Committee for Public Counsel Services

CAFL Appellate Practice Tip

Going Outside of the Record at Oral Argument

SEPTEMBER 16, 2019

We all know the general rule—stick to the record on appeal. But Appeals Court justices often express curiosity during oral argument about what has happened to children since trial. Common questions from the bench include: "Is the child still in the same placement?" "Has sibling visitation been occurring since trial?" And "Has an adoptive family actually been recruited?" Some justices will even ask child's counsel when they last saw the client and how they derived the client's position. So what is appellate counsel to do?

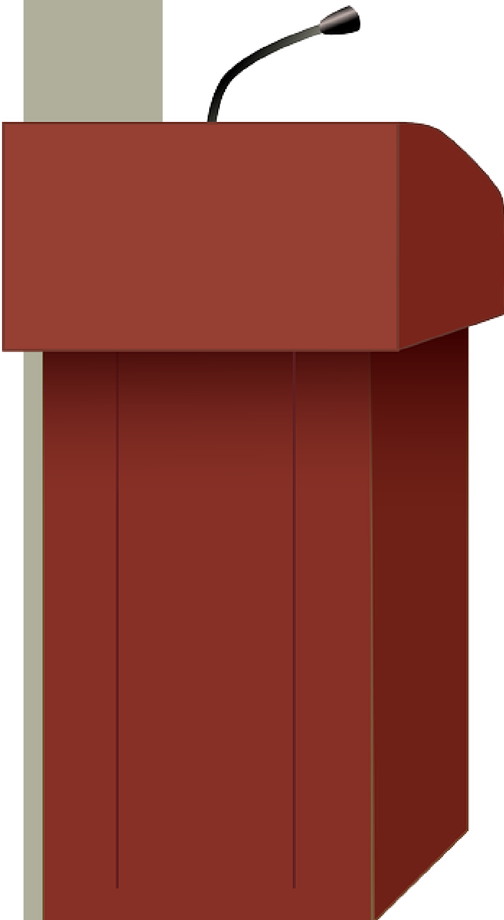
There are no "rules" for this, only rules of thumb. Here's what we've come up with after watching hundreds of arguments (and a lot of squirming in response to outside-the-record questions):

- 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. Don't share unless asked.
- If the post-trial information is in the trial court docket, the panel can take notice of it. That is, the types of post-trial hearings and titles of pleadings, as well as the wording of the trial judge's post-trial orders, are all fair game at oral argument. The *contents* of those pleadings, on the other hand, are not fair game (unless they, too, appear on the docket). In any event, don't spring post-trial docket information on the panel (or other appellate counsel) at oral argument. File a motion to supplement the record with a current docket. That motion will always be allowed.
- If a justice asks you for information outside the record, provide it, but do so by gently reminding the justice that the answer requires going outside the record. Maybe something like this: "I'm happy to answer, Your Honor, but that does require that I go outside the record. Would you still like me to answer?" This gives the justice a chance to change her mind. Never refuse to answer, and never play "hide-the-ball" on this. If you don't know the answer, admit it; don't guess. In your answer, don't go any farther outside the record than you need to. If the judges want to press you, they will (and some certainly do; we've seen oral arguments where the vast majority of the questions and answers were outside the record). If you must do damage control after answering, ask the panel for permission to file a Rule 22(c) letter to further explain your answer.

Going Outside the Record at Oral Argument (continued)

- If your client has been "victimized" by another party's solicited or unsolicited comments outside the record, respond with a Rule 22(c) letter. If the information offered by the other party is false and damaging to your client, you must file such a letter, 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). Remember that you must ask for permission—in writing, if you are the appellant and the new information arises after you've finished—to file a Rule 22(c) letter.

Generally speaking, if there are post-trial developments you learn about early in the appellate process 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), you will need to develop that record through some sort of post-judgment motion. Usually this is through a Motion for Relief from Judgment or a Motion to Reopen the Evidence, brought under Mass. R. Civ. P. 60(b). If the trial court denies the motion, you appeal that denial and consolidate the appeals. If your appeal has already been docketed, you will need leave to bring this type of motion. This can be tricky and will be the subject of another practice tip.



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 triggered by questions by the *justices*, not your own unsolicited comments. 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.