Appeals

- 1. how trial lawyers drive appeal lawyers buggy (let me count the ways)
 - 1.1. they scribble on documents (Courts do not like seeing barnyard phrases in the margins of the reproduced record. I do not like spending my time slopping correction fluid on documents. And just try to eradicate underlining.)
 - 1.2. they don't understand the limited scope of appeal
 - 1.2.1. waiver
 - 1.2.2. court will not second-guess credibility
 - 1.2.3. many decisions are reviewable only for abuse of discretion
- 2. documents to gather ahead of time (This is so you don't go bonkers on day 30.)
 - 2.1. *order*
 - 2.2. docket entries
 - 2.3. transcript order form(s)
- 3. filing and service
 - 3.1. O+1 to lower court, no cover on appellate, two checks
 - 3.2. opponent
 - 3.3. *judge*
 - 3.4. court administrator
 - 3.5. court stenographer
- 4. followup -- Statement of Errors Complained of on Appeal
 - 4.1. 1925(b) compliance is critical
 - 4.2. document any extension -- written motion, timely order
 - 4.3. "concise" is not part of the title (Including it is like saying "Brief on White Paper", but attorneys do it anyway.)
 - 4.4. be brief but not too vague
 - 4.5. leave yourself some room for tailoring
 - 4.6. if sufficiency is at issue, specify the element of offense or claim that is missing
- 5. docketing statement (Superior Court will send you this to fill out and send back with the documents below.)
 - 5.1. copy of Notice of Appeal
 - 5.2. copy of order

- 5.3. copy of docket entries
- 5.4. copy of opinion if issued

6. original record

- 6.1. when record is received, briefing schedule will issue
- 6.2. typically lower court opinion is last thing filing office needs to transmit; you may get opinion and briefing schedule same day
- 6.3. you will get a list of what has been transmitted
- 6.4. make sure everything you need has been transmitted

7. reproduced record

- 7.1. designate it ahead of time, however informally, unless your opponent agrees that this is not necessary
- 7.2. what to include/exclude
 - 7.2.1. docket entries mandatory; if they are not computerized, consider cleaning them up by restating event in clear language and omitting irrelevant events
 - 7.2.2. Notice of Appeal rarely needs to be included in state-court appeals
 - 7.2.3. don't include stuff that isn't relevant; you can always refer to original record
 - 7.2.4. ask whether court needs to actually see a document proving an event or can just infer event from the docket entries (proof of service is an example)
 - 7.2.5. don't add stuff that is not part of record!
 - 7.2.6. transcript is not the only thing that should be reproduced
 - 7.2.7. if there is a transcript, the rules say to re-index the testimony (In reality, it isn't always done.)
 - 7.2.8. if a document has been appended to multiple pleadings below, avoid duplication; indicate in index that item has been omitted but is at a specified earlier page number
 - 7.2.9. you can also exclude irrelevant exhibits but indicate this
 - 7.2.10. include lower court opinion even if redundant
- 7.3. putting it together (This is mainly for those of you that came of age in the days of typewriters.)
 - 7.3.1. get a serious software program, it will save you a lot of grief; you want something that will make scanned documents searchable, that will combine PDFs without loss of quality, and that will paginate the final document
 - 7.3.2. pagination at the top will aid screen review
 - 7.3.3. scale documents that have excessively thin margins (outsource if necessary)
 - 7.3.4. duplex with comb binding permits it to lie flat and permits faster

reading

- 7.3.5. consider making yourself a notebook copy (duplex, three hole punch)
- 7.3.6. take the PDF rather than a hard copy to copy center -- less risk of misordering of pages
- 7.3.7. flash drives are easier to work with than CDs

7.4. consider filing it ahead of time

- 7.4.1. clears space on desk, lets you zero in
- 7.4.2. downside: your research may indicate that an omitted document is important after all
 - 7.4.2.1. you can append it to the brief
 - 7.4.2.2. you can refer to the original

8. brief

- 8.1. if new to this, get some samples
- 8.2. *cover*
- 8.3. contents
- 8.4. table of citations
 - 8.4.1. avoid mid-citation line breaks
 - 8.4.2. use consistent form, and always include the year for a case; otherwise you give the impression that you scribbled it down from a source with a skimpy style and couldn't be bothered to complete it
- 8.5. statement of jurisdiction
- 8.6. standard AND scope of review
- 8.7. text of order
- 8.8. statement of the questions presented
 - 8.8.1. not too convoluted, it should not begin with "did the court err...", and it should indicate what the lower court's answer was to the question
- 8.9. statement of the case
 - 8.9.1. take pains with accuracy
 - 8.9.2. avoid argument, make balanced presentation
 - 8.9.3. if either side could have written it, that is a good thing
 - 8.9.4. sometimes you can put the reproduced record aside once you have written this part of the brief
- 8.10. summary of argument -- rules state great care should be taken
- 8.11. argument
 - 8.11.1. consistent citation form (include year)
 - 8.11.2. cover the basics in a way that avoids obvious dumbing down

- 8.11.3. how would an opinion sustaining your position read? (It would probably not say anything about your opponent's mother swimming after troop ships.)
- 8.11.4. pruefrede! run spell check but don't rely on it (Your ability to spot errors is diminished when you proofread something you just wrote.)
- 8.11.5. only one foolproof way to catch all errors: file the brief, then step into the hallway and reread your file copy
- 9. reply brief? maybe, but not just to reiterate what your brief in chief said
- 10. oral argument
 - 10.1. watch some beforehand
 - 10.2. relax, within reason; no need to state everything in a stiff and overly formal way
 - 10.3. don't address court as "you" (The worst argument I ever saw did this, but the guy won anyway.)
 - 10.4. don't waste time giving information that is on the cover of your brief
 - 10.5. don't treat the court like a jury
 - 10.6. tact: "revisit" is key word if you are asking the court to overrule a prior decision