

Increase Your Odds of Winning an Appeal by Conducting an Objective Appellate Analysis

Justice Faith Ireland (Ret.)

The trial lawyer or appellate lawyer has lived with the case and becomes consumed with the facts and the law. Enlisting an objective appellate analysis can get you and your client out of the weeds and up to a mountain-top view. The objective analyst can help craft the goal, strategy, theory and theme required to win.

Consider with your client a cost-benefit analysis. What is at stake? What is your client's budget? Is your case potentially so lucrative or so potentially damaging to your client that the objective analyst fees are justified? Remember that what you learn from the objective analyst for this case will also prepare you for your next appeal. You are also investing in your own skill set.

When to Start?

If you are petitioning the Washington Supreme Court for review, start there. If your case is not accepted, you are finished. The objective appellate analyst can help you to understand the practical aspects of Title 13.4 of the Washington State Court Rules of Appellate Procedure and how to craft your petition to fit within one of the four considerations governing acceptance of review. If you are defending review, it may not be as important, especially if you want cross-review or feel that the case will be accepted.

Briefing

If you want help with briefing, start your review with the objective analyst before the briefing to craft your goal, strategy, theory and theme. You can then do the briefing and have it reviewed by the analyst. Editing is key, but this is often done at the last minute in briefing.

Many appellate lawyers wait until the briefing is done to ask for help with oral argument. Unfortunately, an objective analyst cannot suggest that you make an argument that was not covered in your briefing.

Goal, Strategy, Theory, Theme and Details

Your objective analyst will want to start with the details. Have you perfected the record, properly assigned error, determined the appropriate standard of review and researched the compelling legal authority?

In perfecting the record, err on the side of inclusiveness. Your analyst may review the findings of facts and conclusions of law to make sure you have preserved error.

Unchallenged findings of fact will be accepted as verities on appeal and cannot be attacked in argument.

Fresh Eyes

The analyst will have the point of view that the justices will have, especially if your case is in an uncommon area of the law. His or her fresh eyes will help you to follow the keep-it-simple principle.

Your analyst will want to know what you need in order to win. The analyst will help you boil down your request of the court to only what is required to get the relief you need. Asking to change the law is risky. Remember separation of powers and do not ask the court to do the legislature's work.

Your strategy is how you intend to reach your goal: challenge the law; argue error; and allege prosecutorial misconduct, incompetence of counsel, etc.

Ask your analyst to help you develop your legal theory; that is, why you are legally entitled to win. Also develop your theme; that is, why you are morally entitled to win and why justice is on your side. Emphasize your legal theory in the briefing and your theme in oral argument.

What the Court Wants

Your analyst will help you understand what every appellate judge wants to accomplish: (1) to find and apply the correct law; (2) to write a good opinion; and (3) to do justice. Make the judge's job easy.

Be timely. A wise journalist once said, "Industry is a better horse to ride than genius." Observing the rules for the timely filing of briefs and other documents will earn you a good reputation with the clerk's office and will help you avoid sanctions. Do not hesitate to call the clerk's office with any questions. They are there to serve you.

Be brief. Even though this is obvious, it may be even more difficult than being on time. Allow time for editing, polishing and compression. "A well-pruned argument suggests confidence; a long, rambling one suggests desperation, or at least nervousness.¹" How do you squeeze the excess from your brief? Professor Tim Terrell advises first to remove facts unless they are critical. Discuss only those cases that relate directly to your conclusions.

Cite Compelling Authority

How should you select the precedent you will cite? "Judges do not apply precedents blindly,²" said Judge Ruggero Aldisert.

1. Are the material facts sufficiently similar to make the cases comparable?
2. Is the principle you are relying upon a holding or mere dictum of the case?
3. If it is old precedent, is it still cited or approved?

Avoid string citing unless you have no local authority and want to show the weight of authority favors your result. If so, include the citations in a footnote.

"[D]o not dilute your argument with weak, thinly supported contentions. More is not necessarily better. Stick to your principal points, and keep the court's attention focused," said Judge Aldisert.

Oral Argument

Preparing for oral argument matters!

1. Your confidence increases the perception of the merits of your case.
2. Judges absorb information differently. Hearing is most important to some.
3. Your preparation allows you to answer the questions that are important to the court clearly and succinctly.

Do you believe wholeheartedly in your case? If not, ask yourself why. Is the law against you? Is your client a person or entity people love to hate? More likely, if you feel defeated before you begin, you may be expecting more of yourself than is reasonable. Your job in oral argument is to present the case as well as you can, and then let go and trust justice.

Virtual Oral Argument

During the pandemic, the Zoom platform has been used in appellate and trial courts. A Zoom tutorial is beyond the scope of this article, but managing those challenges is important. Check with courts in advance. Washington Supreme Court Clerk Susan L. Carlson has created a document titled “Presenting Oral Argument via Zoom,” which is helpful. Court clerks are willing to help with the details. It is likely that virtual appellate hearings will continue after the pandemic as more parties experience increased access to justice and reduced costs.

Elementary Preparation

Being prepared means that you grasp the facts, names, dates, events and pleadings with facility. Your paperwork is within reach and tabbed for easy reference if you need to recite from a document. You have condensed your arguments to a few succinct sentences. You are appropriately attired and well rested. Feeling nervous before you begin is natural and healthy.

You may assume the court knows the basic facts and procedural history of the case, and you should not spend time detailing them. You may need to provide a factual context. If so, stick to the essential facts.

Distillation

To prepare, you should be able to make your argument in a few choice sentences. Distill your topics for argument to the most compelling and be prepared to spit them out. Begin with a road map, just the bare outline.

Controlling Authority

Know your controlling authority and that of your opponent. Have your key cases reduced to the kind of statement you would put in a parenthetical behind a citation.

The Court's Questions

After distilling the argument to a few succinct statements and memorizing controlling authority, your most significant task is to prepare for questions.

Most courts today are "hot" courts in that they prefer to discuss the case through question and answer, rather than sitting back and listening to a prepared argument. The Washington Supreme Court is no exception.

You should be prepared to answer these questions in every case:

What are you asking the court to hold or do? What is the standard of review? What rule of law are you asking the court to apply? Will any interests other than those of your individual client be advanced by the result you seek? Will any detriment resulting from what you seek be confined to the opposing party? Is your case all or nothing, or would a partial victory help? How is justice advanced by the result you seek?

Also, if following any existing rule affords the result you seek, do not ask for a new rule. If asking the court for a new rule of law, succinctly and precisely state the rule, how it will apply, the practical results and the authority for adopting the new rule.

Conclusion

Your conclusion need not be flowery or rhetorical. It is better to be succinct and well-reasoned: "In closing, I ask this court to dismiss the charges because under our constitution, timely justice is owed to all." In a civil case: "In closing, I ask this court to

remand this case so that a new jury can consider all the evidence in this case." Oral argument can win your case.

Justice Faith Ireland (Ret.) served as a judge and justice for over twenty years. She is presently an arbitrator, mediator and appellate neutral analyst with JAMS. She can be reached at fireland@jamsadr.com.

¹Stephen W. Armstrong & Timothy P. Terrell, *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing*, pp. 10-12 (1992).

²Ruggero J. Aldisert, *Winning on Appeal*, p. 238 (1996).

This article appeared in the Spring 2021 issue of the WDTL Defense News.
<https://www.wdtl.org/defense%20news%20spring%202021>