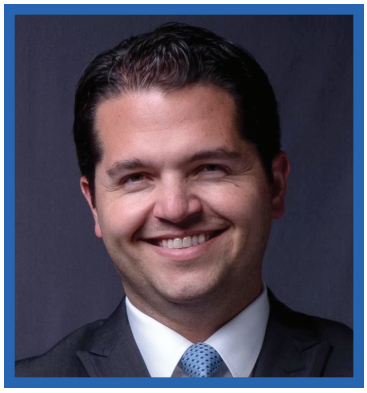
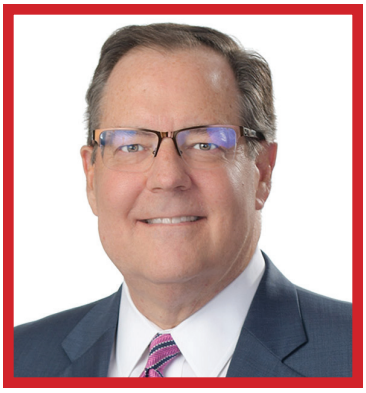
APPEALING to WIN

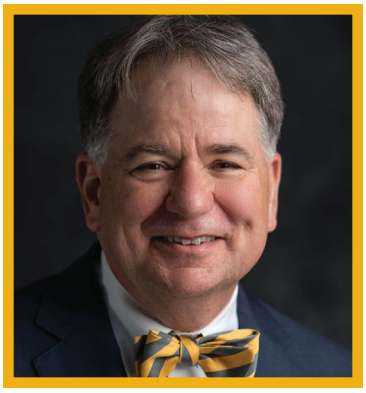
A Q&A with Appellate Advocates



Zak Ritchie practices in state and federal appellate courts. ZR



Marc Williams practices in state and federal appellate courts. MW



Tom Hurney practices in state and federal appellate courts. TH

Interview by J. Zak Ritchie

ZR **Let's jump right in. Each of you has significant trial experience under your belt, but the focus of our conversation today will be appeals. The topic of effective appellate advocacy has grown in importance since the establishment of the intermediate appellate court. As seasoned appellate lawyers yourselves, what do you think are the most important attributes of an effective appellate advocate?**

MW The skill set for appellate work is similar in some ways to trial work, but at the same time very different. Obviously, the best thing for an appellate advocate is to be a strong writer. Written advocacy is more than half of the battle in any appeal, and the ability to write persuasively, while making the brief readable, is key. The other component is oral advocacy, which means the ability to engage in a persuasive discussion with the court about the issues on appeal. It's not a jury argument. You have to be comfortable answering direct and often difficult questions from the court.

TH I agree with Marc that strong, persuasive writing is key, partially because not all appeals are orally argued. As someone who has often handled appeals in cases I litigated or tried below, the common thread between trial and appellate work is not only advocating your case but also anticipating (and disabling) the other side's response. Just as a solid direct examination can disable cross examination, a solid opening brief can disable the response. This is perhaps more at play in oral argument, where the ability to address arguments made by your opponent or questions from a judge can make the difference in persuading the court to your position.

ZR **Let me follow up on that. Without question, effective legal writing must be persuasive. Using plain language is advocated by experts like Bryan Garner and exemplified by the opinions of Chief Justice Roberts and Justice Kagan, to name a few. Why do you think using plain language is so important, and are you seeing more of that in West Virginia? What's your best advice on communicating complicated legal issues in a clear way?**

MW I'm a huge fan of Bryan Garner and Ross Guberman, both of whom stress the readability of a brief. Lawyers tend to come out of law school thinking that complex, stilted prose is "lawyerly." I stress to young lawyers that we have to consider the judge or law clerk who is reading this brief. I've read some of Neal Katyal's briefs in the U.S. Supreme Court, and they are so readable and unlawyerly. We should strive to write like that.

TH I deplore legalese — "Comes now the appellant by and through counsel and blah blah blah … sui generis …" Someone has to read what we write. And that someone — whether a judge or law clerk — has other things to read and do. We must capture them with our writing; and if we don't, we will likely fail. We can all improve our writing. One way is to read the writing of others and work at it. Read briefs and opinions — the Supreme Court of Appeals' website gives you the ability to read most of the briefs in argued cases. Two books I recommend are Garner's *Legal Writing in Plain English and Legal Writing: Getting It Right* and *Getting It Written* by Mary Ray and Jill Ramsfield. A key technique is to read every sentence and ask if it is needed. If not, take it out.

ZR **Those are great points. What role should judges play in promoting effective legal writing? I think we've seen more readable and accessible opinions in recent years.**

MW I've heard from justices over the years about their frustration in reading briefs that don't comply with the Rules of Appellate Procedure, or which are poorly edited or poorly written. I think one of the reasons for that is that West Virginia, unlike almost every other state in the union, doesn't have an established appellate bar. Most of the regular appellate lawyers in West Virginia, like Tom and me, handle appeals after trying the case. That is not the way it works in most states or the federal system. Today I do significantly more appellate work than trial work, largely because cases aren't being tried in the same way as in the past. So the courtroom work is almost entirely appellate work in my practice. I think that encouraging the development of an established appellate practice would enhance the level of advocacy before the Supreme Court of Appeals.

Overly aggressive advocacy in a brief, or in oral argument, can be detrimental to your client's position. In my briefs I try to avoid extreme language, accusatory tone, underlining and bolding in the text. Those tactics don't really help your case.

— MARC WILLIAMS

TH In one sense, it is hard for judges, who must remain neutral, to encourage good writing from the bench, whether trial or appellate. I don't particularly favor public flogging for poor writing. Writing readable opinions — one of the best was the late Judge M. Blane Michael — is a way of leading by example. While I am going to regret saying this, page and word limits force counsel to be concise and get to the point. Recently, judges, particularly appellate judges, are actively advocating effective writing. Just follow #appellatetwitter for a robust discussion of good vs. bad legal writing. I think the continued development of an appellate bar in West Virginia is a good thing — the State Bar's Appellate Committee is getting quite active — particularly for the opportunity it provides for younger lawyers.

ZR **Scrupulous accuracy is obviously important at all stages of litigation, but sometimes advocates stretch the record on appeal, even inadvertently, which can really damage credibility. What would you tell practitioners about maintaining accuracy at the appellate level?**

MW In oral argument, credibility is key. The ability to concede a point, or acknowledge a weakness in your position, is often the key to success. The same applies to accurately referencing the record and knowing the record completely. Some of the best oral advocates I've seen, like Elbert Lin of Hunton in Richmond, anticipate the points from the record that will come up in oral argument and have those citations at their fingertips for use in oral argument. Few things are as powerful as responding to a question from the bench, or refuting a position of your opponent, with an instantaneous recall of the page in the appendix which establishes the position that you are arguing.

TH Credibility starts with your briefing, where you must accurately tie things to the record with pinpoint citation (which the rules require and the judges and clerks love). Don't overcite (or most definitely don't mis-cite) authority. Directly distinguish the cases cited against you. At oral argument, I agree with Marc that knowing the key parts of the record — including record citation — is persuasive and enhances your credibility. You also need to know and be able to discuss the cases that you rely on and that are raised against you, particularly those written by judges on the bench.

ZR **What role does tone (in written and oral advocacy) play in the effort to persuade?**

MW Every advocate has to learn "their voice" — in other words, what tone works best for you. I tend to try to maintain a relaxed, conversational tone with the court in oral argument. These are five brilliant jurists, and they do a very good job of zeroing in on the weaknesses in each argument. Overly aggressive advocacy in a brief, or in oral argument, can be detrimental to your client's position. But in my briefs I try to avoid extreme language, accusatory tone, underlining and bolding in the text. Those tactics don't really help your case.

TH In both writing and at oral argument, I ascribe to John Prine's admonition in *Dear Abby* (1973) that "you are what you are and you ain't what you ain't." I've learned over the years that hyperbole doesn't work — facts and direct argument do. Lots of adjectives and extreme language suggest to me that my opponent doesn't have a great argument. I tend to write (and probably speak) informally; I use contractions and avoid anything Latin like the plague. Of late, I've started to use conjunctions like "but"

and "and" to start sentences which would have sent the Sisters of the Holy Cross into the stratosphere. The few times I've said something sharp in a brief, I've regretted it. A good rule (equally applicable to email) is that you put a brief down for a day and then look at it again with fresh eyes.

ZR **Many lawyers express trepidation about handling appeals. Although the writing process may seem daunting, I think the prospect of oral argument can sometimes be intimidating. What would you tell a lawyer who hasn't handled many appeals about oral argument and how to prepare? What are your top oral argument tips?**

MW First of all, I love oral argument. It is the best part of my job, without question. But as for tips, I would highly recommend that you moot the argument as many times as you need to get comfortable with the questions that are likely to come up. Ask lawyer friends to help. Most lawyers are incredibly generous with their time; and with the advent of Zoom, you can have a moot without leaving your desk. Also, spend time thinking of the types of questions that will be asked. You can find some assistance in this by watching oral arguments on the Supreme Court of Appeals' website. They are now saved, so you can get a feel for the way the Court might challenge your position by watching other cases. It should also make you more comfortable with the process. Our justices are incredibly patient and polite in oral argument. They will not try to embarrass you. My last recommendation is to prepare a full argument as if there was going to be no questions. That way if the bench is cold, you won't be surprised.

TH Marc's observations are terrific. You have to practice. Plan and be prepared to give a full argument in the event you don't get a lot of questions (a "cold" bench). But be ready for a hot bench by thinking of all the hard questions you could be asked and having answers ready and making sure you know the three or four key points you must make if your time is limited by grilling. Moot with colleagues from your firm or others or your pets (who are often good listeners). The Supreme Court of Appeals' YouTube channel is a great way to watch other advocates and see what works (and what doesn't). When we get back to live arguments with audience allowed, I recommend getting to the Court in time for the first argument and listening as you scan your notes. Last tip — bring to the podium only one or two pages of notes with key quotes, cases and record cites.

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ZR **And on the other side of the coin, what should be avoided at oral argument?**

MW Don't be afraid to concede a point where it is clear that your position is contrary to the law or the facts. Also, never talk over a justice. If they are talking, you should stop talking. And don't read your argument. Practice to the point that you're comfortable working from notes.

TH The justices have read the briefs and know the issues, so don't give a recital of the procedural and factual posture of the case. Get to the point of your argument early — if the bench is hot, this may be your only chance. Answer the question asked and if you don't know, say so. Don't ignore a question or answer every question with your three talking points. Further to Marc's point, not conceding where your position is contrary to law just makes it worse and accents the problem. A technique I learned from a colleague in Seattle is to acknowledge when a judge

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(or opponent) makes a fair point and then explain why it doesn't apply to your case.

ZR **Talk a little about your strategy for fielding questions from a multimember court, including how to approach both softball and difficult questions.**

MW I generally try to respond to the justices by name, but that can be difficult sometimes if you're nervous. Or like the time I had two recusals, so Judge Reeder and Judge Reger were appointed. I was afraid I would mix them up, so I avoided calling either by name. But if you can tie a response to a question to a point made by another justice, that can be very effective. For softball questions, the biggest hurdle is recognizing them. The tendency is to assume every question is hard, so you have to listen closely to see if the question is really something intended to help you. On tough questions, acknowledging the difficulty is important; but hopefully it will be a question that you practiced on how to answer.

TH As one who once watched a softball question go by for a strike, I appreciate Marc's comment about recognizing when a justice is throwing you a lifeline. Focus on the justice asking the questions and approach every question the same way — answer the justice directly. Tying a response to one question to another is an effective technique, and you can sometimes use the response to a later question to clarify an earlier answer. Overlapping or simultaneous questions are the hardest, and you have to gracefully answer one then the other. If you are comfortable addressing the justices by name do so, but it can be perilous.

ZR **What do you like best about how today's Supreme Court of Appeals approaches oral argument?**

MW I like the time designations for when your case will be called. That is a COVID-related development and I hope that they make it a permanent change. I wish sometimes that there were more questions from this Court. Each bench is different as justices change, but I definitely favor a hot bench. The current bench is not what I would call really active at oral argument.

TH One effect of remote arguments is a more orderly process for questioning by the justices and a polite hesitancy towards interrupting advocates. I also think the current Court wants to give advocates some chance to present their arguments. I am fine with time designation, but I never minded sitting through other arguments before mine; in fact, I recommend it. As to the bench, my favorite argument was when I was interrupted while saying "good morning" and asked questions for almost the full time I argued. Time flew.

ZR **There's no question that one of the best parts of practicing in the Supreme Court of Appeals is interacting with the Clerk, Eydie Gaiser, and her team. Talk about the Clerk's office as a resource for both new and experienced appellate advocates.**

MW Eydie and her staff are just the best. Just today, we had a question about a weird issue on appeal and the rules were subject to a couple of different interpretations. Rather than guessing on what to do, we called Eydie and in five minutes she cleared it up for us. The Clerk's office is a wonderful resource for all who handle appeals before the Court. I can't say enough nice things about how they have helped me over the years.

TH When I started practicing, if you could not get your brief filed by 5 p.m., the Clerk would leave the time stamp in the law library, so you could file until

8 p.m. The dedication to providing service to the parties appearing before the Court continues with Eydie Gaiser and her terrific staff. I've found they are responsive and helpful. Clearing up a procedural issue with a call to the Clerk's office saves everyone time and trouble. This will be invaluable as we move closer to electronic filing in the Court.

ZR **The new intermediate appellate court is coming. Although its jurisdiction is more limited than the Supreme Court of Appeals, how should lawyers unfamiliar with appellate practice approach this new layer of review? What is your hope for the new court?**

MW I hope that the new intermediate court will give more lawyers an opportunity to participate in oral argument. I think that there are going to be chances for *pro bono* appellate representation at the intermediate court, and that will result in younger lawyers getting experience handling appeals and oral argument.

TH Lawyers unfamiliar with the new appellate court should do what I am going to do: read the enabling statute and the rules to know what appeals go there and what don't, when everything is due and how many pages you get. A variety of administrative appeals are being shifted to the intermediate court, which will hopefully provide opportunity for younger lawyers to appear and argue. Chief Justice Jenkins has discussed his hope that the court will use remote technology to provide oral arguments at less expense to litigants which is a laudable goal. It also reflects the reality that remote technology will be part of the process, both at the trial and appellate level, from here on.

ZR **Let's conclude our conversation with a fun question. What is the most unexpected or potentially embarrassing thing that has happened to you or a colleague at an oral argument?**

MW Back in 1990, I argued my first appeal before the Supreme Court of Appeals, *Morton v. Chesapeake and Ohio Rwy Co.* On the way to the podium to argue, I tripped and fell down, spilling all of my papers and knocking over a chair. I also twisted my ankle in the process. Needless to say, that was an eventful first appearance. Thank goodness Chief Justice Brotherton was very patient with me that day.

TH I was retained to defend on appeal a summary judgment in a Medical Professional Liability action where my client, who was deceased, was alleged to have said some inflammatory things. The arguments were at WVU College of Law in front of a packed house of law students. The bench was hot, and I spent just about all of my time answering questions. *The West Virginia Record* had a reporter there whose article about the argument was entitled "Justices dispense some teaching during arguments at WVU." While the article was not entirely factually accurate, it got the general drift. Summary judgment was reversed in *Estate of Fout-Iser v. Hahn*, 220 W.Va. 673, 649 S.E.2d 246 (2007) (although Justice Davis dissented). As is the custom in West Virginia, after the argument, the justices and my opponent were most gracious. WVL

You can find assistance by watching oral arguments on the Supreme Court of Appeals' website. You can get a feel for the way the Court might challenge your position by watching other cases. Our justices are incredibly patient and polite in oral argument. They will not try to embarrass you.

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J. Zak Ritchie is a litigator at Hissam Forman Donovan Ritchie PLLC in Charleston and former Fourth Circuit law clerk.

This Q&A was modified for clarity and brevity, goals to which all advocates should strive.