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UPPING YOUR GAME: HOW TO WRITE AN EXCEPTIONAL APPELLATE BRIEF

By: John Addams, Esq.

As advocates, many of us love the excitement and the intellectual back-and-forth of oral argument. Still, appeals are typically decided on the strength of the briefing rather than oral advocacy. In fact, in many courts, a near final draft opinion has already been prepared for oral argument. That is why the briefing is critical, and often decisive. Below are some insights that can help take your written advocacy to the next level, and therefore maximize your chances of success in appellate courts.

Approaching the task

Give yourself plenty of time. Trial lawyers are often surprised by how long it takes them to write an appellate brief. Some thought they could simply rework a trial brief or points and authorities from a dispositive motion. That's rarely the case. Indeed, published appellate decisions have commented that presenting recycled trial court briefing on appeal is "substandard" work, and such briefing does not address the critical question on appeal—whether the trial court made an error that was sufficiently prejudicial that it warrants reversal. (See *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 410.) Thus, there is an art to writing a persuasive appellate brief, and it takes time.

If you need more time to finish your brief in state court appeals, you can get up to an additional 60 days through a stipulation with opposing counsel or an application with the court. With opening and respondent's briefs, the court also gives you an additional 15 days, which is commonly referred to as "rule time." Appellate specialists often take advantage of this extra time. Word of caution: Rule time only applies to opening and respondent's briefs. It does not apply for reply briefs.

Be objective. As trial counsel, you have probably lived with this case for a long time, and it is understandable why you would be emotionally attached to your arguments.

However, to be an effective appellate advocate, you must approach the appeal objectively. Arguments you were wed to at the trial court level might not be effective on appeal. Run your ideas by another attorney in your firm or a colleague who was not involved with the case. This also gives you a fresh pair of eyes that see issues or arguments you may have missed.

Write like you talk. Trial lawyers are known for their oratory skills and effective use of plain and simple language when speaking to juries and judges. But when it comes to writing appellate briefs, lawyers often slip into legalese and redundancy. Write your brief like you speak. Use words that are simple, descriptive, and easy to understand. Again, give the brief to someone who knows nothing about the case. If they understand your arguments and find them to be persuasive, then you have done your job well.

Shorter is better. There is a tendency to believe longer and more "academic-looking" briefs are better. That is rarely the case. Research attorneys and appellate court justices will almost always find a shorter, well-written brief to be more effective than one that takes longer to get to the same point. After all, they do a lot of reading, and your brief is just one of many they will read that week. Put yourself in their shoes. Which brief would you rather read? Although the rules give you 14,000 words for your opening and respondent's briefs, you should typically work toward a word count that falls well short of that number. Depending on the nature of the appeal, briefs around half this length or even less can be very effective. Even if your appeal involves a complicated factual background and difficult legal issues, the best appellate advocacy makes the complicated simple.

Edit, edit, and edit some more. To get to the shorter and more effective brief, you need to edit it repeatedly. It takes longer to write a short brief than it does to write a long one. Of course, initial drafts will start out longer because it is more important at that point to get your thoughts on paper. In fact, editing at this stage can impede your creative process. It is hard to be creative while being concise, as each skill comes from opposite sides of the brain. It is best to wait until after you have finished your first draft to edit.

Eliminate words that don't add anything. One word you may often delete is "that." Also, overly descriptive adjectives like "clearly" in describing arguments are rarely helpful. When you can, write in the active voice and present tense. Use transition words to help the reader move easily from one paragraph to the next, and include lead sentences that reveal what you will be discussing next. Break up "run-on" or especially long sentences into two. And mix in shorter sentences with longer ones. Ultimately, you are working toward a brief that is easy to read and has a nice flow. Usage and style dictionaries should be part of your toolbox.

Selecting issues on appeal and identifying the standard(s) of review

If you are the appellant, identify your best issues and (unless yours is a particularly large or complicated case) raise no more than three or four. Of course, if you only have one good issue, limit your appeal to that one. Unless there is good reason for doing so, don't raise weak arguments. They typically only weaken your strongest arguments. Many believe that starting with your strongest argument is most effective. Closing with a strong argument is also recommended, where possible.

Your chances of success on appeal depend largely on the applicable standard of review. As one court explained, "the standard of review is the compass that guides the appellate court to its decision. It defines and limits the course the court follows in arriving at its destination. Deviations from the path, whether it be one most or least traveled, leave writer and reader lost in the wilderness." (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018.)

There are typically three potential standards of review on appeal—"substantial evidence," "abuse of discretion," and "independent" or "de novo." When the substantial evidence standard applies, the trial court's resolution of disputed facts must be affirmed as long as they are supported by substantial evidence, which can be found by a single, credible witness or piece of evidence. Under the abuse of discretion standard, the appellate court may reverse a discretionary trial court ruling only when you show a "clear case of abuse" and "a miscarriage of justice." Generally, any rational decision must be affirmed, even if the appellate justices would have reached a different decision. When your appeal involves a pure question of law, the independent or de novo standard of review applies. This standard presents the best chance of winning on appeal, because the court will decide the issue anew, without giving any deference to the trial court's ruling or reasoning. As the appellant, you want to look for issues governed by the de novo standard.



When in doubt, check the Rutter Group's practice guide on Civil Appeals and Writs, which provides an excellent explanation of the various standards of review with examples when they apply.

Writing the introduction

This is your opportunity to make a first impression, which are lasting ones. A good introduction orients the reader to the nature of the appeal (e.g., "This appeal follows a successful motion for summary judgment"), includes some important facts, provides a basic roadmap for your arguments, and begins to develop a theme—in other words, why your client should win. If possible, your introduction should be two pages or less. Some appellate practitioners write this section first, while others find it easier to write it after fully developing the facts and their arguments on the brief. Do what works best for you. But take the time you need to make it exceptional.

Statement of facts and procedural history—telling your client's story

If you are the appellant, this section will follow the statement of appealability and standard of review sections. If you can, present your facts by telling a story chronologically. Stories usually have more impact on the reader than merely reciting facts. While you **must fairly** present the relevant facts, you can do so in a manner that is persuasive. This applies to respondents as well. Do not simply rely on appellant's statement of the facts if you can state them in a way that better supports your position.

Omit facts that are not essential to the appellate court's decision. Include dates only when they are important in making your legal arguments. While a compelling and complete story is essential, extraneous facts unnecessarily add length and distract the reader.

Make sure your statement of facts is limited to what is in the record on appeal. In this regard, include accurate record cites. Too often, lawyers wait to add record cites until the last minute, which leads to mistakes. If you can, prepare your appendix before you start drafting the statement of facts, so that you can add accurate record cites sooner than later.

An appellant's opening brief must also summarize the relevant procedural history.

Effective arguments

Again, present only your best arguments and generally limit your brief to no more than three or four issues. Start off with your best argument. A trial court error does not automatically require reversal or modification of the appealed judgment or order. You must also show the error was "prejudicial," meaning it is reasonably probable your client would have had a more favorable result without the error. Nearly every trial involves errors that do not change the outcome. You must identify those errors that made a difference.

Organize the argument section by using major headings and subheadings that describe your arguments in a short and concise manner. Do not repeat your points. Although repetition can help persuade jurors, the court only needs to read your argument once.

Use footnotes sparingly. They can be helpful when you are providing the court with full quotations from pertinent authority or the appellate record, or providing additional information the court might find useful. However, the court may disregard any legal argument made only in a footnote.

Summarize the most important cases or statutes that support your position and explain how your facts fall within that authority. The argument should be tailored to the applicable standard of review. Make good use of parentheticals (a bracket with a short description) when listing other cases that help your cause. Avoid needless string cites.

You should not ignore authority that might hurt your case. Assume the other side will cite to it. Certainly, the appellate court will find it. Explain why the case is distinguishable or should not be followed.

Do not use "fighting words," make personal attacks on the other side or opposing counsel, or insult the trial court. There is simply no place for that in appellate advocacy, and the court may interpret such language as an implicit concession that your legal argument is not a good one.

The conclusion—tell the court what you want

This is your last opportunity to make an impression. Consider going back to your theme and writing a short statement about why you should win. This is also where you need to ask the court for the exact disposition your client seeks. Courts of Appeal may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings. Be specific in requesting the relief you seek.

Finally, enjoy the process! Although writing a persuasive brief involves hard work, the reward is well worth the effort.



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