



Kansas Appellate Advocacy:

An inside view of common-sense strategy

By Patrick Hughes

When I meet new people at cocktail parties and the like, eventually the question comes up of what it is that I do. If I'm in a particularly ornery mood I say: "A little of this and a little of that." I explain: "Violent crime, mostly. Murder, as much as anything, although I used to do some aggravated robbery or burglary occasionally ... a battery now and again. I've done a couple of convenience store heists." As they look frantically for some other small group on which to intrude, I add, "I was involved in midwifery for awhile, after a few sour real estate deals and experiences with leasing and the oil business that didn't go too well. With one of the best gigs I got I ended up in the middle of a paternity suit. You see, the price has been high, several divorces, a few work-related injuries and of course my fair share of tax problems."

If no security guard can be readily found, the conversation continues. "Sounds like you keep busy."

"Well, filings are way up." After a quizzical look, I add "I'm a research attorney in the Kansas appellate courts. I work on all kinds of cases."¹

Appellate arguments, like cocktail party conversation, can be disconcerting to those not quite up to speed on what's going on. Many attorneys enter the Kansas appellate courts with no more than passing thought to appellate strategy and are surprised by the results. The fundamental rule of appellate strategy is much like the fundamental rule of cocktail parties: Know who you are talking to. Contrary to popular belief, knowing whom you are addressing in appellate practice is not principally a matter of knowing the predilections and idiosyncrasies of each appellate judge or justice, but comes from an understanding of the appellate system.

Who they are and how they're built²

The two principal³ appellate state courts in Kansas, the Kansas Court of Appeals and the Kansas Supreme Court, have similar functions, but they go about them in quite different manners. Indeed, from the viewpoint of effective advocacy, some of the differences may be more critical than the similarities.

The majority of appeals are handled by the court of appeals.⁴ The court of appeals consists of 10 judges,⁵ one of whom is the chief judge with power over court administration.⁶ Each judge has an executive assistant and a research attorney in his or her chambers.⁷ The court as a whole is also assisted by a central staff of research attorneys whose workload may include cases assigned to any judge. These central research staff attorneys also have some responsibilities to the court as a whole, including determining whether the court of appeals has jurisdiction over each case it is to hear, and a motions attorney has responsibility for evaluating various motions filed by the parties in the course of an

appeal. In the court of appeals the docket is managed in-house through the chief judge's office.⁸ The number of cases handled by the court of appeals is truly staggering. In 1995 the court received 2,185 case filings.⁹

Like the court of appeals judges, each of the seven Kansas Supreme Court justices has an executive-secretarial assistant and a research attorney in his or her chambers.¹⁰ The supreme court central research staff consists of only two attorneys.¹¹ Their responsibility is to evaluate and make recommendations regarding petitions for review of court of appeals decisions along with other tasks in cases of original jurisdiction. The supreme court docket is managed by the office of clerk of the appellate courts. During 1995 the supreme court had 263 cases filed.¹²

Generally, in the court of appeals a case may be handled in one of three ways: as a summary disposition case; as a summary calendar case; or as an oral argument case. Before being placed on the docket the cases to be decided by the court of appeals are screened and graded by estimated level of difficulty. In the screening process the briefs for the cases are distributed among the judges, who read the briefs they are assigned and determine both the complexity of the case and if oral argument would be helpful.

Summary disposition cases are those which essentially raise no justiciable issue. These include single-issue cases directly controlled by a recently decided case,¹³ or other cases where the lack of merit is equally obvious.¹⁴ In summary disposition cases the judges have the benefit of the parties' briefs and a short memo or proposed opinion from a research attorney briefly explaining the required disposition. Summary disposition cases are decided on special dockets, and often result in very short "rule opinions"¹⁵ that do little more than cite the controlling authority.

1. The author worked as a research attorney for the Hon. Edward Larson from August 1994 to July 1996. Justice Larson was appointed to the Supreme Court of Kansas in 1995. Prior to his appointment he served as a judge on the Kansas Court of Appeals.

2. The dry stuff.

3. In certain situations the district courts may act in an appellate capacity. See, e.g., K.S.A. 60-2103a (appeals from district magistrate judges); K.S.A. 61-2709(a) (appeals under small claims procedure act); K.S.A. 22-3609 (appeals from municipal courts); K.S.A. 22-3609a (criminal appeals from district magistrate judges).

4. Direct appeal to the supreme court is permitted in any case in which a Kansas or United States statute has been declared unconstitutional and in any criminal cases involving off-grid crimes, class A felonies or maximum sentences of life imprisonment. K.S.A. 60-2101(b); K.S.A. 22-3601(b). Appeals by the state in criminal cases under K.S.A. 22-3602(b) are also taken directly to the supreme court as are questions certified by federal courts or court of other states under K.S.A. 60-3201 *et seq.* The supreme court also has discretion to handle appeals in cases which the court of appeals has decided are outside its jurisdiction or have subject matter or legal issues of such public importance that the supreme court should take them, K.S.A. 20-3016(a) and (b); Kansas Supreme Court Rule 8.01 (1995 Kan. Ct. R. Annot. 46-47); cases the court of appeals requests to be transferred, and the supreme court accepts, which require transfer for the expeditious administration of justice because of the court of appeals caseload, K.S.A. 20-3016(a)(4); K.S.A. 20-3016(b); cases the parties themselves timely request to be transferred to the supreme court because of their importance, the caseload of the court of appeals or because the court of appeals lacks jurisdiction, K.S.A. 20-3017; Kansas Supreme Court Rule 8.02 (1995 Kan. Ct. R. Annot. 47); cases the court of appeals has already decided and that the supreme court has agreed to review on request of an aggrieved party, K.S.A. 20-3018(b); Kansas Supreme Court Rule 8.03 (1995 Kan. Ct. R. Annot. 48-52); decided court of appeals cases

reviewable as a matter of right, see K.S.A. 60-2101(b); K.S.A. 22-3602(d) (whenever a constitutional question arises for the first time as a result of the court of appeals decision); and cases in other assorted areas, see, e.g., K.S.A. 25-1450 (election contests); K.S.A. 26-504 (eminent domain); K.S.A. 55-1410 (pricing of natural gas); K.S.A. 65-4211(b) (mental health technicians licensure act); K.S.A. 66-1,164 (electric generating facilities); K.S.A. 1995 Supp. 74-8813(v) (parimutuel racing); K.S.A. 74-8815(n) (parimutuel racing). The court of appeals has exclusive jurisdiction over orders of the Kansas Corporation Commission arising from public utility rate hearings. K.S.A. 1995 Supp. 66-118a(b).

5. K.S.A. 20-3002. With the advent of the senior judges program the court of appeals 10 full-time judges are aided by part-time retired district court judges. These judges are treated as regular court of appeals judges for most internal purposes.

6. Kansas Supreme Court Rule 1.02 (1995 Kan. Ct. R. Annot. 2).

7. See K.S.A. 20-3014. The chief judge has additional staff.

8. See Kansas Supreme Court Rule 1.02 (1995 Kan. Ct. R. Annot. 2).

9. Figures are from the December 1995 caseload activity summary prepared by the clerk of the appellate courts.

10. See 1995 Kan. Ct. R. Annot. 59. The chief justice is also aided by an additional executive assistant/counsel. *Id.*

11. Reportedly, the Kansas Supreme Court has the smallest support staff of any state supreme court in the nation.

12. The supreme court also handles a large number of petitions for review, disciplinary cases, certified questions and administrative matters. The number of cases filed alone does not reflect the full stress of the court's workload.

13. See Kansas Supreme Court Rule 7.041 (1995 Kan. Ct. R. Annot. 41-42).

14. See Kansas Supreme Court Rule 7.042 (1995 Kan. Ct. R. Annot. 42).

15. Kansas Supreme Court Rules 7.041 and 7.042 (1995 Kan. Ct. R. Annot. 41-42).

