Court Rules>Chapter 6).

***Highlights of the Amendments to the Rules of Appellate
Procedure***

Rule 6.100(1) mandates use of EDMS for appellate cases. Rule 6.100(2) applies the Iowa Rules of Electronic Procedure to appellate court cases.

Rule 6.110 clarifies a filing party’s responsibility in handling protected information and confidential materials. The amended rules require separate appendices for confidential information. See rules 6.110(2)(c) & 6.905(14).

Rule 6.201(2) bars a party from joining another party's petition on appeal in a termination-of-parental-rights appeal.

Emailing or faxing documents does not constitute electronic filing under Rule 6.701(2).

Rule 6.702(1) requires that a filer ensure all required service is accomplished pursuant to Iowa Rs. Elec. P. 16.315 & 16.319(1)(c).

Rule 6.803(2)(f) no longer permits condensed transcripts. (Yea!)

Rule 6.803(2)(g) requires electronic transcripts to be text searchable and comply with Iowa R. Elec. P. 16.402.

Rules 6.903(1) and 6.905(3) clarify that electronically filed appellate briefs and appendices should have white covers with consecutive page numbering in Arabic numbers beginning with the cover page (numbered page one) and including any blank pages. Page numbers must match the digital page numbers of the electronic document. Every appellate brief must be filed as a searchable .pdf document. Rule 6.903(1)(h) reduces the maximum printing cost per page from \$4.00 to \$1.00.

Rule 6.904(2)(a) removes the requirement to use L.Ed. cites.

Rule 6.904(2)(d)(2) requires that citations to treatises, textbooks, and encyclopedias include the edition, and the section or page as applicable.

In referencing the record, Rule 6.904(4)(b) requires final briefs to contain a reference to the original page and line numbers of the transcript.

Rule 6.904(5) allows hyperlinks.

Under Rule 6.905(3)(c), if an appendix consists of multiple volumes, the volumes may not be consecutively paginated and references in

briefs to the page numbers must include both the volume number and the page number, e.g., appendix v. II p. 256.

Under Rule 6.905(4), if the appendix consists of multiple volumes, the table of contents *in each volume* must disclose the contents and page numbers of *all* volumes.

Rule 6.905(7) allows, but does not require, relevant portions of an electronically filed transcript or evidentiary deposition to be included in the appendix.

Under Rule 6.905(14), confidential or protected information that is not or cannot be redacted must be included in a separate volume of the appendix, and only that volume must be certified as confidential.

The Brief

The United States Court of Appeals for the Seventh Circuit has an excellent *Practitioner's Handbook for Appeals* on its website: www.ca7.uscourts.gov (Home>Rules and Procedures>Handbook). Your time would be well spent reading the tips included in the handbook's sections on "Writing a Brief" and "Requirements and Suggestions for Typography in Briefs and Other Papers."

A concise introductory paragraph (omitting unnecessary facts) is helpful to the court and screening staff. Iowa R. App. P. 6.903(2)(e). What is the case about? What did the district court decide? Why was the district court wrong (or right)? What relief do you seek?

It is said that you only have one chance to make a first impression. The brief is your first impression to the appellate court. We are cognizant of the temporal constraints and economic pressures of today's law practice, but an obviously hurried, error-filled, sloppy cut-and-paste-job does not impress. Have the brief proofread by someone other than you.

Edit out the chaff. To be sure, it takes more time to be succinct, but be aware that a rambling 60-, 70-, or 80-page brief that bumps up against the 14,000-word maximum is not greeted with enthusiasm. In many cases, less is more. Assume you are writing for persons afflicted with attention deficit disorder.

Boilerplate is annoying and unnecessarily lengthens your brief.

While brevity is preferred, random mention of an issue, without elaboration or supportive authority, is not sufficient to raise the issue for our review. *See EnviroGas, L.P. v. Cedar Rapids/Linn Cty. Solid Waste Agency.*, 641 N.W.2d 776, 785 (Iowa 2002).

Don't be a Del Griffith.¹ Tell a story, and tell the story with interest—and have a point. Lay out the facts in a logical fashion. Give enough honest relevant facts to set the context for your asserted points of error.

Use the parties' names, or a descriptive term, such as “the paramour,” “the husband,” or “the decedent.” Iowa R. App. P. 6.904(1). Use of designations such as “appellant” or “appellee” can be confusing and is discouraged.

Every fact asserted in your brief must be supported by a reference to the record or appendix. Iowa R. App. P. 6.903(2)(e), (f) & (g)(3). Mere citation to the district court's findings of fact is not sufficient.

Do not reference matters not in the record or that occurred after the appeal was taken.

You may include charts, diagrams, photographs, or portions of relevant documents. Inclusion of a graphic can be worth a thousand words—and may save you from having to write that many.

Choose and narrow your issues carefully. Don't sling mud at the wall just to see what sticks. Trivial arguments can detract from your strong ones.

Tell us how/where each issue was raised and preserved in the record. Iowa R. App. P. 6.903(2)(g)(1). Merely stating error was preserved by

¹ Chatty shower curtain ring salesman played by John Candy in the 1987 movie *Planes, Trains and Automobiles* whose pointless anecdotes wearied fellow traveling companion, Neal Page, played by Steve Martin.

filing a notice of appeal will not do. “While this is a common statement in briefs, it is erroneous, for the notice of appeal has nothing to do with error preservation.” Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake Law Rev. 39, 48 (Fall 2006).

Generally, the court will not consider an issue not raised before or decided by the district court. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Set out the scope and standard of review for each issue you raise. Iowa R. App. P. 6.903(2)(g)(2).

Do not ignore or misrepresent bad facts. Address them head-on.

Support your argument with authority, for failure to do so may be deemed a waiver of that issue. Iowa R. App. P. 6.903(2)(g)(3). And be honest in citing case law. Although a West® headnote may say precisely what you wish, confirm that the case actually stands for the proposition asserted.

When citing to a case, give a pinpoint or jump cite (i.e., the specific page or pages of the case on which the cited material appears). Iowa R. App. P. 904(2)(a). Check your citations for accuracy. For unpublished opinions, you must include the electronic cite. E.g., No. ____-____, ____ WL ____, at * ____ (____ 20__). Iowa R. App. P. 6.904(2)(c). Lexis® cites are not helpful as the court has no access to that service. A North Western Reporter cite to a table of unpublished opinions is not particularly helpful either.

Hyperlinks and other electronic navigational aids may be included as an aid to the court. Iowa R. App. P. 6.904(5).

If your case involves some arcane area of the law, educate us. Set out relevant portions of applicable statutes and rules.

If you are asking us to decide an issue for which there is no Iowa authority, point us to other authority that supports your argument—

the law from other states, federal law, and legal treatises. Do not expect the court to do your legal research for you.

Emotional appeals and exaggeration have little effect on an appellate court (other than to induce a collective rolling of the eyes) and only undermines your credibility. The brief should be written to persuade the court, not to impress your client.

Do not raise discovery disputes in the briefs and at oral argument unless there is a discovery issue on appeal. If the fact that one side was not forthcoming during the pretrial phase did not become an issue during trial and is not an identified issue on appeal, there is no need for us to hear it.

Every brief should conclude with a statement telling us the relief you seek. Iowa R. App. P. 6.903(2)(h).

Do you want oral argument or not? Iowa R. App. P. 6.903(2)(i). Assignment for oral argument will delay disposition of your appeal. Appellees: Do not conditionally ask us to grant oral argument “only if we are thinking of reversing the district court.” Do not ask for oral argument unless you really want it and think it would be helpful. Iowa R. App. P. 6.908(2). If you do not request oral argument and we think it will be useful, we will order it anyway.

As former Justice Mark McCormick once wrote, “To be understood, the writing must be clear and organized. To be clear, it must be as simple as possible. To be simple, it must be focused. To be persuasive, it must be clear, simple and focused.” A tight 20-page brief is more likely to be reread than a muddled 50-page brief.

The Appendix

Only include material relevant to the appeal and those items required by the rules. The trial court record is available to us in the form of an electronic “Trial Court Binder.” Much like the old paper files, the trial court binder is not indexed or paginated and filings are arranged (mostly) in reverse chronological order. Transcripts of proceedings may or may not be included. You are not prevented from relying on parts of the record not included in the appendix. Iowa R. App. P. 6.905(10)(b). If you do refer to a document not included in the

appendix, please indicate the date it was filed in the district court. That will make our task of finding the document in the trial court binder much easier. Also, do not include matters outside the record. If it is not in the district court file before us, we cannot consider it.

Wholesale inclusion of voluminous medical and financial records will not endear you to the court or its staff. There is no need to duplicate documents in the appendix—one copy of a document is enough.

Do you really need to include all those Facebook pictures and postings, nastygrams, emails, text messages, and family photo albums?

In the table of contents, give a concise description of each exhibit included in the appendix. Iowa R. App. P. 6.905(4)(c).

Please place the contents of the appendix in the order prescribed by rules 6.905(2)(b) & 6.905(6).

List the *relevant* docket entries. Iowa R. App. P. 6.905(2)(b)(2). Just slapping the district clerk of court's multi-page computer-generated docket sheet in the appendix is not helpful and most readers just scroll right past it. Usually the copy is barely legible. It is full of gobbledygook. Many entries just reference "Other order," sometimes with no description of the subject matter of the order.

If a photograph or document cannot be reproduced legibly in the appendix, don't bother including it. Instead, refer us to the court record where we can view the presumably legible original exhibit. It is implicit in the rules that all exhibits included in the appendix must be legible. Poorly reproduced documents are of no help to the court. If the exhibit is a color photograph, a color-coded map, diagram, or document, copy or scan it in color if possible. The court would like to view the exhibits just as the fact-finder viewed them. Generally, black and white reproductions of color photographs are of poor quality.

If you include transcripts of testimony, the name of the witness *must* be placed at the top of each page where the witness's testimony appears. Iowa R. App. P. 6.905(7)(c). It is helpful, but not required, to indicate whether the testimony is direct, cross, re-direct, or re-

cross examination. When including portions of the transcript, you have to make the call whether you want to include more than just the passages cited in the brief. If the transcript portions set out in the appendix are too choppy (I call it the “every-other-page syndrome”), we note to you that the appendix will be set aside and the original deposition or trial transcript from the district court file will be read instead. Indicate transcript page omissions by a set of three asterisks. Iowa R. App. P. 6.905(7)(e).

Protected and Confidential Information

Before trial, familiarize yourself with Iowa Rule of Civil Procedure 1.422 and EDMS rules 16.601 through .609 to determine what information *must be* omitted or redacted and *what may* be omitted or redacted.

With some exceptions, Social security numbers; financial account numbers; personal identification numbers; and other unique identifiers *must* be omitted or redacted. Iowa R. Civ. P. 1.422(1). Other information: personal identifying numbers, such as driver’s license numbers; medical treatment and diagnosis; employment history; personal financial information; trade secrets; home address; dates of birth; names of minor children, *may* be omitted or redacted. Iowa R. Civ. P. 1.422(2).

On appeal, familiarize yourself with Iowa R. App. 6.110 (which incorporates Iowa R. Civ. P. 1.422). Omission or redaction is not required if the appendix is certified as confidential under rule 6.110(2). If the appendix contains confidential information as defined by statute or court rule, the appendix must be certified confidential. If not certified confidential, the appendix is a public record available for all to see. The certification can be affixed to the cover of the appendix. The best practice would be to redact protected and confidential information prior to an exhibit’s offer in the district court. Briefs are not confidential and shall not contain confidential information. Iowa R. App. P. 6.110(5).

Housekeeping Details

Avoid a “benchslap” by following the rules. So, before you start your appeal, read up on the rules of appellate procedure, particularly if you

haven't handled an appeal in a while. Many attorneys delegate appellate tasks to staff, particularly preparation of the appendix, so make sure your staff is familiar with the current rules. If in doubt, call an experienced appellate lawyer or the clerk of the supreme court.

Before filing, take a look at the brief or appendix yourself. Make sure all documents, diagrams and photographs are legible and have not been degraded in the scanning or copying process. Make sure page numbers and portions of documents have not been cut off. Remove any comment bubbles from your filing.

There is no need for you to include opposing counsel's name and address on the cover of your brief. Iowa R. App. P. 6.903(1)(b)(5).

Use underlining, italics, and bolding sparingly. Do not bold the entire text of your brief.

The Oral Argument

Despite myths to the contrary, oral arguments can change a judge's mind—and have. An effective argument can make a real difference in close cases.

Do not spend much of your precious argument time reciting mundane facts, or basic legal concepts, or talking about the standard of review unless there is a disagreement between the parties or the court asks about it. Assume the court has read the briefs and is familiar with the facts. If we have a specific question about the facts, we will ask. So, limit yourself to the facts central to your argument. Ten minutes is a very short time in which to make an argument.

Do not refer to matters outside the record, including events or matters that have occurred since the record closed.

Do not misrepresent the facts.

Although it is sometimes tempting to put on a show for the client who accompanied you to the courtroom, avoid the histrionics—it just distracts from the merits of your argument. The appellate court is not

persuaded with theatrics. As *Dragnet's* Sgt. Joe Friday might likely implore: “Just the facts and the law, ma’am.”

It has been said that “you have to stoop to cut.” Spending time running down the opposing party may weaken, not strengthen, your argument.

Be responsive to your opponent’s position. If your opponent says *Smith v. Jones* is controlling or persuasive and you don’t agree, tell us why.

View oral argument as a conversation with the court. Anticipate and welcome questions. It’s not law school. The court isn’t trying to play a game of “Gotcha!” by asking trick questions—although we may be trolling for an admission.

Answer questions directly and immediately. Don’t say, “I’ll get to that later”— you won’t. And if you don’t know the answer, just admit it instead of going on a tangent answering a different question you do know the answer to.

Take a breath occasionally; it will give the more reserved judge an opportunity to ask a question without interrupting you.

If you finish your argument before time has expired, feel free to sit down, but please don’t immediately bolt for the counsel table. A pause at the podium affords the judges an opportunity to pursue unasked questions.

Respect the red light. Ask to briefly finish your thought. If allowed to continue (some presiding judges are more lenient than others), do not abuse the privilege by droning on and on with a rehash of what you have already said. Finish your thought with a sentence, not the rest of your argument on that issue.

Postscript

“The principal role of the court of appeals is to dispose justly of a high volume of cases.” Iowa Ct. Rule 21.11. And a high volume it is. The court of appeals filed an average of more than 1150 opinions each year during the five-year period from 2011-2015. The court filed a record 1390 opinions in 2016—with each active judge authoring about 142 opinions for the year. The record for a single filing was broken when the court filed 112 opinions on August 17, 2016. The supreme court transferred 1439 appeals to the court of appeals in 2016. Some 405 appeals were transferred to us in the first three months of 2017.²

Rule compliance lightens the court’s burden and promotes judicial efficiency because compliance begets uniformity, and uniformity eases the court’s navigation through the thousands of briefs and appendices it reviews each year. With your help, the Iowa Court of Appeals will continue to decide appeals in a timely manner.

² The current pace brings to mind that hilarious scene in the *I Love Lucy* sitcom episode where Lucy Ricardo and Ethel Mertz go to work in a candy factory and try to keep up with chocolates coming down a speeding conveyor belt. *I Love Lucy* (TV Series), *Job Switching*, Season 2, episode 1, first aired on September 15, 1952 (Desilu Productions 1952). Haven’t seen *I Love Lucy* reruns? A more recent TV series may come to mind—*M*A*S*H*; which originally aired from 1972 to 1983. Think of the court as a *MASH* (Mobile Army Surgical Hospital) unit triaging cases. If neither image comes to your mind, I give up.