HOW TO LOSE AN APPEAL
Presented at the in-house training programme of Lagos State Ministry of Justice[1] by Yusuf O. Ali Esq; SAN[2]

INTRODUCTION

May I with the respect, thank the organizers of this programme for the privilege and honour given to me to address this August body on the important topic ***"How to Lose an Appeal."*** You will undoubtedly agree with me that this topic is relevant and highly important in view of the pivotal role of the appellate system in a true democratic setting.

The principles of justice and fairness imply that decisions affecting the rights of liabilities of persons should not be absolute in the first instance but can be reviewed on appeal to a higher body than the original decision maker. There are different kinds of decisions. Decisions may emanate from administrative, regulatory, judicial, arbitral or other dispute resolution, disciplinary or regulation. Thus, decisions could be court judgments, decisions or orders of administrative tribunals, award of arbitration tribunals, decisions of regulatory bodies or even decisions of traditional rulers. Different principles and procedures govern appeals against each kind of decision. However, this paper focuses mainly on appealing judicial decisions.

The generally consensus among contemporary writers is that it is difficult to win an appeal. This is because the rebuttable presumption is that the lower Court's judgment is correct and the appealing party must convince the court otherwise to win the appeal. As such, an appellate lawyer who is desirous of winning an appeal must keep himself abreast of the practice and procedures courts, especially the Court of Appeal and the Supreme Court.

The objective of this paper is therefore, to examine the pitfalls that an appellate lawyer should be on the lookout for. It is expected that by understanding negative practice and procedures, the positive practice and procedures will be better appreciated.

What is an Appeal?

"An appeal is the resort to a superior court to review the decision of a tower court or bodies intended to correct a perceived injustice or error committed"

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[3]See http://www.courts.alaska.gov/shc/appeals.htm

[4]Appealing a Decision in Nigeria by Nnamdi Kingsley, Crag http://www.executivereview.com/knowledge_centre.php?c=110

also, be referred to as a petition for review of a case that has been decided by court of law. The petition is made by the party, who has lost part or his entire claim in a lower court's decision, to a higher court for the purpose of overturning the lower court's decision. The specific procedures for appealing, including even whether there is a right of appeal from a particular type of decision, can vary greatly from country to country. The nature of an appeal can also vary greatly, depending on the type of case and the rules of the court in the jurisdiction where the case was prosecuted.

The court that hears cases on appeal from another court is usually referred to as an appellate court. Depending on the particular legal rules that apply to each circumstance, a party to a court case who is unhappy with the decision of the court might be able to challenge that decision in an appellate court on specific grounds. These grounds typically could include errors of law, fact, or procedure (in the United States, due process). In different jurisdictions, appellate courts are also called appeals courts, courts of appeals, superior courts, or supreme courts.

An appeal, by its nature, is a continuation of the prosecution of the original cause or matter which is the subject of the appeal. See **Ogundiani v. Araba**. The position, as upheld by the courts, is that a party should not be seen to put forward, in the appellate court, a case different from what he canvassed at the trial court. See **Ohiaeri v. Akabueze.**

In Nigeria, the right of a litigant to appeal, the jurisdiction of the appellate court to entertain such appeals and the procedure to be followed are strictly regulated by the Constitution and other Statutes

History of Appellate Courts in Nigeria

The development of the Nigerian legal system has been greatly influenced by its colonial past as a part of the British Commonwealth ditto, the appellate system in Nigeria. Before the advent of the Europeans, the various indigenous people of Nigeria had different methods of dispute resolution mechanism and appellate system.

Among the Yoruba and Ibo, the system revolved around their traditional institutions. It was fashionable among the Yoruba to refer contentious matters to the head of the family. If he could not settle the dispute, the matter was taken to the head of the compound and if a solution could not be found, then to the oba Similar systems existed among the Ibo. In the North, there was a bit of formalization as founded on the Islamic legal system, the sharia. There was an elaborate system of court systems, the hub of which was the Alkali system. The Emir was the ultimate appellate judge

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theme Cou http://en.wikipedia.org/wiki/Appeal
(1978) 11 N.S.C.C. 334 @ 347
(1992) 2 NWLR (PT. 221)1 @ 20

After 1842, the power to administer and dispense justice in Nigeria was mainly vested in native courts. These courts, in dispensing justice, fashioned out systems of taxation, civil laws and procedure, penal law and sentencing policies including death sentence. It should be noted that these Native Courts are the forerunners of the present Customary, Area and Sharia Courts.

With the advent of the colonialists in the Southern part of Nigeria between 1843 1913, the British through a combination of the **Foreign Jurisdiction Act of 1843 and 1893** established law under which various courts were set up. Despite the establishment of British Courts, native courts were still allowed to function so far as the native law and custom they administered were not repugnant to natural justice, equity and good conscience. In 1863, by **Ordinance No 11 of 1863**, the Supreme Court of Lagos was established, it had both civil and criminal jurisdiction.

In 1900, via the **Supreme Court Proclamation Order No. 6,** a Supreme Court was established for the Southern Nigerian protectorate. The Court exercised Same powers and jurisdictions as were vested in Her Majesty's High Court of Justice England. The common law, the doctrines of equity and status of general application in England were administered in the court in so far as local circumstance permitted.

In most parts of Northern Nigeria, Sharia Law in its entire ramification was operative before 1892. In 1989, the **Northern Nigeria Order in Council 1899** gave the Commissioner of Northern Protectorate of Nigerian the power b for the administration of justice in that protectorate. By virtue of that order, the High Commissioner issued the **Protectorate Court Proclamation Order,** which established a Supreme Court, Provincial Court and Cantonment or Magistrate Courts. The High Commissioner also issued the **Native Courts Proclamation Order of 1900,** which established a new system of Native Courts for the territory. This arrangement endured until 1914, when the Northern ar Southern Protectorates of Nigeria were ambulated. Provincial Courts were abolished and in its place were established High courts. In 1954, the Federal Supreme Court was established.

Between 1934 and 1954, appeals from Magistrate Courts and Customary of Native courts Grade A went to the Regional High Courts, while appeals from each of the High Court of the regions went to the Federal Supreme Court. Also, appeals from the Supreme Court went to the West African Court of Appeal, while appeals from the West African Court of Appeal went to the Judicial Committee of the Privy Council. However, from 1954, appeals from the Supreme Court of Nigeria went directly to the Judicial Committee of the Privy Council, which was the court of last resort. Even after Nigeria attained independence in 1960, the Privy Cornel still remained the highest appellate court until 1963, when appeals from Federal Supreme Court to the Judicial Committee of the Privy Council were abolished at that point and the Supreme Court became the highest court in Nigeria

In 1967, the Western State, via the **Court of Appeal Edict, No 15 of 1969,** established a Regional Court of Appeal and the Supreme Court ceased to have direct jurisdiction to hear and determine appeals in any matter from the High Court of the state. In 1976, the Court of Appeal (originally known as the Federal Court of Appeal) was established by the **Court of Appeal Act, 1976**, as a national court to entertain appeals from the High Courts of each of Nigeria's 36 states, which are the trial courts of general jurisdiction. The appellate courts in Nigeria are now shaped by **Chapter VII of the Constitution of the Federal Republic of Nigeria, 1999.**

Present Appellate Courts and Their Jurisdiction

The 1999 Constitution (as amended) makes provisions for the establishment and constitution of the following appellate courts:

The Supreme Court of Nigeria

This is the apex court in the hierarchy of courts in Nigeria and is situated in the Federal Capital Territory, Abuja. The Chief Justice of the Federation heads the Judiciary of Nigeria and presides over the Court. The court has limited but exclusive original jurisdiction in any dispute between the Federation and a State of between States if, and in so far as, that dispute involves any question (whether of law or fact) on which the existence of a legal right depends. Its appellate jurisdiction is to determine appeals from the Court of Appeal and this is also to the exclusion of any other court.

The court consists of the Chief Justice of Nigeria and such number of Justices no exceeding twenty-one as may be prescribed by the National Assembly. Ordinary the Court is duly constituted if it consists of not less than five Justices of the Court, except where it is exercising its original jurisdiction or a matter involves a question as to the interpretation or application of the constitution or whether any provision relating to the Fundamental Rights provisions of the Constitution has been, is being or is likely to be contravened. In this regard, the Council constituted if it consists of seven Justices of the Court[8].

The decision of the Supreme Court on any matter is final and is not subject to an appeal to any other body or person. This is however without prejudice to the power of the President or Governor of a State's exercise of Prerogative of Mercy in appropriate cases. The decisions of the Court are binding on all other courts in Nigeria.

The Court of Appeal

This is next in the hierarchy of courts in Nigeria and its decisions are binding on all other lower courts. It is composed of the President of the Court of Appeal and other Justices of the Court of Appeal not being less than forty-nine of which not less than three shall be learned in Islamic

Personal Law and not less than also learned in Customary Law. The court has original and exclusive jurisdiction over questions as to whether a person has been validly elected to the Office of President or Vice President of the Federation or whether the term of office of such person has ceased or whether the office has become vacant. It also has appellate jurisdiction to hear and determine appeals to the exclusion of any other court from decisions of the High Courts of the States and the Federal Cap Territory, Federal High Court, the Sharia Courts of Appeal of the States or of the Federal Capital Territory, Customary Courts of Appeal of the States or of the Federal Capital Territory as well as from decisions of a court martial or other tribunals as specified by an Act of the National Assembly

The court is duly constituted by not less than three Justices for the purse exercising any of its stated jurisdictions. If an appeal is from the Sharia Court of appeal, there must not be less than three justices learned in the Islamic pers law sitting, and if from Customary Court of Appeal, not less than three justice learned in customary law shall sit. A justice who disagrees with the majority may give a dissenting opinion. A single justice is empowered to exercise any power vested in the Court of Appeal except that of final determination of e cause or matter. For administrative convenience, the court is divided into Judicial Divisions which sit in various parts of the country.

The Sharia Court of Appeal

There is a Sharia Court of Appeal for the Federal Capital Territory and any State that requires it. This Court has appellate and supervisory jurisdiction in Civil proceedings involving questions of Islamic personal law, which the Court is competent to decide in accordance with the Constitution. Matters the court can adjudicate upon relate to marriage, family relationships, gift, wills, guardianship of infants, succession, maintenance or guardianship of a physically or mentally infirm Muslim. The Court also has jurisdiction on any question where all Muslims and have elected that the case be determined in accordance with Islamic personal law. The Court comprises of a Grand Khadi and other Khadis as the National Assembly or the State Houses of Assembly (as the case may be) may prescribe.

The Customary Court of Appeal

There is a Customary Court of Appeal for the Federal Capital Territory and any State that requires it. This Court has appellate and supervisory jurisdiction in civil proceedings involving questions of customary law and is comprised of a President and such number of Judges as the National Assembly or the State Houses ol Assembly (as the case may be) may prescribe.

[8]See generally Section 230 to 232 of the Constitution of the Federal Republic of Nigeria 1999
[9]See generally Section 237 to 240 of the Constitution of the Federal Republic of Nigeria 1999
[10]See sections 9 and 10 of the Court of Appeal Act. No. 43, 1979

Types of Appeal

Depending on the judgment which is the subject of appeal, an appeal may be civil criminal, final or interlocutory.

Civil Appeals: In civil matters, a party that is dissatisfied with the ruling, judgment, decision or order of the court, whether in the exercise of its original or appellate jurisdiction, may appeal to a superior court to review the decision of a lower court and correct the perceived injustice or error committed.

Right of appeal is a Constitutional right which is exercisable at the instance of the parties to a case. It can also be exercised or with the leave of the court, by other persons having interest in the matter. The exercise shall also be in accordance with any law and rules of court regulating the powers, practice and procedure of the court. Note that in exercising the right of appeal, it can either be as of right or with the leave of the court. 15 See ***Aqua Motors vs. Ondo State Sports Council***[14] **and** ***Harriman vs. Harriman***[15]

Where leave is required to appeal, the following items must accompany application for leave to appeal.

(a) Notice of motion for leave to appeal duly completed (FORM 5).
(b) A certified true copy of the judgment of the High Court sought to be appealed against.
(c) A copy of the proposed grounds of appeal. The court usually grants leave where the question is one of general importance decided for the first time or, where there is rare and substantive complaint ww a trial judge, though he may not agree with, considers arguable. See **Ademolekun vs. Dike**. 16 Where the complaint is frivolous, leave will be refused See **Ojora vs. Odunsi**.

The application for leave to appeal is usually made to the High Court. If the application is refused; similar application can be made to the Court of Appeal within 15 days after the date of the refusal. In this case, a copy of the order of the High Court refusing application must accompany the application to the court of Appeal. However, where an appellant had not utilized the time allowed by the law, the application for extension of time within which to appeal is made to the Court of Appeal, not the High Court. 18 In this case, the proper application to make at the Court of Appeal will be for the TRINITY PRAYER viz:

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[11]See section 277 of the 1999 Constitution
[12]See section 280 of the 1999 Constitution
[13]See generally, sections 241 and 242 Constitution of the Federal Republic of Nigeria, 1999.
[14](1986) NW.LR (pt 91)
[15](1987) 2 N.S.C.C 930

(i) Extension of time to seek leave to appeal
(ii) Leave to appeal
(iii) Extension of time within which to file the Notice of Appeal

See Reg. Trustees of **CAC vs. Uffien** and **Ibrahim vs. Balogun**

In granting an application for extension of time within which to appeal, the Court normally considers whether there is a genuine reason for failure to appeal within time (which may include inadvertence or negligence on the part of the Counsel) or where delay is attributed to the Court. See **Bowaje vs. Adediwura (supra).** The appellant must also show that he has prima facie good grounds of appeal, See **Yesufu vs. Cooperative Bank**.

Criminal Appeals: In criminal matters, a person aggrieved by any judgment, conviction, sentence or order of the court, whether in the exercise of its original or appellate jurisdiction, may appeal. Right of appeal is created by statute and where there is no provision for appeal in the statute creating rights of appeals, no such right exist. See ***Nunku vs. The Police; R. vs Grantham; Boardman vs. The Sokoto N. A.24; Ugwu vs. The Attorney-General East Central State***
Right of appeal to the Court of Appeal from the decision of the High Court exercisable at the instance of an accused person or at the instance of the Attorney-General of the Federation or of a State. See ***Nafiu Rabiu vs. The State***. 26 A person who is neither the prosecutor nor the accused cannot appeal either as of right, or with leave. See **Akinbiyi vs. Adelabu**, However, a person who is affected by an order of court will be allowed to appeal, whether is a party or not to the initial action. See ***Pan African Bank vs. State***

The accused or other authority appealing shall commence his appeal by sending to the registrar of the lower court, his notice of appeal or notice of application for leave to appeal or notice of application for extension of time within which such notice might be given, as the case may be. Such notice shall be signed by the appellant himself. The period for giving notice of appeal or notice of application for leave to appeal is 90 days from the date of decision appealed against.

Note that application can be made for extension of time within which to appeal to the Court of Appeal in all cases. 31 See **Kema vs. The State**.

Final and interlocutory appeals: In order to ascertain whether an appeal is final or interlocutory, a distinction must be drawn between final and interlocutory decisions. Some legal practitioners have found themselves swimming in murky waters with regard to the means of determining whether an order or decision is final or interlocutory.

(1979) NMLR
(1964) 1 ALL NLR 61
See Order 6 Rules 1 and 2 of the court of Appeal Rules 2011
(1999) 7 NWLR Pt 610 254 20
(1997) NWLR Pt 610 254
(1989) 2 N.S.C.C. 489

The test to determine whether an order or decision is final or interlocutory is to look at the order made and not the proceedings and to see whether the entire case or proceeding has been brought to its finality or whether there are still other issues or matters to be resolved in subsequent litigation. See Excel Plastic ***Industries Ltd. vs. FBN PLC***[33]. Thus, a judgment after the hearing of the entire case is a final decision as it finally determines the matter but at the same time a decision upon a simple application challenging the court's jurisdiction may be final - if the application succeeds as it may also determine the matter. See **Akinsanya vs. UB.A. Ltd.**

The law prescribes the time within which an appeal can be initiated. If the decision is an interlocutory decision, the notice of appeal must be filed within 14 (fourteen) days from the date of the decision. If it is a final decision, the notice of appeal must be filled within three months. It has been decided by case law that the notice of appeal must be filed within the relevant time notwithstanding the fact that leave is first obtained and the computation of time starts from the date the decision is given and not when the leave is obtained.

Where the time has already lapsed because of delay in obtaining leave, an application must be brought for an extension of time within which to file the notice of appeal. A notice of appeal filed out of time without obtaining an order for extension of time, is invalid. See **Bowaje vs. Adediwura [36]; Amudipe vs. Arijori[37]; Lamai vs. Orbih[38]s and Oba Adegbera Odo Giyan 1 vs. His Panical Construction (Nig) Limited.[39]**

Also, where a decision is final, an appeal lies as of right (no need to obtain the leave of the court), but if the decision is interlocutory (and the appeal is not on ground of law) the leave of the court should be obtained. [40] See Aqua Ltd vs. **Ondo State Sports Council.[41]**

<u>Existence of Judgment Ruling or Decision</u>

We use the expressions "decision" and "judgment" so often that we scarcely ask ourselves what those expressions really mean. In **Oredoyin vs. Arowolo[42]**, the supreme court per **Oputa,** J.S.C. (as he then was) gave a comprehensive definition of judgment thus:

2215 W.A.C.A. 23
23(1969) 53 C.A.R. 369
24(1965) NMLR 329 (
251975) 6 5.C. 13
26(1980) 2 N.C.R. 117, (1980) 8-11 S.C. 130
27(1965) 1 F. S.C. 45
28(1997) 4 NWLR (pt. 499) 296
29See Order 17 Rules 3 and 4 of the Court of Appeal Rules 2011
30See Section 1 of the Court of Appeal (Amendment) Act1979
31See Section 25 Court of Appeal Act 1976 as amended by Section 6 Court of Appeal (Amendment) Act No 7,1982
32See (1986)1 NWLR 396
33(2005) 11 NWLR (PT. 935) 59

> ***"A "judgment" is an official and authentic decision of a court upon the respective rights and claims of the parties to an action or suit, therein litigated and submitted to the determination of the court. It is the decision of a court resolving the dispute between the parties and thus***
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> ***determining their rights and obligations. It is a conclusion of law upon facts as found or admitted by the parties. It is a decision given to a court upon matters submitted to it. It is the application of the law to the pleadings, and to the facts as they appear from the evidence in a case and as they are found by the court or jury, or admitted by the parties or deemed to exist upon their default"***

A judgment is synonymous with the formal decision made by a court following a lawsuit, such as imposing a sentence upon an accused person found guilty in a criminal matter, or providing a remedy for the plaintiff in a civil matter. A judgment must be in writing and it must be signed by a judge. The Court has no power to deliver an oral judgment to be reduced to writing later on. See **Unakalamba vs. C.O.P13 and Okoruwa vs. The State** .

On the other hand, a court ruling is an official proclamation by a judge (or panel of judges) that defines the legal relationships between the parties to a hearing, a trial, an appeal or other court proceedings. Such ruling requires or authorizes the carrying out of certain steps by one or more parties to a case. A court ruling must be signed by a judge.

The content a court ruling depends on the type of proceeding, the phase of the proceedings in which they are issued, and the procedural and evidentiary rules that govern the proceedings. A ruling can be as simple as setting a date for trial. It may be a final (one that concludes the court action), or an interim order (one during the action). Most rulings are written, and are signed by the judge. Some orders, however, are spoken orally by the judge in open court, and are only reduced to writing in the transcript of the proceedings.

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[34] (1986) 4 N.W.L.R 173
[35]See section 25 Court of Appeal Act
[36](1976) 6 S.C. 143
[37](1978) 9-10 S. C. 27
[38](1980) 5-7 S.C. 28 35
[39](1987) 7 CA. (Pt. 111)106
[40] See Section 220 (1) (a) (b) 1999 Constitution. section 241 (1) (a) and (b) of the (1999) Constitution
[41](1988) 4 NWLR 622
[42] (1989) 2 NWLR (Pt. 114) 172 at 211, parasG-H

Since an appeal is an invitation to a higher court to find out whether on proper consideration of facts placed before it, and the applicable law, arrived at a correct decision. The existence of a judgment or ruling is a condition precedent to a valid appeal.

Notice of Appeal

All appeals shall be by way of rehearing and shall be brought to the Court of Appeal by Notice of Appeal to be filed in the registry of the lower court Therefore the first and most important step in the prosecution of appeals is the preparation of the notice of appeal. Practitioners are required to summarize the facts and outline their grounds concisely. Well drafted notice and grounds of e the Judge(s) when hearing the appeal. While ill prepared and prolix documents lead to wasted time spent on preparation and unnecessarily protracted hearings

The Rules prescribe the form and content of the notice and grounds of appeal [45]
The notice must state the following:

(a) The notice of appeal shall set forth the grounds of appeal whether a misdirection or error in law and the particulars of such misdirection and for errors shall be stated, if not the ground shall be struck out. See ***Okone Udoh and Osawere vs. Ezeruka***.
(b) The notice of appeal must state whether it is the whole or only part of the decision of the court below that is appealed against and in the latter case, such part must be specified.
(c) The notice of appeal must also state the exact nature of the relief sought, and the names and addresses of the parties directly affected by the appeal
(d) The grounds of appeal must be set forth concisely under district heads without any argument or narrative and shall be numbered consecutively
(e) The notice of appeal shall be signed by the appellant or his legal representative. Note that in criminal appeals, the notice of appeal must be signed by the appellant himself, except in cases where the appellant nas relied on the defence of insanity or unsound mind at the trial and where the appellant is a corporate entity"

Note that there is the distinction between misdirection in law and nur in law A ground cannot be both at the same time. See ***Chidiak vs. Laguda***. Where a ground of appeal alleges misdirection or error in law, the particulars of suck misdirection or error shall be clearly stated.

[43](1958) 3 FS.C. 7
[44](1975) 5 S.C. 23 at 26

Note also, that grounds of appeal must arise from the ratio decedendi of the decision that is being challenged[50] and it must not be vague. Any ground of which is vague or general or which discloses no reasonable grand permitted except the general ground that the judgment is against the weight of evidence. See ***Awhinawai vs. Oteri[51] and Atuyeye vs. Ashamu[52]***. A ground of appeal or any part thereof which is not permitted by the Rules may be struck out by the court suo motu or upon application by the respondent.[53]

The notice and grounds of appeal must be carefully prepared. Do not leave out any part of the lower court's decision which is detrimental to the success of your appeal. This is because an appellant cannot without the leave of court, be heard in respect of any issue which does not flow from the grounds of appeal as contained in the notice of appeal. The court may however allow appellant to amend the grounds of appeal upon paying the necessary fees or upon such terms as Ana fit. See ***National Investment Properties vs. Thompson Org. Ltd[54]***.

Brief of Argument

Brief writing was first introduced into the practice and procedure in our superior courts by the Supreme Court Rules of 1977, which was revoked and re-enacted by the Supreme Court Rules of 1985. Brief writing was introduced at the Court of Appeal level by Court of Appeal (Amendment) Rules 1984. Before 1977 appellants Counsel at the Supreme Court had to prepare his case and appear to argue orally before the bench. The oral argument had to be written down by the Justice and all references to the rules of law and evidence would be read in open court and important points also written down by the justice in their own hands.

An appellant is now required to file in the Court of Appeal a brief within sixty days of the receipt of the Record of Appeal. See ***Western Steel Works Ltd vs. Iron and Steel Workers Union***.[55] The respondent is required to file his own brief within forty-five days of service of the appellant's brief on bim Where new points are raised in the respondent's brief of argument, the appellant may within 14 days of the service of the respondent's brief but not later than three clear days before the date set out down for the hearing of the appeal, file a reply to the brief which should deal with the new points so raised. Failure of the appellant to file the reply within the specified time will be taken as an admission of the new points or issues arising from the respondent's brief.

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[45]See Order & Rules to 5 of the Court of Appeal Rules 2011
[46](1960) 5 E. S. C. 162
[47](1987) 6 7 SC 135
[48]See Order 17 Rule 4 of the Court of Appeal Rules 2011
[49](1964) NMLR 123 at 125
[50]See Garuba v. Omochodian: http://easylowonline wordpress
[51](1984) 5 S.C. or (1984) N.S.C.C. 299
[52](1987)1 N.S.C.C.

It should be noted however, that except with the leave of the court no oral argument would be allowed in support of any argument raised in the brief on behalf of any party for whom no brief has been filed.[56]

Appellant's Brief

A good appellant's brief as a general rule should be brief, containing what are on appellant's view, the issues arising in the appeal as well as any point taken in the court below which the appellant wishes to abandon and any point not taken in the High Court below which he seeks the leave of the court to argue.

It is important for the appellant's counsel to carefully and properly formulate the issues for determination, which must flow from the grounds of appeal Where they do not, they must be fundamental in order to be entertained by the court. Sec ***Sha vs. Kwam***[57]. Many practitioners have lost their appeals in spite of apparently well written briefs.

The first lesson is that the question to be submitted for determination must have been an issue submitted to the lower court for determination. In the case of ***Balarabe Musa vs. The State***[58]***, Oputa,*** J.S.C. (as he then was) stated

> ***"Learned Counsel for the appellants should be well advised to know that they can only urge on appeal, points arising from a decision of a trial court on an issue submitted to it for determination. If no such question has been submitted it cannot form the basis of a ground of appeal or, an issue for determination in a brief"***

The second lesson is that an appeal court can only "determine" issues which bar been submitted to it for determination". Stressing the need to raise issues for determination in briefs, ***Justice Uwaifo***, J. C. A. in the case of ***Echo Enterprises Ltd vs. Standard Bank of Nigeria Limited***[59] stated:

> ***"I wish to remark that in none of these briefs of argument filed were any issues for determination raised. There is need to always comply with rules of briefs writing in order that relevant issues may be considered as a guide.***

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[53]See section 226 of the Evidence Act 5
[54](1969)1 ALL NLR
[55](1986) 3 NWLR Pt. 30 Pg. 617
[56]See order 18 Rules 1 to 9 of the Court of Appeal Rules 2011

The third lesson is that in formulating the issues, counsel show notes the distinction between issues for determination and grounds of appeal. The grounds of appeal filed accentuate the defects in the judgment sought to be set aside while the issues for determination accentuate the crux of the reason encompassing one or more grounds of appeal for the determination of the appeal

In ***Ikemson vs. State 60, Justice Karibi-Whyte,*** J.S.C. (as he then was) observed:

> **"Both counsel have not appreciated the fact that the issue for determination must necessarily arise from the grounds of appeal filed, and could not have an independent existence". Counsel should learn, as a fourth lesson, that issues for determination in an appeal are not the same as the grounds of appeal filed. Karibi- Whyte J.S.C. in the same judgment stated that: "Whereas the grounds of appeal filed accentuate the defects in the judgment sought to be set aside, the issues for determination accentuate the crux of the reasons encompassing one or more grounds of appeal for the determination of the appeal".**

The fourth lesson is that in the ordinary run of cases, it is generally better to focus the appellate court's attention on a few well briefed issues which, ideally, are some way related to each other. A brief that gives cursory treatment to too many issues may be worse than no brief at all. Such a brief is likely to result in an opinion that rejects all the issues in equally cursory fashion. An oversize brief that gives the full appellate treatment to the issues, if allowed by the court, may induce fatigue rather than keen interest.

Again, if you cannot define your issue clearly, you don't have an issue. But you must also phrase it simply, and explicitly. The first thing the judge will see is your formulation of your issue in the table of contents. It must be simple, and it must be precise. The requirement of brevity extends to the statement of facts, as well.

More important, rarely do we have a multitude of equally appealing issues. In the typical case, some of the issues that we preserved are much more likely than others to result in reversal. Why should we clutter our briefs with one shot if we have one or two clear cut potential winners? Once again, our value to clients is in distilling the case to its core without losing anything important in the process. Law students are asked to spot every issue only to show off their

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[57]2000) 5 SCNJ 104j

[58](2001) 10 NWLR (Pt. 722) 668

[59](1989) 4 NWLR (Pt. 116) 509

knowledge. We are in the business of picking and choosing issues, which requires good judgment and not merely knowledge.

Respondent's Brief

Read, digest and understand the appellant's brief very well, do not take the introduction and facts stated in the appellant's brief for granted Note the important submissions on issues of law and facts in the appellant's brief and reply same in the order in which they were argued in the appellant's brief. Read and check up every statutory and decided authority cited in the Respondents brief Make efforts to distinguish such cases or cite authorities of higher courts to the contrary of the proposition if possible. Do not forget to carefully argue any objections contained in your brief.

You don't have to adopt the issues for determination as formulated i appellant's brief, your issues should be designed to impeach the applicant's submissions and support the lower court's decision. However, the issues for determination must relate to the grounds of appeal. Commenting on the necessity to relate issues for determination to grounds of appeal in the case of ***Atanda vs. Ajani***[61], the Supreme Court (per **Nnaemeka - Agu,** J.S.C.) held as follows.

> ***"Indeed, none of the four issues for determination as formulated by the respondent has any relevance to the grounds of appeal before the court. This court has stated a number of times that a respondent's primary duty is to support the judgment appealed against by showing that the contentions of the appellants as to the grounds of error are without merit. Also, if they have cross-appealed, they cannot Formulate issues as it were, "in nubibus" - hanging in the skies".***

Reply Brief

Read, digest and understand the respondent's brief very well, pay particular attention to the introduction and facts stated in the respondent's brief. Note the important submissions on new areas of law and fact in the brief. Pay particular attention to any objections raised, properly and improperly, in the respondent's brief. Do an introduction to underscore why a reply was necessary Reply to every new point of fact or law in the order in which they were argued in the Respondent's brief. Read and check up every statutory and decided authority cited in the Respondent's brief. Make efforts to distinguish such cases or cite authorities of higher courts to the contrary of the proposition. On what a reply brief should not contain, see the cases of ***Ibeto V Aminu (2007) 5 NWLR (Pt. 1028) 446 CA; Amadasunm V Ume (2007) 13 NWLR (Pt. 1051) 214 CA and Kayode V State (2008) 1 NWLR (Pt. 1068) 281 CA.***

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[60](1989) N.S.C.C. 471
[61](1989) 2 N. S. C C. 5

Outline of a Brief

A brief is a written statement containing the facts of a case and the lega arguments supporting a party's legal contentions. A brief is referred to as A succinct statement of his argument in the appeal". 62 Great pains must therefore be taken to set down in accordance with the rules of procedure, well thought out argument on the case of your client either as appellant or respondent. The outline of a good brief is set out hereunder:

1. Introduction or Preliminary Statement
    (a) Introduction- Note the genesis of the matter.
    (b) Highlight the facts found by the court(s).

2. Statement of facts
3. Questions or issues for determination
4. The Argument
    (a) Recall the issue.
    (b) The law on the issue or the subject.
    (c) Facts found by the court.
    (d) Factual and legal reasons for impeaching and/or supporting the decision.
    (e) Pay particular attention to citation of cases.
    (f) Highlight and/or quote dictum/dicta in support of your position.
    (g) Round up with summary and prayer.

5. Summary and Conclusion
6. List of Legal Authorities
7. Addresses for service

Tips for Writing an Effective Brief

It has been said that the darkest moment for any lawyer who must write a brief- indeed, the worst moment for any writer, comes just before the first sentence is written. At this moment, the computer screen/paper is blank and so it is likely to remain for many painful minutes or even hours. The screen fills with words. The words are deleted. The screen is blank again and it is at this moment that all of question whether we will be able to write any brief, let alone a great one. The following tips will get you through that moment of appellate stage fright so that you will fearlessly write compelling briefs that win the admiration of your clients, your adversaries and the courts.

Don't Rush: Good writing takes time. Presumably it takes time to write good novels, good screenplays and good musical compositions. Why should it take less time to write good briefs? In a good brief, every fact should be perfectly

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See Order 18 Rule 2 of the Court of Appeal Rules 2011 and Order 6, Rule 5 of the Supreme Court Rule 63 "Ten Tips for Writing a Great Appellate Brief" by Andrew R. Schulman, Esq Getman, Stacey, Schulthess & Steere PA.

supported by a citation to a specific page in the record, and it takes time to ensure perfect factual citation. Every legal principle should be supported by the best possible citations, and it takes a lot of time to get this right. If you scrimp on hours then your brief may get your point across, but it won't sing. It will be read and understood, but it won't be read effortlessly. Your account of the facts and your explanation of the law will be noted, but perhaps more skeptically than necessary.

Avoid unnecessarily lengthy briefs. Briefs should be brief. Everything it follows flows from this initial premise: you must be as succinct as possible There is almost a rule: the shorter brief wins. This means you must edit tightly, you must formulate your points briefly, and you must not repeat yourself.

Trial lawyers get used to using the formula, "Tell them what you're going to tell them; tell them; then tell them what you told them." That is a very bad idea on appeal. Make the point well once. By the time you are writing the argument you will have already stated the issue in your heading and your summary of the argument. Don't repeat it again. If judges want to reread your argument, they can.

The judge who reads your brief will be sitting at a desk on which there are stacks of other cases, in front of a credenza or near a table similarly burdened with brilliant appellate reasoning. You must grab this reader's attention quick. preferably in the first paragraph, then not abuse the reader's attention. Briefs are not so named that out of whimsy. After a page or so, the longer goes on, the more power it loses.

If you assume you are writing for victims of attention deficit disorder, you will not go far wrong. It's true: they don't have much attention to spare for your case. Appellate judges have a lot of other matters clamoring for their attention. Grab them quickly or they will lose patience. When the judge loses patience, you lose the case.

The more work you do for the appellate judge, the more likely you are to prevail. So, when writing your brief, pretend you are writing the opinion. Judges appreciate a brief that can become the opinion, with very few changes. So, think of opinions. Opinions are not argumentative. They are not angry. They state the law authoritatively but not exhaustively. They give only enough facts to and to address the points of error. Most of all, they have an air of authority ne do not quibble. These are the facts. These are the claims. This is the law that applies to those claims.

Don't muddle things up: A brief must be clear, simple, and easy to read There is a school of thought among lawyers that says basically, "If I muddle this up, make the issues really cloudy, then the appellate court can pick out what it wants the court can write my brief for me, choosing whatever aspect of what I spill out of that appeal to them." The consensus among appellate judges, however, is that none of it will appeal to them.

More than anything, appellate judges want a clear, precise statement of the error claimed: who made a mistake, and what it was. They want it in simple language, too. Judges who read a lot of briefs are suspicious of fancy writing and intricate phrases. They went to law school too: you're not going to impress them. In too many cases, well-worn legal phrases disguise lack of thinking. If you cannot phrase your point of error or issue for appeal simply, you may not have an issue at all.

If you're having trouble writing a clear, simple statement of your point, you need to think more about exactly what your point is. Maybe your convoluted phrases are hiding the truth even from yourself. Before you rewrite, re-think. Is this the real point? Maybe the real issue is a shade different from what you thought it was. Think your ideas through to their logical end, which should be clear and simple

If your argument is not clear, your opponent can use it to his own advantage Sometimes a judge (or briefing attorney, or staff attorney) finishes a brief thinking, "Huh?" Then the reader opens the opposing brief and reads, "What appellant appears to argue is that..." The reader (who will soon be the writer - of the opinion) leaps on that idea. Oh. Okay. Now I understand. The opinion writer writes a simple opinion instead of exploring your complicated argument. The appellate practitioner who can write more clearly can often take the issue away from opposing counsel whose writing is more muddled

Persuade the Court: We are advocates for our clients' positions; the purpose or an appellate brief is persuasion. As an attorney, it is your job to persuade the court that your arguments should prevail. As an attorney, it is your job to persuade the court that your arguments should prevail and that the relief sought should be granted. The judges know this. But that doesn't mean we can't be trusted.

It is basic, but critical to persuade the court that the result you seek is the rob result. The court has to feel good about ruling in favor of your client. According ***Judge Gurfein:***

> ***"It is still the mystery of the appellate process that a result is reached in an opinion on thoroughly logical and precedential grounds while it was first approached as the right and fair thing to do."***

The statement of case and facts is critical in this regard. You are most likely to prevail if your properly presented statement of the facts without argument makes the reader believe that your client should prevail. In order to do this, you should not set out the facts in the same way in every brief; sometimes you may need a chronology of facts, other times you may not.

This does not mean ignoring bad facts, or slanting facts your way even though you were the losing party at the court below. It means marshaling your facts within the standard of review the court will be applying, in a manner that inexorably leads the reader to conclude that your client should win. On the other hand, if you are the respondent, consider the broader ramifications of a legal

ruling in your client's favor: Is the ruling good or bad as a general, jurisprudential principle? Remember the first thing the court reads should be what the issue is and why you prevail on that issue.

Avoid breaching any of the Rules or otherwise stepping outside the medium of brief writing. Although Appellate briefs follow very narrow and traditional conventions, yet there is great room for creativity.

First, remember that appellate courts have exacting Rules about what must, and must not be in a brief. There are page limits, font restrictions, citation conventions and rules governing the colour of the brief. 65 Read those rules before you the notice of appeal and again, before you start writing your brief. This "tip" is so obvious that it is not really a tip at all, but you will be surprised at the number of non-conforming briefs that get filed.

You can however, be creative without either bending any of the formal rules or otherwise stepping outside the medium of brief writing. You are writing a legal argument for an appellate court, not a magazine article or blog entry. Yet at the same time, try very hard to keep the reader engaged, so that reading your brief will be the best part of his or her day.

Don't take liberties with your citations on legal authorities: your first goal in writing a brief is to be helpful to the court. Let them use your brief, your appendix, your citations to the record and your citations to the law as their primary source of information. Like a good salesperson, you are guiding others through a "purchasing" decision. They can get the information they need to make that decision from four sources: The lower court's decision; your briefs, the other side's briefs; or their own, independent, review of the facts and law. In most cases, the first place an appellate court looks for guidance is in the lower courts narrative order, if one exists. The second place should be your brief. Indeed, your brief should more helpful than the trial court's decision, especially if you are the appellant and the trial court ruled against you.

How do you do this? First, you make sure that every fact, no matter how small, is perfectly cited to a specific page or paragraph in the record. The citations alone speak to credibility and, when they are checked by the judges and found to be correct; our credibility is proven rather than undermined.

Second, include every "bad fact" along with the "good" ones. Regardless of the ethical issues involved, if you are caught cherry picking the facts viewed as annoying salesperson rather than as a helpful one. The judge will leave the showroom and pick up the other side's brief. Then, if you prevail it will be despite, rather than because of your hard sales tactics. We make the facts compel the conclusion that we want the court to "buy" by arranging them in the correct order and the correct manner. You can be exceedingly honest with the facts and remain an advocate at the same time

[64]John C. Godbold, Twenty Pages and Twenty Minutes - Effective Advocacy on Appeal 30 SWL) 801 11476) See
[65]Order 18 Rule 3 of the court of Appeal rules 2011

Third, include a lot of parentheticals which describe the precise point for which you cite an authority. Pay great attention to citation signals, so that you never use "see," when what you mean is "cf:" or, even, "see e.g." Anybody who checks your citations should know that they are 100% honest.

Recognize that our judges are all generalists. In a single day, they hear commercial disputes, criminal appeals, marital cases, insurance matters, election. petition appeals and constitutional matters. Without being either presumptuous or patronizing, a good brief can help them by explaining the law. Every good brief has a clear description of the general governing standards that should have been applied by the trial court. Again, this may be a formality in many cases because Judges are expected to know the law. But in other cases, a concise and clear statement of the general governing standards can actually assist the reader.

Avoid Personal Attacks. It is one thing to say that your opponent is wrong. If you are an appellant, that is the purpose of your brief. It is another to take the argument into the sandbox by calling names. That is exactly what happens when you accuse opposing counsel of misrepresenting the facts or the law.

Don't overtax the reader. Short sentences make our briefs more readable. You can use some longer sentences to make sure that the writing is not too staccato or disjointed, but try to keep the sentence structure as simple as possible. Also, but try as much as possible to use plain language. You may use a few more advanced vocabulary words, but the words used, except legal terms, should be words that can be found in an elementary school dictionary.

Short paragraphs tell the reader that he or she can take a break. A good paragraph has no more than four or five separate sentences. A paragraph that takes more than half a page may overtax the reader.

To avoid overtaxing the reader, facts and the law need to be chopped up into bite size chunks. To accomplish this, we must use Sub-Headings. Sub-headings (and sub-sub-headings) can break a thirty-page brief down into manageable two-page sections. They tell the reader what to expect next

Never use legalese except when you have to: It is necessary, of course, to use correct and precise legal terminology. An executor is not an administrator and a man whose house was burgled was not "robbed." But why is it necessary to use words such as "herewith" or "hereinafter" or phrases such as "within said time period" or "on or about"? Why would anybody ever say "at this point in time," when what he means to say is "now?".

Never file a brief without proof-reading. Give painstaking attention to proofreading. Even experienced writers cannot produce a polished product on the first draft. Proof-reading is essential! We cannot emphasize this enough. You must plan your time to leave ample time to proofread.

When you are proof-reading, don't fall in love with your own prose. You are not preparing a literary masterpiece - you are preparing a tool to help someone figure out an answer to a dispute as concisely and quickly as possible. Be brutally objective about your own work. How do you go about proof-reading? This is something that should be done on paper, not on a computer. Print the brief and read it, with a sharp red pen, in the following way:

First, focus on the organization and the flow of the brief as a whole. Have you developed your arguments first-that is, demonstrated why you should win as opposed to what's wrong with the other side's argument? Do the paragraphs, themes, and thoughts flow from one to next? Are your thoughts in sequence? Is the transition clear?

Does your central point emerge clearly and quickly? Is your logic explicit and sound? Have you considered and anticipated to the extent necessary possibly counter arguments or alternatives to your arguments and framed your arguments in the light of them? Is your tone appropriate? Could you be bolder in your thesis? Or have you overstated it?

Look at the paragraphs next. Are they too long? Does each paragraph have a topic sentence? Do all paragraphs fit within the heading? Do you need more or different sub-headings? Then focus on each sentence. One thought to a sentence. Break long sentences in half. Eliminate rhetoric's, hyperbole, and overstatement Avert metaphors and hypotheticals. Be careful that any quotations are correct-it is a "little learning," not a "little knowledge."

Eliminate any negative references to counsel or the lower court. Don't say that "counsel falsely told" the court something. Just show why the statement is incorrect. The court will know whether it was a blatant lie or not.

Eliminate alphabetical short forms, repetition and redundancy. Eliminate indented quotes if at all possible. If the quote is really essential to make the point, explain the substance of the quote in the sentence leading into the quote, so the court will know the point you are trying to make by using the quote. Beware of the placement of dependent clauses within, or particularly at the end of a sentence where it is unclear what words the clause modifies, and as a result the sentence can be read more than one way. Turn any passive tense to active tense

Set the brief aside for a while. Then proof-read again. That way the writing will seem fresher in your mind and not as familiar. You will catch things you missed as you were reading the brief over before. Look at the brief as a whole. Does it communicate your arguments and themes in a concise,

understandable way? Is the tone proper? Is it courteous and in appropriate moderation? Have you cut away every nonessential word, sentence, and paragraph? Can you shorten the brief? You do not have to use all the pages you are allowed. Are there any types or grammatical errors? Check your Spellings.

Never file a brief without giving it to one or two other attorneys to read first

Objections

A respondent intending to rely upon preliminary objection to the hearing of the appeal shall give the appellant three clear days' notice thereof before the hearing setting out the grounds of objection and shall file such notice together with seven copies thereof with the Registrar of the Court of Appeal within the same time. If the respondent fails to comply with this rule, the court may refuse to entertain the objection or may adjourn the hearing thereof at the cost of the respondent or may make such order as I think fit.[66]

In practice, notice of preliminary objection to an appeal may be given in the bre of argument, but the party raising the preliminary objection in his brief of argument must not forget to draw the attention of the court to his objection and seek the leave of the court move the objection before the oral hearing of the appeal commences. Otherwise, the objection will be deemed to have been waived and therefore abandoned. In ***Nsirim v. Nsirim***[67], the Supreme Court pa ***Obaseki,*** J.S.C. stated as follows:

> ***"The respondent in the instant appeal has contended that although the objection was stated in the brief, the court was. not moved at the oral hearing of the appeal to strike out the grounds for failure of particulars of errors. He therefore submitted that the appellant herein should be taken to have abandoned the objection more so as it was not an issue for determination in the appeal before the court of appeal. In my opinion, there is substantial merit in the contention of the respondent. Being a preliminary objection, the objection should have been by motion on notice before the hearing of the appeal so that arguments on it can be heard by the court. While notice of objection may be given in the brief, it does not dispense with the need for the respondent to move the court at the oral hearing for the relief prayed for. This preliminary objection not having been raised and argued at the oral hearing the Court of Appeal cannot be condemned as having erred in allowing the then appellant (now respondent) to argue his appeals."***

[66] See Order 10 Rules 1 and 3 of the Court of Appeal Rules 2011
[67](1990) 3 NWLR (Pt. 138) 285 at 296-297

Similarly, a party raising the preliminary objection in his brief should not wait until after the oral hearing of the appeal before taking his objection, if he does, the objection will be deemed to have been waived and therefore abandoned see ***Agagu vs. Mimikos***[68]***,*** where the 1st respondent raised a preliminary objection against some of the grounds of appeal in some of the notices of appeal filed on the ground of incompetence and he prayed that they should be struck out. The said preliminary objections were raised and argued in his brief of argument, but the same was not taken before the hearing of the appeals. Rather, it was taken after the appeals had been argued. The Court of Appeal per Abdullahi, P.C.A. (as he then was), held:

> ***".....However, the objection was not taken before the hearing of the appeal, even though it was canvassed or argued in the petitioner/first respondent's brief of argument. It was taken after all the appeals had been argued. This omission can be traced directly to the multiplicity of appeals taken together, which provided learned senior counsel for Dr. Olusegun Agagu an escape route. The situation was founded on the Supreme Court decision in Lagga v. Surhuna (2008) 16 NWLR (Pt. 1114), 427 at 480 - 1. Counsel contended that the preliminary objection was abandoned or deemed abandoned having not been raised prior to the hearing of the appeal. It makes sense. It is to demonstrate the futility of bolting the stable after the horse had escaped. See also Oforkire & Anor. v. Maduike & Others (2003) 5, NWLR (Pi. 812) 166. 178-179***
>
> ***The notice of preliminary objection can be given in their respondent's brief, but a party filing it in the brief, must ask the court for leave to move the notice of objection before the oral hearing of the appeal commences. Otherwise, it will be deemed to have been waived and therefore abandoned."***

Oral Hearing of Appeal

The Appellant is entitled to open and conclude arguments. Where there is a cross appeal or a Respondent's Notice, the appeal and the Cross-Appeal or Respondent Notice is usually argued together with the appeal as one case and within the time allotted for one case and the case may, depending on the nature of the appeal, decide which of the parties is to open and close argument.

In the adoption of briefs filed by parties, counsel should bear in mind that the main aim of oral argument, as provided for under the Rules, is to emphasize and clarify points already raised in the Brief of Argument. It is recommended that

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[68](2009) 7 NWLR (PT. 1140) 342

[69]See order 18 Rule 9 of the Court of Appeal Rules 2011.

[70]See Order 18 Rule 9 of the Court of Appeal of Rules 2011

counsel seize the occasion to buttress and press home points that are in favour of the party's case, within the limited time allowed for oral adumbration

Where a counsel is saddled with the responsibility of adopting a brief, it is immaterial whether or not he settled the brief. All that is required is adequate preparation. The following are helpful in the preparation for the adoption of a brief in court.

1. Go through the record.
2. Read all the briefs with understanding.
3. If objection has been raised by you or against you, ensure that the arguments in the brief covers it or appropriate reply.
4. Identify the most potent issue or issues.
5. Put down your argument in expatiation of such issue or issues.
6. Prepare a list of all the processes that will be used for the appeal.
7. When appeal is listed for hearing, you must always be prepared to go on.
8. When the case is called, and after appearances, indicate to the Court that you are ready.
9. If you are the Respondent, pay particular attention to the Reply brief.
10. If you are the Appellant, ensure that you file a reply brief when necessary.
11. Watch the panel and study the drift of argument.
12. Be attentive to hints from the bench.

CONCLUSION

Understanding the appeal process is a vital part of efficient justice delivery. The lack of understanding of the appeal process has remained an albatross of several appeals which have failed to meet the strict requirements of a valid appeal. Appealing decisions requires a good grasp of the substantive and procedural law of the subject matter of the case as well as the grounds of appeal permitted by law. It is therefore important that we all take seriously our responsibility to ensure the effective prosecution and determination of appeals.

Once again, I thank the organizers for the invitation extended to me to share my thoughts with my learned colleagues, and thanks to you all for your attentiveness

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By Order 18 Rule 9, the time allowed is 30 minutes for each party, unless otherwise directed by the Court