***Committee for Public Counsel Services***

***Children and Family Law Division***

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**MEMORANDUM**

To: CAFL Appellate Panel Members

cc: CAFL Trial Panel Members

CAFL Administrative Attorneys

Fr: Andrew Cohen, Director of Appellate Panel, CPCS/CAFL Division

 Jaime Prince, Staff Attorney, CAFL

Julie Meads, Staff Attorney, CAFL

Re: Moot Courts

 Recent Rule 1:28 Decisions

 Post-trial Information and Oral Argument

Date: August 29, 2012

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**Moot Courts**

If you want to moot-court a case scheduled for argument in September or October, please let us know soon. In some circumstances we can travel to your office (or somewhere in between) for the moot. If you moot with a CAFL administrative staff member, you get 2 CLE credits.

**Recent Rule 1:28 Decisions**

This memo catches us up with Rule 1:28 decisions through last November. Next month’s memo will catch us up through June 2012.

Remember, if you cite to a Rule 1:28 decision in your brief or motion, you must:

(a) attach a copy of the decision as an addendum; and

(b) cite the page of the Appeals Court reporter that lists the decision and a notation that the decision was issued pursuant to Rule 1:28.  In your brief or motion, you do not need to cite the docket number, month or day. For example: Care and Protection of Priscilla, 79 Mass. App. Ct. 1101 (2011) (Mass. App. Ct. Rule 1:28). Please note that we’re using the docket numbers and dates of issuance below just to make it easier for you to find the decisions online.

Each of the Rule 1:28 decisions discussed below is available on the web at:

<http://www.massreports.com/UnpublishedDecisions/>. Just type “adoption” or “protection” into the line for “Parties.”

1. Adoption of Vladimir, 79 Mass. App. Ct. 1116, 2010-P-1780 (May 10, 2011). In Vladimir, the trial court issued an order for post-adoption visitation between father and child. DCF and the child appealed, arguing that there was no bond and no other evidence that visits served the child’s best interests. The panel agreed and reversed the order.

Vladimir was two at trial. The father was incarcerated before Vladimir’s birth and was serving a 20-year sentence. There were several visits at the prison. Although the trial judge acknowledged that there was no bond between father and child, she nevertheless ordered post-termination and post-adoption visitation because: (1) allowing the child to develop a relationship with his biological father would “assist him in negotiating the path between his adoptive and biological families”; (2) visitation would “enable the child to identify with his father’s racial and cultural heritage”; and (3) visits would allow the child “to understand his father’s criminal past… thus helping the child to develop a more pro-social manner than his father did.” The trial judge also placed much weight on the department’s failure to provide visits sooner.

The panel found these reasons to be either “overly speculative or inapplicable to the circumstances of the case.” The child had never lived with the father, so there was no “path” between families to negotiate, and there was no evidence to support a finding that the child had emotional needs regarding racial or cultural heritage or his father’s criminal past.

The take-away? There has to be *some* evidence that post-termination and post-adoption visitation is in the child’s best interests; good intentions (even those backed by clinical studies) alone don’t suffice. Counsel must *show* that racial/cultural identity is important for the child or that the child has identity or self-esteem issues that will be aided by contact.

2. Adoption of Bethany, 79 Mass. App. Ct. 1117, 2010-P-1755 (May 11, 2011). This case is also interesting only for its post-termination visitation order. The judge ordered four visits per year between the children and parents, but specified that “there shall be no legal obligation on the part of the legal guardians or adoptive parents to transport any of the subject children to any prison facility, substance abuse treatment facility or other such residential program for visits.” The panel affirmed this order:

Here, the judge has not abused her discretion by crafting an order that seeks to balance competing factors relevant to the best interests of the children. Visiting a parent in jail or in a substance abuse program could be a stressful or anxiety-producing situation for any child. In addition to these general concerns, the judge made specific factual findings that raised concerns about the potential impact of such visits on these particular children. In light of these specific concerns and the parents’ history of drug abuse and incarceration, the judge’s order represented a reasonable and limited restriction on posttermination visitation while still providing for the children’s need for a sense of security in their relationship with their biological parents.

While most children do just fine with prison visits (and would much rather visit parents in prison than have no visit at all), the facts of this case did suggest that the children were disturbed by visits to the father in prison. Bethany, at n. 14.

3. Adoption of Carissa, 79 Mass. App. Ct. 1119, 2010-P-1820 (May 18, 2011). The panel in Carissa makes a very bold statement, but that bold statement may be wrong. The panel affirmed the termination decree after determining that DCF provided the parent with adequate services. That isn’t the interesting part. What’s interesting is that the panel deemed lack of services a potentially viable defense to termination.

But before getting to the language of this odd little Rule 1:28 decision, we need to spend a moment on the language of the published SJC cases that actually control the issue.

We have generally viewed Adoption of Gregory, 434 Mass. 117 (2001), and Adoption of Ilona, 459 Mass. 53 (2011), as foreclosing any defense to termination based on DCF’s failure to provide services. In Gregory, the SJC held that parents cannot raise the agency’s failure to follow the Americans with Disabilities Act (ADA) as a defense to termination of parental rights. 434 Mass. at 122. In Ilona, the SJC said all sorts of good thing about the agency’s obligation to provide services tailored to the needs of parents. But then it expanded on Gregory and suggested that the failure to provide services shouldn’t interfere with termination of parental rights:

Where a parent [has special needs] that affect the receipt of services, the department’s duty to make reasonable efforts to preserve the natural family includes a requirement that the department provide services that accommodate the special needs of a parent. *See* *Adoption of Gregory,* 434 Mass. 117, 122, 747 N.E.2d 120 (2001). The department must “match services with needs, and the trial judge must be vigilant to ensure that it does so.” *Adoption of Lenore, supra* at 279 n.3.

When committing a child to the custody of the department or terminating parental rights, a judge must determine whether the department has complied with its duty to make “reasonable efforts . . . to prevent or eliminate the need for removal from the home.” G. L. c. 119, § 29C. A judge may consider the department’s failure to make reasonable efforts in deciding whether a parent’s unfitness is merely temporary. *See* *Adoption of Carlos,* 413 Mass. at 350. However, even where the department has failed to meet this obligation, a trial judge must still rule in the child’s best interest. “A determination by the court that reasonable efforts were not made shall not preclude the court from making any appropriate order conducive to the child’s best interest.” G. L. c. 119, § 29C. While courts protect the rights of parents, “the parents’ rights are secondary to the child’s best interests and . . . the proper focus of termination proceedings is the welfare of the child.” *Adoption of Gregory, supra* at 121.

Ilona, 459 Mass. at 61 (certain citations omitted). Accordingly, even if DCF fails to make reasonable efforts, the court can terminate parental rights if the child’s best interests so require.

Ilona doesn’t say that DCF’s failure to provide services is irrelevant. There is some wiggle room: if the child’s best interests are not necessarily served by termination (or even by an immediate trial), and DCF hasn’t made reasonable efforts, the court *may* consider the department’s failure in deciding whether a parent’s unfitness is merely temporary. And if the parent’s unfitness is only temporary, termination is generally inappropriate. The word “may” in Ilona is pretty weak; the court has broad discretion in determining both best interests and whether the services DCF failed to provide could, if offered, meaningfully improve the parenting of the temporarily-unfit parent. Still, a case can be made on appeal that the judge abused his discretion in failing to consider a meritorious motion to continue or in improperly determining that unfitness wasn’t temporary. Both are uphill battles.

That brings us to Carissa. The panel *seems* to ignore Ilona (which came out two months before Carissa), and it interprets Gregory narrowly:

The department and Carissa argue that the mother waived her claim of inadequate services because she raised the argument for the first time at the termination proceeding, citing *Adoption of Gregory,* 434 Mass. 117 (2001). *Gregory* states that a parent, who fails to make a timely claim for inadequate services, “may not raise *noncompliance with the ADA or other antidiscrimination laws* for the first time at a termination proceeding” (emphasis added). *Id.* at 124. *Gregory* does not address a claim for inadequate services as a direct defense to unfitness. Therefore, we do not address waiver, and we resolve this claim on the merits.

Carissa, at n. 5. On the merits, the panel held that DCF did, in fact, provide adequate services.

Carissa is not necessarily wrong. But, as discussed above, Gregory and Ilona render “inadequate services” a defense to unfitness only in the narrowest of contexts. So cite Carissa with care. And make sure the issue was preserved below, with thorough testimony (or offers of proof) regarding (a) the services that weren’t offered and should have been offered, (b) the availability of those services, (c) how the parent would have benefited from those services, and (d) how long it would have taken – and will take – for the parent to achieve that benefit with those services. Without all of that information in the trial record, an appellate argument based on “no reasonable efforts” stands no chance whatsoever.

(Note: For more on the ADA and child welfare cases, look out for a practice tip email from our Training Unit, coming out soon.)

4. Adoption of Zollie, 79 Mass. App. Ct. 1121, 2010-P-1914 (June 1, 2011). Zollie has some excellent language relating to DCF’s obligation to make efforts to facilitate parent-child visits. Here, the father was working full-time and initially requested that his weekly visit with the child take place on the weekend. The DCF worker told him the visit would have to take place on a weekday between 9:00 a.m. and 5:00 p.m. Father told the worker that he could be available on Fridays. The worker told him that Friday was her duty day, so visitation would only be possible when another worker was available to supervise. Over the next 2 ½ months, DCF only found a worker to supervise visits twice.

The panel was not pleased, and this displeasure is eminently quotable:

Particularly in light of the requirement that DCF make every effort toward encouraging the integrity of the family, we think the father makes a substantial argument that DCF’s efforts to facilitate visitation with his child were inadequate. Further, given the centrality of the parent-child bond to the decision to terminate parental rights, there is a substantial argument that, where a parent is working – as is desirable – and is willing and able to visit with his child on weekdays, DCF performs inadequately when it enables those visits to take place only twenty percent of the time.

The panel affirmed the termination decree because there was other substantial evidence (unrelated to visits) proving the father unfit. Still, the language above is great support for a visitation motion where a parent or child is not getting regular visits because of a worker’s inflexible schedule. Zollie also dovetails nicely with Carissa in an argument that DCF has rendered a parent temporarily unfit by failing to facilitate enough visits, and therefore trial should be continued until more visits can take place.

5. Guardianship of Killian, 79 Mass. App. Ct. 1130, 2010-P-1596 (July 19, 2011). For those attorneys regularly arguing child welfare appeals before the Appeals Court, it will come as no surprise that the panels are increasingly willing to consider information outside the appellate record to ensure that children’s best interests are protected. See “Post-trial Information and Oral Argument,” below. In this case, a Probate and Family Court judge vacated a temporary guardianship and returned custody of Killian to his mother. The mother had been in a relationship with a man who had physically abused Killian, but the judge credited her testimony that she no longer had contact with him. After the decision, the former guardians (the child’s grandparents) and the child moved to reopen the evidence, claiming that they had observed the abusive man at the mother’s home. The judge was “disturbed” by this and stated that if, in fact, the man was present at the home, “that changes this case significantly.” Despite making this comment, the judge refused to hold an evidentiary hearing on the motion to reopen. The trial court docket sheet noted that there were affidavits submitted by the grandparents and the child detailing the mother’s contact with the abusive man, but the record wasn’t clear if the judge ever saw the affidavits, and they were not included in the appellate record. The grandparents and child appealed the judge’s refusal to reopen the evidence.

The issue should have been deemed waived: there was no evidence the judge had considered the affidavits and they weren’t in the record, so technically there was nothing for the panel to review. But when children’s safety is at issue, panels are much, much more flexible:

It may be that the petitioners and the child never brought the affidavits to the judge’s attention; in other circumstances, we might have found that the issue was not sufficiently presented to the judge below and therefore was waived. However, given the judge’s acknowledged concern for this child’s safety, we decline to do so here.

Killian, at n. 7. The panel vacated the order denying the motion to reopen the evidence and remanded the case just “to be sure” that the judge “has the benefit of all of the facts in deciding whether to reopen the evidence or reconsider his decision.”

Killian is thus a good case to cite in support of a motion to enlarge the record on appeal or some other procedural motion to permit an appellant (or appellee) to argue evidence that wasn’t before the trial court.

6. Adoption of Liam, 80 Mass. App. Ct. 1101, 2011-P-178 (July 28, 2011). Just because a parent is unfit does not mean that a child’s best interests are served by termination. The problem with that principle has always been finding good cases to illustrate it. Liam is such a case. It is also a helpful case if parent and child both seek reunification and the parent has made late progress in getting his or her act together.

In Liam, the mother and child appealed the termination of mother’s parental rights and the denial of their joint motion to vacate the decree. They argued that while mother could not be reunited with the child at the time of trial, termination was not in the child’s best interests and was premature. They further argued that the judge erred in denying the motion to vacate without a hearing given the mother’s changed post-trial circumstances.

The panel affirmed the trial judge’s decision that the mother was unfit at the time of trial. But it reversed the denial of the motion to vacate, vacated the termination decree, and remanded the matter for further proceedings to determine whether termination remained in the child’s best interests. The panel cited several “unusual circumstances” that led to this “rare” disposition: (1) this was not a case of “continuous unceasing unfitness” by mother, but rather one where the mother had shown herself unable to sustain long-term stability; (2) the mother and child shared a significant emotional relationship, and continued contact and visitation by the mother was found to be in the child’s best interests; (3) the child was placed with his maternal aunt who, although willing to adopt, had given no indication that adoption or termination was a matter of urgency; (4) there was no evidence that returning the child to the mother would be disruptive to him or that the parties would not work together to effectuate a smooth transition; and (5) the evidence of post-termination changes in the mother’s circumstances included affidavits from “neutral” persons (an employer and a social worker).

While these circumstances may be “unusual,” they aren’t rare. Liam is helpful if several of these factors are present in your case and there is evidence that the parent can currently parent the child.

Note that the panel, on its own initiative, asked the parties for memoranda “on the procedural issues connected with obtaining factual information concerning Liam’s current best interests and the mother’s fitness.” In other words, the panel wanted current information not in the appellate record. DCF failed to provide it, and the panel noted this failure. Liam, at n. 3. See also “Post-trial Information and Oral Argument,” below. The take-away for attorneys? If the panel wants it, provide it. But don’t offer information outside the record at oral argument unless so requested.

7. Adoption of Jermaine, 80 Mass. App. Ct. 1107, 2011-P-292 (September 23, 2011). Can a trial judge essentially take over questioning of the witnesses and do the job of the DCF attorney? Apparently, yes. In Jermaine, the father appealed the termination decree, arguing that the judge questioned witnesses “to such an extent that he relieved the department of its burden of proof.” The judge elicited opinions from a psychologist, including the bases for her opinions, before the DCF attorney reached those topics. Nevertheless, the panel disagreed with the father, finding that most of the judge’s questions were confined to “follow-up questions aimed at eliciting more details concerning hard facts such as when or where an event occurred, or the sequence or chronology of events.” Judges are entitled to question witnesses in order to obtain clarification or eliminate confusion. Id. (citing Adoption of Seth*,* 29 Mass. App. Ct. 343, 351 (1990), and Commonwealth v. Festa*,* 369 Mass. 419, 422-23 (1976)).

The panel did issue a vague warning, however, that might be useful to cite in another case with an active judicial questioner:

[A]s the father correctly states, at times the questioning went into substantive areas that would have been best left to the department’s attorney to develop in the first instance. . . . . [While a judge can elicit factual information], the judge must be cautious about stepping in too far too soon -- particularly where the testimony that is elicited may become the basis for the judge’s ruling on the merits of the case. Examination in the first instance is best left to the parties’ attorneys, and the judge should defer questioning the witnesses until such examination appears necessary.

The panel concluded that there was no prejudice from the judge’s questioning, because “all of the testimony elicited by the judge would have been admitted had the questioning been done by the department’s attorney instead.”

That reasoning seems pretty thin to me. What if the DCF attorney *wouldn’t* have elicited that testimony? What if the DCF attorney hadn’t prepared for trial? What if the DCF attorney had gone in another direction? Can a judge offer *documents* in evidence on her own initiative because those documents would have been admissible if offered by a party? Wouldn’t the panel’s reasoning permit this? A troubling case, but ultimately helpful if you represent an appellee-child who is defending a judgment issued by an actively-questioning judge.

8. Adoption of Natalia, 80 Mass. App. Ct. 1113, 2011-P-357 (November 2, 2011). This case is a helpful reminder about how best to assert ineffective assistance of counsel:

The father claims ineffective assistance of counsel based on trial counsel’s failure to call several expert witnesses or admit additional documents. The father argues that the witnesses would have added to his credibility and shown the benefits received from services. However, the father’s appellate counsel fails to identify who the witnesses would have been or what new information would have been shared, making a finding of prejudice impossible.

If you are going to raise ineffective assistance for failing to call witnesses, you must identify the witnesses and the content of their omitted testimony. This is best done by securing affidavits from those witnesses as to what their testimony would have been. If you are arguing ineffective assistance for failing to offer documents, you must attach the documents and explain why they are important. Otherwise, the panel cannot assess whether the failure to offer this evidence was harmful, and you cannot satisfy the second prong of the Saferian standard.

9. Adoption of Serafina, 80 Mass. App. Ct. 1114, 2011-P-249, (November 10, 2011). This is a great case, and it’s a real pity it wasn’t published. But thanks to Rule 1:28, you can still freely wave it in front of trial judges and appellate panels alike.

In Serafina, the panel vacated the termination decree and remanded to the trial court. The trial judge placed great weight on the fact that it took sixteen months for the putative father to establish paternity. Although the DCF attorney, shortly before trial, told the judge that the delay wasn’t the father’s fault, the judge blamed him anyway and heavily cited father’s “lack of interest in his paternity” in several conclusions of law.

The panel agreed with the father that many of the paternity-related findings were clearly erroneous. Much of the delay wasn’t the father’s fault: he was not appointed counsel for almost a full year after the child’s birth; his court-appointed attorney failed to order genetic testing due to vacation, illness, or the mistaken belief that it had already been ordered; the DCF attorney failed to schedule the testing due to vacation; and the department misplaced relevant documents for three months. The panel noted that “[i]t is incumbent on the courts no less than the department to ensure that neither children nor parents are penalized for the defective operation of a system into which they have been drawn involuntarily.” What a great quote!

The trial judge also based the termination on father’s employment circumstances: “Father’s main focus, instead of being on [the child] and working toward reunification, has been, and continues to be, on his job.” The court blamed father for working long hours. The panel acknowledged the catch-22 parents face in these cases: a parent is unfit if he doesn’t work hard enough to provide financial security for a child, and he’s unfit if he works too hard seeking financial security. (And, of course, if he works hard enough to provide financial security, DCF may move to strike his counsel.). The panel held that the father’s work circumstances did not qualify as clear and convincing evidence of unfitness.

Finally, the trial judge based the termination on the child’s bonding with pre-adoptive parents. But after trial, a 51A report was filed on the pre-adoptive parents and the placement disrupted. While that information wasn’t before the trial court or part of the appellate record prior to argument (See “Post-trial Information and Oral Argument,” below), the panel was receptive to father’s request to enlarge the record to include information about the problems and disruption. The panel was clearly displeased (at argument as well) with the position taken by DCF and the appellee-child about enlarging the record: “Both the department and the child’s counsel objected to enlargement of the record. We fail to see how this posture advances the best interests of the child.” Serafina, at n. 5. Of course, “this posture” was solid appellate practice – why agree to enlarge the record this late in the game and allow the panel to consider a potentially dispositive fact? – but it felt like a game of “hide the (best interests) ball” to the panel. That’s never a good impression to make.

The panel vacated the termination decree and remanded for further proceedings.

**Post-trial Information and Oral Argument**

You must stick to the record on appeal.

Or maybe not. Because our cases are different, and anyone who handles a lot of child welfare appeals knows that this basic rule of appellate practice is often honored only in the breach. Appeals Court justices often express curiosity during oral argument about what has happened to children after trial (*i.e*., “We know we can’t base our decision on this, counsel, but we would like to know if the mother is still visiting the child/the child is still with the pre-adoptive parents/the mother is still clean/etc.”). Some panels are willing to consider substantively certain post-trial evidence that was before the trial court but not appealed (*e.g.*, a post-trial permanency hearing or ruling on a motion). Some go further and consider post-trial information that was not before the trial court. And this spring we’ve watched arguments where the justices *insisted* on knowing what the current custodial, placement, and visitation circumstances were so that they weren’t entering orders that had become factually or procedurally moot.

It’s enough to make an appellate traditionalist’s head spin. But rather than lament this development, it is more productive to come up with some basic rules of thumb for how to handle post-trial or post-findings evidence. By fleshing out these rules of thumb, we hope to encourage zealous advocacy and, at the same time, keep you from getting in trouble with, or damaging your reputation before, the Appeals Court.

The “post-trial developments” problem falls into two basic categories: the evidence you learn about and want to include in a brief or otherwise put before the panel (*e.g.*, a disrupted placement, parental incarceration, or twelve more months of parental sobriety); and requests for information from the panel that surprise you at oral argument (*e.g.*, “I know no one briefed this issue, but are the siblings still visiting each other?”).

“Oral argument surprises” are easier to address. Again, these are rules of thumb – there are no Rules of Appellate Procedure that address how to handle questions from the panel that require discussing facts outside the record:

* Never “offer” information outside the record on your own initiative. If you represent an appellee-child, don’t ask the panel, “Would you like to hear how the child is doing now?” That’s amateurish, and you’re likely to be reminded that appellate courts don’t go outside the record. I can only think of one exception to this: if you have filed a motion to enlarge the record and you want to remind the panel that your motion is pending, you can ask the court if you can argue the contents of your motion.
* If a justice asks you for information outside the record, gently remind the justice that the question requires going outside the record (which will allow her to change her mind or give another panel member an opportunity to tell you not to go outside the record). If you are nevertheless encouraged to answer, provide the information requested. Never play “hide-the-ball” on this. See Serafina, above. If you don’t know the answer, admit it; don’t guess. If you must do damage control after answering, file a Rule 22(c) letter with the panel further explaining your answer.
* If your client has been “victimized” by another party’s solicited or unsolicited comments outside the record, respond with a Rule 22(c) letter. You must respond if the information offered by the other party is false, because an appellate court can deem true any representations of counsel at argument that go unchallenged. See Adoption of Peggy, 436 Mass. 690, 700 n. 12 (2002).

Getting “helpful” post-trial or post-findings evidence into your brief or otherwise before the panel is more complicated.

* You are almost always on solid ground if, before docketing, you place the information before the trial court in the form of a motion for new trial, to reopen the evidence, or for relief from judgment. If the trial court denies the motion, you appeal that denial and (though this is not always necessary) consolidate the appeals.
* If the case has already been docketed, get leave from the single justice to (a) file any post-trial motion in the trial court that puts at issue the judgment appealed from (other than a review and redetermination or permanency hearing, which are authorized by statute and don’t require leave), or (b) include the post-trial information in your brief or to supplement or enlarge the record. If the case is already briefed, you can ask the single justice for leave to supplement or enlarge the record with a post-trial affidavit or other document. The caption of your motion isn’t important, so long as it’s clear to the single justice what you’re asking for.
* If the single justice denies your motion, file a notice of appeal to the full panel and move to consolidate that appeal with the underlying appeal. If you have not yet briefed the underlying appeal, ask for permission in your consolidation motion to brief the matters together. If you have already briefed the underlying appeal, ask for permission to file a short supplemental memorandum. (Joseph Stanton, Clerk of the Appeals Court, has informed us that the panel is likely to limit such a memorandum to 10 pages.) This gets your post-trial material before the panel.
* In all cases, ask that the single justice refer to the panel all relevant orders and motions prior to argument. As we learned in a recent argument before a thoroughly-perplexed panel, the panel may not receive the pleadings that were before the single justice in your appeal unless the single justice has entered an order referring the matter to the panel. Absent such a clear referral, the panel may have no idea what the single justice has permitted, ordered or denied.
* But if you ask for permission to supplement or enlarge the record or argue issues not before the trial court, the worst that happens is that your request is denied. If the single justice has referred the matter to the panel, at least the panel is aware of the new evidence (even if it can’t “officially” consider it).
* Under no circumstances should you “spring” information on the panel at argument.
* Note that once a case is assigned to a panel for oral argument, motions are sent by the Clerk’s Office to, and are decided by, the senior justice on the panel, not Justice Hanlon (the usual single justice for child welfare appeals).

It’s never clear what post-trial developments will interest the panel enough to act. And, of course, some panels won’t consider *any* post-trial information that wasn’t before the trial court. But oral arguments in our cases can be very odd. Just make sure that anything out of the ordinary in your argument is caused by the *justices*, not you. Because if you spring information on the justices, you have a very good chance of being criticized for violating the long-standing, traditional, never-to-be-broken rule of appellate practice that you are limited to arguing facts in the appellate record. And the justices will be right.

Please note that I have shared my thoughts in this section with Joseph Stanton, the Clerk of the Appeals Court, and he has given his thumbs-up.