***Committee for Public Counsel Services***

***Children and Family Law Division***

*44 Bromfield Street, Boston, MA 02108*

*Phone: (617) 482-6212, Fax: (617) 988-8455*

**MEMORANDUM**

To: CAFL Appellate Panel Members

cc: CAFL Trial Panel Members

CAFL Administrative Attorneys

CAFL Staff Attorneys

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

Jaime Prince, Staff Attorney, CAFL

Julie Meads, Staff Attorney, CAFL

Re: Administrative Matters

Recent Rule 1:28 Decisions

Very, Very, Very Late Notices of Appeal (*i.e.*, after a Year)

Tips from Justice Trainor

Writing Tips

Date: September 7, 2012

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Administrative Matters**

1. **Moot Courts**

If you want to moot-court a case scheduled for argument in October or November, please let us know soon. In some circumstances, we may be able to make it out to your office (or somewhere in between) for the moot. You get two CLE credits if you moot with a CAFL administrative staff member.

1. **Out-of-State Travel for Appellate Attorneys**

Trial attorneys must request approval for out-of-state travel using a form available at:

<http://www.publiccounsel.net/Practice_Areas/cafl_pages/forms.html>

But appellate attorneys do NOT need to use the form. Instead, please email Andrew Cohen ([acohen@publiccounsel.net](mailto:acohen@publiccounsel.net)) directly to request permission.  Your email should include (a) the client name, (b) the NAC number, (c) the docket number(s), (d) the departure and arrival towns, (e) the round-trip distance, (f) the dates of travel, and (g) the reason for the travel.

**Recent Rule 1:28 Decisions**

This memo catches us up through today. (I never thought I’d be able to write that.) If we have left out one of your Rule 1:28 decisions and it has a useful tidbit in it, please let us know.

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 Elian, 81 Mass. App. Ct. 1101, 2011-P-621 (December 2, 2011). Post-adoption visitation orders do NOT require excruciating detail. As the panel in Elian held, the trial judge need not identify the dates that post-termination visitation should occur. Here, the judge entered an order specifying the frequency, duration, location, and conditions of visitation. The exact dates were left to the discretion of DCF. The panel felt that this sufficiently complied with the holding in Rico and did not give DCF impermissible latitude.
2. Adoption of Herman, 81 Mass. App. Ct. 1109, 2011-P-1105 (January 18, 2012). In Herman, the trial judge chose the adoption plan supported by mother and DCF (adoption by maternal grandmother in New Jersey) over the child’s plan (adoption by long-term foster parents). The child’s request for a stay was denied by the trial court but granted by a single justice of the Appeals Court. A year later, the child moved to reopen the evidence in the trial court because the court hadn’t yet issued findings. The court denied the motion to reopen. The trial judge waited an additional six months (totaling 18 months after judgment) to issue findings.

The child appealed the denial of the motion to reopen. The panel in Herman vacated the order placing the child with the grandmother. The panel was concerned that so much time had passed between the termination decree and the issuance of findings that circumstances might have changed dramatically. For example, the child was two at the time of trial and had lived with his foster family since he was six months old. By the time the trial judge issued her findings, the child was four and still with the foster family. The panel noted, “moving a child at two years old is different than moving him at four.” Id.

While the remand order was couched in terms of “exploration” and “inquiry” into new developments since trial, the panel also suggested that the trial judge erred in weighing the two plans. The trial judge had failed to consider the grandmother’s listing on DCF’s Registry of Alleged Perpetrators. The trial judge had also given too much weight to grandmother’s New Jersey ICPC homestudy that failed to adequately explore and explain the criminal record of the grandmother’s youngest son. A second homestudy was ordered but “apparently nothing came of it.” The panel suggested that this, too, “might be worthy of exploration.”

Kudos to child’s trial counsel (whose actions are not mentioned in the decision) for preserving the status quo following trial. Had trial counsel not aggressively sought a stay pending appeal, the child would have been moved to New Jersey and the outcome of the appeal might have been different. As Herman illustrates, zealous post-trial advocacy can make or break a case.

The take-away? If the judge in your case has not issued findings for a year or more after the termination decree, and new circumstances – or just the passage of time – raise questions about whether the judge’s order still serves the child’s best interests, Herman may help your effort to reopen the evidence. Needless to say, it will be easier to convince a trial judge to reopen the evidence, or to convince a panel to remand for more evidence, if the “passage of time” evidence concerns the choice of adoptive/guardianship resource, rather than a parent’s fitness.

1. Adoption of Lin, 81 Mass. App. Ct. 1128, 2011-P-1084 (April 12, 2012). The trial court approved plans specifying that two brothers would be adopted by different families. The plans did not address sibling visitation, and the court’s findings did not address why the boys couldn’t be placed together. The panel remanded to the trial court for further findings on the issues of sibling visitation and the possibility of joint placement. According to the panel, G.L. c. 119, § 26B(b) required findings on these issues. This is fascinating, because we usually think of § 26B(b) only as the “sibling visitation” statute. But the statute requires that the court “ensure that children placed in foster care shall have access to and visitation with siblings . . . .” We had assumed “access to” meant phone calls and letters, but the panel in Lin (based on a clever argument by child’s counsel) interpreted it to mean “placement.” And the trial court’s failure to explain how joint or separate placement of the boys served their best interests required remand.

Lin is a helpful case if you represent a child who is aggrieved by placement apart from a sibling and the court fails to make specific findings explaining why joint placement doesn’t serve their best interests.

4. Adoption of Marta, 81 Mass. App. Ct. 1132, 2011-P-1888 (May 2, 2012). In Marta, the mother argued that her due process rights were violated by the gap of one year between trial and the entry of findings and conclusions. The panel disagreed. The mother failed to show that the outcome of the case would have been different had the findings been issued quicker. Id. (citing Adoption of Don, 435 Mass. 158, 170 (2001)).

To be fair, there are probably only a few ways that delayed findings *ever* make a difference. Bonding is one; if the evidence of unfitness is fatally slim, but the judge waits a year or more before issuing the findings, the parent is much more likely to be found unfit on remand based on the child’s bonding with pre-adoptive parents. But that’s tough to argue in the first appeal, and very unsympathetic to argue on the second appeal (of the termination decree on remand). Another way to show harm from delayed findings is to show that the findings were so erroneous that they reflect poor recollection of the evidence. You would need quite a few incorrect (or at least some wildly incorrect) findings to show this. Similarly, you could argue that the findings relied extensively on subtle credibility determinations, in particular, determinations based on witness demeanor or tone that no judge could reasonably remember a year or more after trial. Rhona supports this argument. And while Marta doesn’t cite Rhona for this proposition, it is worth noting it here:

While “trial judges have great discretion to assess the credibility of witnesses, based on their opportunity to observe the witnesses' demeanor during trial ... it is all the more crucial we be assured that the judge actually remembers what the witnesses were like.” *Care & Protection of Three Minors, 392 Mass. 704, 705 n.3, 467 N.E.2d 851 (1984).* We establish no per se rule or presumption concerning the length of time after which the accuracy of a judge’s findings may be called into question. However, a lapse of three and one-half years after trial began and two years after trial ended strains the outer limits of any judge's ability to remember witness demeanor and credibility. In this case, a number of the judge’s findings are contradicted by the evidence, suggesting that such limits were exceeded.

Rhona, 57 Mass. App. Ct. 479, 486 (2003).

The panel in Marta also provides another way that delayed findings might prejudice a parent, although it’s a very different kind of prejudice. Delayed findings might prejudice a parent if there were post-trial/pre-findings changes in circumstances that better reflect the parent’s current fitness. In Marta, the mother didn’t file a motion to reopen (which may not have been warranted), which proved fatal: “[A]though she did bring the delay to the attention of the judge, the mother did not seek to ‘reopen evidence to allow all parties to submit relevant, updated information concerning parental fitness.’” Marta (citing Rhona, 57 Mass. App. Ct. at 486-87).

The take-away? If you are raising the issue of delay in issuance of the findings, you must prove harm to the appellant either by (a) showing that the findings reflect faulty memory or (b) filing a motion to reopen the evidence showing that the findings, when issued, did not reflect current parental unfitness.

1. Care and Protection of Yevgeny, 81 Mass. App. Ct. 1134, 2011-P-2028 (May 9, 2012). In Yevgeny, the father waived his right to a trial and stipulated to the children’s permanent custody with DCF. The father argued that his waiver wasn’t “knowing and voluntary” because the judge did not explain during the colloquy that the father was stipulating to unfitness. The panel disagreed. While the judge did not mention “unfitness” in the colloquy, the term had been discussed many times during the proceedings, and the panel found it implausible that the father didn’t realize that this was part of his stipulation. The panel noted that while an explicit mention of unfitness during the colloquy “would have been advisable,” it was not required. Id. at n. 8.

The father next argued that the judge erred in failing to issue findings to support the stipulation. The panel cited Care and Protection of Erin, 443 Mass. 567, 572-73 (2002), for the proposition that, while “the factual basis for the initial determination of unfitness ideally should appear somewhere in the record,” it was not required.

The father also argued that he was confused and depressed and therefore unable to validly stipulate to anything. The panel noted that “[e]motion and stress caused by the situation . . . are not sufficient to render a stipulation void.” Id.

Finally, the panel noted that, to vacate his stipulation and reopen the judgment, the father needed to show a chance of success on the merits. He failed to do so.

6. Adoption of Samira, 81 Mass. App. Ct. 1138, 2012-P-186 (May 23, 2012). What is “good cause” for an appellate court to extend the time period for filing a notice of appeal? Samira tells us what “good cause” is *not*: drug use. The mother (who was not present at trial) waited eight months from the denial of her motion for new trial/amendment of judgment before filing a notice of appeal. In the interim, the child was adopted. The only reason proffered by the mother for the delay was that she had a drug problem. The single justice granted mother leave to file a late notice of appeal. The child and DCF appealed. The panel reversed, holding that that this did not furnish “good cause” under Mass. R. App. P. 14(b).

7. Adoption of Opal, 81 Mass. App. Ct. 1138, 2011-P-1972 (May 25, 2012). This case is of little interest other than a footnote. The judge made several findings of fact relevant to G.L. c. 210, § 3(c)(vii) (parental unfitness based on the child’s bonding with substitute caretakers, harm to the child from removal, and the parent’s inability to ameliorate the harm after removal). But in her conclusions of law, she wrote that the factor didn’t apply. So did that factor apply or didn’t it? More importantly, can the panel affirm a termination based (at least in part) on a factor that is supported by the facts but which the judge doesn’t rely on in the conclusions of law?

The answer appears to be “yes.” The panel noted that, “[t]he judge wrote that [factor (vii)] was inapplicable. However, from the factual findings related to Opal’s relationship with her foster parents, it is clear [the judge] considered this factor in her decision.” Id. at n. 4. This suggests that if a judge’s fact findings are sufficient to satisfy a factor of § 3(c), the panel can consider it even if the judge didn’t conclude that the factor applied (and even if the judge expressly found that the factor didn’t apply). That is, the fact findings trump the conclusions of law. Good to know if you are an appellee seeking to support a termination (or other order) that appears to have decent findings but poor conclusions of law.

8. Adoption of Rosalie, 81 Mass. App. Ct. 1139, 2011-P-2129 (May 29, 2012). Rosalie is Adoption of Ulon, 81 Mass. App. Ct. 1113 (Mass. App. Ct. Rule 1:28), on remand. The decision is not noteworthy other than footnote 3:

We have no difficulty taking judicial notice that in *Adoption of Ulon,* 81 Mass. App. Ct. 1113 (2012), this court affirmed the termination of the mother’s rights to her second child while the appeal in this case was pending. See *Matter of Welansky,* 319 Mass. 205, 210 (1946); *Amato v. District Attorney for Cape & Islands Dist.,* 80 Mass. App. Ct. 230, 232 n.5 (2011) (judicial notice may be taken of facts and proceedings cited in prior judicial opinions).

So what does this mean? It means that, on an appeal after remand, you can freely cite to, and ask the panel to take judicial notice of, any information that appeared in the earlier published or Rule 1:28 decision, even if that information is not in your current record. Welansky and Amato, cited in the footnote above, clarify that trial courts, too, can take judicial notice of facts cited in appellate decisions. The Rosalie footnote states that appellate courts (and probably trial courts, too) can take judicial notice of the facts set forth in a prior appellate decision even if the prior decision concerned a different child. It is unclear how far this extends. It is also unclear if courts can take notice of prior appellate decisions that involved respondent-caretakers who were not part of the earlier litigation (*i.e*., first appeal involved child and respondent-parents, second appeal involved same child but respondent-guardians).

9. Care and Protection of Zella, 82 Mass. App. Ct. 1102, 2012-P-50 (June 20, 2012). In this case, all the parties agreed that the trial court’s finding of unfitness against the father was not supported by the evidence. However, the department argued that the case was moot because the child was living with her father in New Jersey and the mother and father had obtained joint legal custody of the child through a proceeding in New Jersey. The panel disagreed: “As it is unclear what, if any, effect the erroneous finding may have on the proceedings in New Jersey, we decline to hold that the matter is moot.” The panel reversed the trial court’s orders and dismissed the care and protection proceedings.

Good! A panel finally recognized that an unfitness finding might have relevance in another proceeding, even one in another state. Zella is a great decision to cite if your appeal has similar facts. Ask that the judgment be vacated/reversed; dismissal of the appeal as moot may not serve your client’s long-term interests.

10. Adoption of Wendy, 82 Mass. App. Ct. 1102, 2011-P-1953 (June 21, 2012). This case has a very important tip for trial counsel, and a warning to appellate counsel, regarding challenges to expert testimony. In Wendy, the mother argued that the department’s experts relied on inadmissible evidence when forming their opinions. The panel made it clear that a party opposing expert opinions must attack the bases of such opinions at the trial level, not for the first time on appeal:

To the extent that the mother believed that the testimony of the experts was of a “mixed foundation” of admissible and inadmissible evidence, “the recommended approach would [have been] for the mother’s counsel to request a voir dire.” Adoption of Seth, 29 Mass. App. Ct. 343, 353 (1990). This option was neither requested nor utilized.

Unless the expert testimony was outrageously improper, and the testimony formed the lynchpin of the termination, I counsel against arguing error for the first time on appeal. Better to raise the issue in a motion for new trial to ensure that it is preserved.

**Very, Very, Very Late Notices of Appeal (*i.e.*, after a Year)**

Sometimes we discover, late in the appellate process, that the client’s notice of appeal was accepted improperly by the trial court. Maybe it was unsigned; maybe it was filed on the 31st day after entry of the judgment without a motion to file late; or maybe it was improperly accepted by the trial court on the 61st day after entry of the judgment. What do you do if you make this discovery after a year from the date of entry of the termination decree? Are you out of luck?

Maybe not. [Rule 14 (b) of the Massachusetts Rules of Appellate Procedure](http://www.lexis.com/research/buttonTFLink?_m=a55ee81a735ec9507c5a39686348128b&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b429%20Mass.%20258%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=48&_butInline=1&_butinfo=ALM%20RAP%2014&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAb&_md5=a7957431665ebe3a5d08e1bcddd2648b) provides:

The appellate court or a single justice for good cause shown may upon motion enlarge the time prescribed by [the rules of appellate procedure] or by its order for doing any act, or may permit an act to be done after the expiration of such time; but neither the appellate court nor a single justice may enlarge *the time for filing a notice of appeal beyond one year* from the date of entry of the judgment or order sought to be reviewed[.]" (emphasis added).

Accordingly, the Rule prohibits *filing* a notice of appeal after a year. But if a notice of appeal was filed within the year but it was faulty – that is, it was late or unsigned by a parent – and not entered because of this fault, the appellate court can allow it after the year has passed *nunc pro tunc* if the appellant fixes the problem. According to the SJC in Commonwealth v. White,

While under [rule 14 (b)](http://www.lexis.com/research/buttonTFLink?_m=a55ee81a735ec9507c5a39686348128b&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b429%20Mass.%20258%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=58&_butInline=1&_butinfo=ALM%20RAP%2014&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAb&_md5=086cb13d805d4097c409ef72e164c4bb) the one-year anniversary of the order to be appealed terminates the defendant's right to file a notice of appeal, it does not terminate the jurisdiction of an appellate court to consider a motion to enlarge the time, nunc pro tunc. Had the drafters of [rule 14](http://www.lexis.com/research/buttonTFLink?_m=a55ee81a735ec9507c5a39686348128b&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b429%20Mass.%20258%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=59&_butInline=1&_butinfo=ALM%20RAP%2014&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAb&_md5=4f33dd791851ab59be656a1d3c4351bf) intended the latter, they would have employed more precise language. For example, the cognate Federal rule prohibits an appellate court from enlarging the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Fed. [R. A. P. 26 (b)](http://www.lexis.com/research/buttonTFLink?_m=a55ee81a735ec9507c5a39686348128b&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b429%20Mass.%20258%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=60&_butInline=1&_butinfo=ALM%20RAP%2026&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAb&_md5=be4a110ae1f3a9c4f9dc85fb36766be9). The drafters of [rule 14 (b)](http://www.lexis.com/research/buttonTFLink?_m=a55ee81a735ec9507c5a39686348128b&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b429%20Mass.%20258%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=61&_butInline=1&_butinfo=ALM%20RAP%2014&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAb&_md5=b384c0283968ff08551e76c82360a64a) could have used similar language.  Absent that specificity, we conclude that [rule 14 (b)](http://www.lexis.com/research/buttonTFLink?_m=a55ee81a735ec9507c5a39686348128b&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b429%20Mass.%20258%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=63&_butInline=1&_butinfo=ALM%20RAP%2014&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAb&_md5=f78d25f43634af69bca814660a7dab98) sets one year from the date of the judgment or order appealed from as the maximum enlargement of time for filing a notice of appeal that an appellate court or single justice may permit. The fact that more than two years have elapsed from the denial of the motion does not mean that an appellate court is precluded from granting the defendant relief, nunc pro tunc, if the notice has been filed within the time specified by [rule 14 (b)](http://www.lexis.com/research/buttonTFLink?_m=a55ee81a735ec9507c5a39686348128b&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b429%20Mass.%20258%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=64&_butInline=1&_butinfo=ALM%20RAP%2014&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAb&_md5=6de4ed646d2ce8397d198e1fb077a6fe).

429 Mass. 258, 263-64 (1999); see also Commonwealth v. Abreu, 66 Mass. App. Ct. 795, 798 (2006) (“a commonsense reading of the cases and the rules of appellate procedure establish that as to orders denying motions for postconviction relief, [Mass. R. A. P. 14(b)](http://www.lexis.com/research/buttonTFLink?_m=947acfff0afb539922db4592fa726b91&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b66%20Mass.%20App.%20Ct.%20795%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=48&_butInline=1&_butinfo=ALM%20RAP%2014&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAb&_md5=ae01a10359c7b1dde80d1e00eac988ad) ‘terminates the defendant's right to *file* a notice of appeal, [but] it does not terminate the jurisdiction of an appellate court to consider a motion to enlarge the time, nunc pro tunc’”) (emphasis in original); Eyster v. Pechenik, 71 Mass. App. Ct. 773, 781 (2008) (applying rule in Commonwealth v. White to civil case).

**Tips from Justice Trainor**

Every year or so we have a justice from the Appeals Court speak at our training for new CAFL appellate panel members. Justice Trainor spoke at our last training. Here are some of the comments he made on “common mistakes appellate attorneys make.” Please note, he made clear that these thoughts were not necessarily those of the Court generally or other justices.

* If you can say it in 35 pages, don’t say it in 50 pages just because the Rules permit it.
* Never misstate the record or the law.
* Don’t cite and rely on overruled cases (know your case law and Shepardize key cases).
* Reply briefs are useless unless the appellee raises new issues or argues that an issue raised in the blue brief was not preserved for appeal.
* Don’t argue emotionally – never pound on the lectern.

All good tips. Please consider them.

**Writing Tips**

1. **Quotation Marks**

Here’s some important writing advice from Bryan Garner’s Oxford University Press usage newsletter.

**Today: Quotation Marks [" "] (8/18/2011).**   
  
Reserve quotation marks for five situations: (1) when you're quoting someone; (2) when you're referring to a word as a word {the word "that"}, unless you're using italics for that purpose; (3) when you mean so-called-but-not-really {if he's a "champion," he certainly doesn't act like one}; (4) when you're creating a new word for something -- and then only on its first appearance {I'd call him a "mirb," by which I mean . . . }; and (5) when you're marking titles of TV and radio programs, magazine articles, book chapters, poems, short stories, and songs {having been put on the spot, she sang "Auld Lang Syne" as best she could}.  
. . .

With a closing quotation mark, practices vary. In American English, it is usual to place a period or comma within the closing quotation mark, whether or not the punctuation so placed is actually a part of the quoted matter. In British English, by contrast, the closing quotation mark comes before any punctuation marks, unless these marks form a part of the quotation itself (or what is quoted is less than a full sentence in its own right). With respect to question marks and exclamation marks, American and British English practice is the same. They're either inside or outside the ending quotation mark depending on whether they're part of what's being quoted. Colons and semicolons are placed outside quotation marks.   
  
As to quotations that are interrupted to indicate a speaker, American and British English again show different preferences. In AmE, the first comma is placed within the quotation mark {"Sally," he said, "is looking radiant today"}; in British English, the first comma (usually) remains outside the inverted comma, just as though the attribution could be lifted neatly out of the speaker's actual words {'Sally', he said, 'is looking radiant today'}.   
  
Finally, be cautious about using gratuitous quotation marks. The emphatic use is a sign of amateurish writing (and advertising). Don't use them for phrasal adjectives, don't use them to be cute, and don't use them to suggest that the marked word or phrase is somehow informal or slangy -- it usually isn't. If you mean what you say, say it without hesitation. If you don't, then use other words.

Needless to say, using the American practices is the only way to go for filings in our Appeals Court or Supreme Judicial Court.

|  |
| --- |
| 1. **Formatting Argument Headers**   Here’s another good tip from Bryan Garner (email dated May 8, 2012, LawProse Lesson #69) about argument headers (which he calls “point headings”):  “How should point headings be formatted?”  ANSWER: Please attend to this. Ideally, they're complete sentences that are single-spaced, boldfaced, and capitalized only according to normal rules of capitalization -- that is, neither all-caps nor initial caps. Even if court rules require headings to be double-spaced, all the other rules nevertheless apply. All-caps headings betoken amateurishness.    For instruction on precisely how to do it, see: Scalia & Garner, *Making Your Case: The Art of Persuading Judges* 108-09, 122 (2009).  *The Winning Brief* 299-307 (2d ed. 2004). *Garner's Dictionary of Legal Usage* 292 (3d ed. 2011).  I have to say, this makes good sense to me. It’s hard to read sentences that are in all caps, and it’s even harder to read them when all words start with caps (that is, “initial caps”). Instead, use normal capitalization. Use boldface if you want your main Argument headers to stand out, or underline them.  After all, which Argument header is easier to read? (Note that each header is in Courier 12-pt.)   1. The Court erred in allowing experts and the child’s treating professionals to vouch for the child’s credibility, compare her to “other” sexually abused children, and testify that the child was sexually abused. 2. The Juvenile Court properly found Father unfit because he had an anger management problem THAT he acknowledged but refused to treat and a 20-year substance abuse problem that he failed to even acknoweldge. 3. The Juvenile Court Erred In Finding That The Department Made Reasonable Efforts To Reunify The Child With Father Because It Failed To Provide Father With Substance Abuse Services, Parenting Training, And Family Counseling Despite His Repeated Requests For Such Services.   Seems to me that the first one, with normal capitalization, is easiest to read. The last one, with “initial caps,” is very hard to read. Why make the panel struggle to read your Argument headers?  I’ve had some push-back on this from attorneys. One seasoned appellate attorney said, “It’s not that hard to read all caps.” But that’s my point. “Not that hard” isn’t good enough. For something as important as an Argument header (or an Issue Presented), it should be *easy* to read. Try using regular capitalization for all headers and sub-headers. |