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PERSPECTIVE

5 tips on appellate brief writing from the bench & bar

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Brief writing and oral argument form the core of appellate advocacy. In this and a following article, we will provide a few tips on these core aspects, which were gathered over collectively nearly half a century of appellate judging and advocacy. We will start with brief writing.

Grab the court's attention. Appellate courts are busy. And appellate judges are of necessity generalists: The case being heard before yours could be a criminal case, an employment case or a probate case. You need to ground the court within the first two paragraphs — or at least by the end of the introduction to the opening brief — about your appeal. What kind of case is this? What are the keys to deciding this appeal?

Be sure to at least cover these four things: the procedural posture (demurrer, summary judgment or trial); some relevant background on the parties and the dispute; what the legal issues are on appeal; and how the appellant was harmed by decisions at the trial court level and the trial court outcome.

Here are a couple of examples: “This appeal concerns a district court order granting summary judgment on contract and trademark claims brought by two affiliated manufacturers of jeans against a clothing and textile recycling company.” Appellee’s answering brief at 1, *Sweet People*

Apparel, Inc. v. Phoenix Fibers, Inc., 18-55036 (9th Cir.). “This is an appeal from a final judgment after a weeks-long jury trial and subsequent court order declining to grant relief on disability discrimination claims under the Fair Housing Act (FHA), California Government Code section 65008, and related laws challenging enforcement of a zoning ordinance regulating group sober living homes in single-family residential neighborhoods in Costa Mesa, California.” Appellee’s answering brief at 1, *Yellowstone Women’s First Step House, Inc. v. City of Costa Mesa*, 19-56410 (9th Cir.).

Similar principles apply when seeking discretionary review from a court. For example, one successful petition for review to the Supreme Court of California laid the groundwork for review as follows: “This case provides the Court with an opportunity to clarify an issue of vicarious liability critical to the burgeoning franchise community in California, and address a jurisdictional issue of importance to the state’s appellate courts.” Petition for review at 2, *Patterson v. Domino’s Pizza, LLC*, S204543.

Appellate strategy is different from trial strategy — and it should show in the briefs. Do not reargue the facts. Do not argue the facts without ensuring they are relevant to the legal issues being raised on appeal. This does not mean you cannot raise “flavor facts” that may impact how the court might view the case — particularly those that make your

client appear more sympathetic — but do not present them as you would to a jury. The court’s focus on appeal is on legal issues.

Be the brief the court treats as a trusty resource. The goal is not only to persuade, but for your brief to be the trustworthy touchstone that the court and its research attorneys return to time and again to confirm what the record on appeal says and what the published case law demands. You want to see the imprint of your brief in the court’s recitation of the facts and application of the law in its opinion. The way to do this is to accurately cite the record and the law. Do not leave out mitigating facts or

ignore facts that are not helpful, particularly if the standard of review obligates you to include them. Do not play fast and loose.

Select issues carefully, use signposts throughout the brief to guide the court and edit ruthlessly. In order to focus the court’s attention on the issues that matter, it is helpful to limit the issues on appeal (generally no more than three to five; any more will make it appear as though you are not committed to any of them and are “throwing things against the wall” to see what sticks).

It helps, too, to organize your headings so that, upon review of

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the table of contents, the court can get a good sense of the arguments you are making and whether it must decide all of them or just some of them in your favor for your client to prevail.

You can also provide guideposts like this within the body of the brief.

Footnote a heading in the “Legal Argument” section of the brief to make it clear that if the court agrees with this point, it can reverse without deciding any of the other legal arguments in the brief. Or lay out alternate routes to affirmance or reversal in the introduction.

Here is an example: “This

Court should affirm, on either one of three separate and independent grounds. First, the waiver and invited error doctrines preclude plaintiffs from challenging the district court’s evidentiary rulings now, because plaintiffs knowingly relinquished any right to respond to [these] evidentiary objections in the district court. Second, the district court’s evidentiary rulings are correct on the merits. ... Third, even if plaintiffs’ evidence was wrongly excluded, this Court should affirm on an alternative ground amply supported by the record: even with plaintiffs’ evidence, no reasonable juror could

have found for plaintiffs on their contract or trademark claims.” Appellee’s answering brief at 3, *Sweet People Apparel*.

Pay attention to the facts and the standard of review. Tell a story within the bounds of appellate review. Facts matter on appeal, but they matter within the lens of the legal issues the court is tasked with deciding, and this includes the standard of review.

The appellate court does not retry a case or redetermine factual assessments made by the jury or trial court. It does, however, review those factual findings to determine whether they were supported by substantial

evidence or decided under the correct legal standard. Hyperbole or closing argument — style approaches are therefore not effective. The facts instead should be addressed with these legal standards in mind in an appellate brief, and the story in the brief should be woven around the legal issues.

In our next installment, we will discuss oral argument.

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