Appellate Tips for Trial Lawyers

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Appeals can be a minefield for those who don't regularly practice in the appellate courts. This series of short articles, provided by members of the Association's Appellate Courts Committee, will help you find your way. Although the articles focus primarily on California state court appeals, much of the guidance will apply in any appellate court.

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Expert Appellate Briefs Keep the Reader in Mind

by Mitchell C. Tilner

For an appellate specialist, steering a case to a successful conclusion in the California Court of Appeal or the California Supreme Court can be a challenge. For a trial attorney who rarely handles appeals, the prospect can be downright daunting. The most formidable of the tasks with which trial attorneys may not be comfortable or familiar is preparing an appellate brief that effectively presents the client's case.

The brief is critical to success on appeal. While both the brief and the oral argument afford counsel opportunities to explain the merits of the case to the court, oral argument is dwindling in significance. Most appellate panels in California prepare tentative opinions based on the briefs before hearing argument and, according to many justices, rarely depart from those tentative opinions. Thus, unlike pleadings, motions, and other papers filed in the trial court, which are usually only steps along the road to the final judgment, the brief alone often makes or breaks the case on appeal.

Volumes have been written about the art of appellate briefing, but most of the advice and rules flow from a single, overarching principle: Every part of the brief—from the Introduction to the Conclusion—should be written with the needs and expectations of the reader in mind.

Sensitivity to the reader—the appellate judge, law clerk, or research attorney—distinguishes the expert brief writer from the novice. The expert strives to satisfy the reader's needs. The expert writes for a judge who wants to understand it all as quickly as possible because the press of work is constant. The expert recognizes that his or her brief is just one among many competing for the judge's time and attention. Therefore, the expert delivers easy access to well-ordered, well-written and comprehensible arguments.

The novice, in contrast, gets bogged down by his or her own needs. The novice feels compelled to recite every fact, catalog every error, and repeat every argument that seemed important in the crucible of the trial court, oblivious to whether the appellate judge will likely consider the fact significant, the error prejudicial, or the argument meritorious. To the novice, anything that was worth arguing about in the trial court is worth arguing about on appeal.

Experts picture themselves sitting in the judge's chair and try to see their own brief through the judge's eyes. The expert knows that "[t]he overarching objective of a brief is to make the court's job easier. Every other consideration is subordinate." Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 59 (2008).

To ensure that the brief eases the judge's task—and thus maximizes the likelihood of success on appeal—the expert writes and rewrites with these questions in mind:

- Does the Introduction succinctly and persuasively frame the issues and preview all the arguments in the brief, so that a busy judge going back to the brief and rereading only the Introduction will remember the issues, the arguments, and the reasons why my client should prevail? Have I crafted the Introduction "so that within the first two or three pages, [the judge will] know basically what the case is about; what legal questions are at issue; what will be [the] standard of review; what are the essential arguments; and what

is the relief sought"? Bryan A. Garner, "Judges on Briefing: A National Survey," 8 *The Scribes J. of Legal Writing* 1, 21 (2001-02) (quoting Montana Supreme Court Justice James C. Nelson).

- Have I been scrupulously accurate in recounting the facts and describing the legal authorities? Have I remembered that "[o]f prime importance, a brief should be trustworthy. If authorities are inaccurately described, the judge will lose confidence in the reliability of the brief and its author; if the judge reads on at all, she will do so with a skeptical eye." Garner, *supra* at 10 (quoting U.S. Supreme Court Associate Justice Ruth Bader Ginsburg).
- Do the facts tell an interesting and compelling story? Would a judge reading only the facts be sympathetic to my client's position, even before reading the legal arguments?
- Is the brief clearly and logically organized? Have I separated the historical facts (Statement of Facts) from the procedural facts (Statement of the Case)? Have I opened the Legal Argument section with my strongest argument, explaining why it is strong?
- Are the major argument headings forceful, clear, and informative? Do they succinctly capture the crux of each argument, so that a busy judge going back to the brief and rereading only the Table of Contents will remember the issues, the arguments, and the reasons why my client should prevail?
- Have I structured the discussion of each issue in the form of a syllogism? Does each discussion first explain the controlling law without unnecessary detail and then apply the law to the facts, demonstrating that the law compels the desired conclusion?
- Are the paragraphs too long? Do they encompass diverse points that could be presented more effectively in separate paragraphs?
- Have I liberally employed transitional words and phrases ("however," "nevertheless," "on the other hand," "first…, second…, third…"), so the busy judge will better understand the flow of my arguments and the way in which each sentence, paragraph, and section relates to those that preceded it?
- Have I written in plain English, employing simple syntax and avoiding outmoded legalisms and archaic expressions? Have I followed the rules of good grammar and English usage to facilitate the judge's ability to understand my arguments?
- Is the brief too long? Have I deleted the weaker arguments, which my opponent will easily answer and which may distract the judge from my stronger arguments? Have I eliminated repetitive facts or arguments? Have I compressed wordy constructions and cut every needless word? Have I heeded the advice of the busy judge who reminded lawyers: "I don't have time to read a law-review article masquerading as a brief. Tell me only what I need to know to reach the result you want—and do it in a soundly reasoned manner"? Garner, *supra* at 7 (quoting U.S. Court of Appeals Judge John M. Duhé, Jr., Fifth Circuit).
- Have I employed a civil, professional tone? Have I resisted the temptation to impugn the trial judge or opposing counsel, which could distract the appellate judge from the merits of my argument, damage my credibility, and possibly generate sympathy for my opponent?
- Does the Conclusion succinctly explain precisely what relief I am seeking, so that a busy judge going back to the brief and rereading only the Conclusion will quickly remember what relief the court should grant?

The trial lawyer who writes the appellate brief with these questions in mind is more likely to produce a product to rival that of any appellate expert.

Contributed by Mitchell C. Tilner, a partner in the Encino law firm of Horvitz & Levy LLP, specializing in civil appeals. He has been certified by the State Bar of California Board of Legal Specialization as a specialist in appellate law and has handled or supervised about 300 appeals and writ proceedings. Tilner has published many articles on appellate law and brief writing, and he has participated on a number of panels addressing these subjects.