



Appellate Practice in the Information Age

By Cam Ferenbach and Robert Hernquist

The rapid progression of technology in recent years has had a profound impact on the legal profession. Researching the facts of a case and the applicable law is now predominately performed on the Internet by utilizing services such as Lexis and Westlaw, Secretary of State websites, and countless other resources. Similarly, correspondence with clients and opposing counsel is often transmitted via e-mail, rather than the traditional letter or phone call. This technology has also impacted attorneys' interactions with the justice system itself—from the filing of a complaint, to discovery and motion practice, and even through trial—attorneys often utilize tools such as e-filing, document storage databases such as Summation, and audio visual tools. These changes are all considered to be improvements; they make us more efficient, and allow us to maximize our resources and present the best case possible on behalf of our clients. While both the federal and many state trial courts have implemented these tools, the Nevada Supreme Court and the Ninth Circuit still lag somewhat behind, and have not yet adopted e-file systems. Nevertheless, the web sites for both of these appellate courts offer other valuable resources. All indications suggest electronic filing of appeals and supporting briefs will soon be commonplace in both our state and federal appellate systems.

Audio files of appellate arguments

On September 13, 2007, the Nevada Supreme Court joined a growing trend amongst courts across the country when it provided the oral arguments in *Halverson v. Nevada Commission on Judicial Discipline*, 123 Nev. Adv. Op. No. 48 (Nov. 1, 2007) on its website. (<http://www.nvsupremecourt.us/>). The day after that case was argued, audio files of the arguments were available online. News Release, Supreme Court of Nevada, Administrative Office of the Courts (Sept. 12, 2007). Since then, the Court has continued this practice by posting audio files for all cases argued within the previous 30 days. The files may be listened to on a computer, or downloaded to an MP3 player.

In addition to the audio files provided by the Court, each of these recent decisions also has a “Details” link, which presents additional information such as the names

of those appearing before the court, the length of the argument, the start times, and the name of the speakers. The website includes instructions for listening to the audio files, downloading the files, and converting the files to MP3's. The Court intends to continue and improve upon this technology—Chief Justice Maupin recently stated the Court hopes to eventually offer live web casts of oral arguments with both audio and video. Courts in twenty-one states currently offer live web casts of proceedings, including Arizona, Georgia, Indiana, Maryland, New Hampshire, North Dakota and West Virginia.

The website for the Ninth Circuit Court of Appeals also offers audio files of oral arguments. (<http://www.ca9.uscourts.gov/>). The Ninth Circuit files may be searched by case number or the date of oral argument, and the site currently offers case arguments dating back to 2004.

Audio files of prior arguments are a wonderful tool for appellate litigators for a number of reasons. Hearing previous arguments and the questioning techniques used by the same jurists one will be appearing before are obvious aids in the preparation of one's own case. Having the audio available after the argument is also an asset—it helps us identify where we can improve in the future, or if particularly illustrative, the file could be shared with clients, or even posted to one's online biography as a marketing tool.

Additional resources available on appellate websites

The Ninth Circuit and Nevada Supreme Court websites offer a number of other tools and information. Most practitioners are aware of the advance opinions available on these pages, but many of the additional features are overlooked and underutilized. The Ninth Circuit provides local rules, the status of pending en banc cases, information about its pro bono program, and a “how to page” which clarifies and integrates many of the local rules and explains things such as how to file a petition for review or perfect an appeal. On an “FAQ” page you will find quick answers to many of those technical questions we all need to consult, regardless of how long we have been practicing, such as: (1) the number of cop-

Information continued on page 32

Information *continued from page 30*

ies which must be provided to the court, (2) filing fees, (3) page limits, and (4) what color you must use for the cover of the third brief in your cross appeal (the answer is yellow). The Nevada Supreme Court's website also provides numerous resources, such as an oral argument calendar, sample forms, court rules, a directory of Nevada courts and judges, and a news section.

The future . . .

Local practitioners should become familiar with these websites now, because additional features of more significant impact will likely be adopted soon. Most lawyers are familiar with the CM/ECF and PACER systems, which are used for the filing and review of documents in the federal district courts. Nationwide, federal and state appellate courts are adopting similar systems. The American Bar Association has lobbied for such changes, and has included current trends in technology in its *ABA Standards Relating to Appellate Courts*, Standard Nos. 3.90, 3.91, 3.92 and 3.93. Appellate courts across the country have implemented technology used to improve the filing and briefing of appeals, submission of the record, and even the argument of the case. Electronic filing, e-briefs and possibly even remote arguments are the wave of the future.

E-filing poses many benefits for courts and practitioners. It eliminates many of the costs associated with copying and postage, reduces storage, and improves efficiency in locating and searching the documents. These benefits are exponentially increased in appellate cases, where the filed documents and record often consist of hundreds of thousands of pages.

This fall, the Nevada Supreme Court requested proposals from software vendors for the implementation of a new Case Management System (CMS). Supreme Court of Nevada Request for Information No. 10-1 (Aug. 10, 2007). The background information provided in the request reveals the

Court has already begun the first phase of an e-filing system, which allows the user to enter the required data and upload documents online. The requirements for the new CMS include the ability to integrate documents filed electronically. Although the Nevada Supreme Court does not currently allow electronic filing of appeals or briefs, it is clear from their request that this will soon change. *Id.*; NRAP 25, 32. The Court's proposed CMS would also provide a service similar to PACER and allow attorneys and the public to access documents filed with the Court.

At this time, the Ninth Circuit does not allow e-filing either. Although the Federal Rules of Appellate Procedure permit electronic filing of papers pursuant to local rule, the Ninth Circuit still requires hard copies. Fed. R. App. P. 25(a)(2)(D); 9th Cir. R. 31-1. But this will likely change. For example, the local rules do allow electronic service of documents with the other party's consent. 9th Cir. R. 25-3. The Ninth Circuit's website now invites registration for the CM/ECF system.


Once e-filing becomes universal, the next step could be interactive electronic briefs, which have already been allowed by some courts. In fact, North Dakota requires briefs to be submitted on a diskette. N.D. R. App. P. 31(b). Electronic briefs can include hyperlinks, allowing the reader to simply click her mouse in order to access the cited authority or record, as well as video of testimony or exhibits. This eliminates the need of pulling cases from reporters or online services or fumbling through files or boxes to locate documents contained in the record.

This is an exciting time for the practice of law. As technology rapidly becomes more and more complex, our profession will continue to change to accommodate or take advantage of it. For some, this change will be too rapid. Others will demand efforts and expenditures to place us on the cutting edge. Nevada courts have wisely formed bench-bar committees which address these issues. We can look forward to the accelerated impact of technology on our profession. Hopefully that impact will be a positive one. **G**

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