Best Practices for Litigating an Appeal

By John J. Bursch

Appellate practice in the United States has undergone a dramatic transformation over the past several decades. Historically, lawyers handled their own cases as litigation moved from trial to appeal. Today, most large firms have appellate specialty practices, nearly every state bar association has an appellate-practice section, and it is an exception rather than the rule when an advocate without United States Supreme Court experience presents an argument there.

Despite that evolution, there are still ample opportunities for lawyers without appellate experience to try their hand at an appeal. This article is intended to be a primer. It begins with resources for learning appellate rules of procedure, then continues with tips for writing appellate briefs and presenting oral arguments.

Know the rules

There are many ways to run afoul of appellate rules. Most infractions will result in nothing more than an irritating defect letter. More serious rule violations include losing your right to appeal by failing to timely file a notice of appeal and losing your right to argument by omitting the oral-argument request on the cover of a Michigan Court of Appeals brief.[1]

For Michigan appeals, become familiar with MCR 7.200 and 7.300 and use ICLE's *Michigan Appellate Handbook* as your guide. The *Handbook* covers everything from preparing your case for appeal to motion practice, briefing, and oral argument. In the federal courts, review not only the Federal Rules of Appellate Procedure, but also your circuit's local rules and internal operating procedures. The American Bar Association's *Appellate Practice Compendium* is an extraordinarily useful guide to practice in every state appellate system as well as the federal appellate courts.[2]

The appellate brief

Introduction

An appeal brief's introduction is its most valuable piece of real estate. It can set the scene for a good story, articulate the major theme, briefly summarize the legal issues, or some combination of these. The introduction should be short, punchy, and compelling. Do not use the introduction as a boring summary of the case's procedural posture.

Statement of facts

The statement of facts is where your client's story can be told in more detail. There is a reason that humankind has used stories for millennia to entertain, communicate, and teach. Stories help us interpret events and present truths that affect the way we think about life and each other. An appeal brief is no different. For a more detailed discussion, review the article "Storytelling in Brief Writing."[3] The best factual statements have plenty of subheadings serving as signposts to keep the reader on track.

Proceedings below

Summarizing the proceedings helps focus the appellate court on a case's procedural posture. It also allows you to draw a target around the portion of the trial court's opinion that is most indefensible or to show how the trial court's opinion is a thing of beauty, worthy of enshrinement in the legal hall of fame. Either way, do not skimp on the trial court's rulings.

Standard of review

On appeal, the review standard will often dictate the outcome. It is rare that an appellate court will conclude that a trial court abused its discretion or committed clear error. But if review is de novo, anything is possible. Whether you are the appellant or appellee, think about how to frame the standard of review favorably.

The argument

The argument section should be ordered logically, with headings and subheadings that, standing alone, lead the reader ineluctably to the conclusion your client desires. In the best briefs, an appellate court will know enough to rule in your client's favor simply by reviewing your table of contents. When drafting the headings, keep them short and use complete sentences. And use the same typographical conventions as in the text—no ALLCAPS or Initial Caps.

Conclusion

Ideally, the conclusion should consist of two paragraphs. The first should touch (concisely) on the case's major themes and legal issues. The second should detail the specific relief requested. This second paragraph is particularly important when a party asks to reverse only in part, where an injunction request is involved, or where special instructions are required on remand.

Questions presented

Although it appears first in the brief, I've saved the subject of questions presented for last because they are so critical. Be judicious

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about the number of questions you present on appeal. In all but the most unusual case, present no more than three to four questions. Any more than that, and the appellate judges will assume that all the questions presented lack merit.

The Bryan Garner "deep question" is an ideal way to frame a question presented on the merits of an appeal. It consists of a one-sentence statement of law, a one-sentence fact summary, and a question that has a self-evident answer.[4] For example: "The statute of limitations for fraud is two years. The plaintiff filed this lawsuit three years after he claims the defendant committed fraud. Is this case barred by the limitations period?"

For appellate briefs seeking discretionary review, such as an application for leave to the Michigan Supreme Court, the approach is different. Garner's deep questions are fact-specific, so they inherently appear to lack jurisprudential significance. The better approach is to write an open-ended question with broad applicability. For example: "Whether a cause of action for fraud accrues at the time the fraud is committed or when its effects are felt."

No matter the type of question you present, keep it short and to the point. Garner recommends no more than 75 words for deep questions—a good rule of thumb for any question format.[5] If circumstances dictate that more information be shared, consider starting with a short paragraph introducing the case followed by a series of short questions.

Oral argument

Appellate judges will sometimes say that oral argument affects the outcome of a case only 10–20 percent of the time.[6] But because you have no way to know ahead of time if your case falls in that narrow range, it is important to be prepared *every* time. Moreover, in many cases it is just as important *how* you lose as whether you lose. Oral argument is an opportunity to influence how the opinion is written.

Listening

The first rule of oral advocacy is to be a good listener. When a judge asks a question, he or she expects a direct answer. Do not avoid it. Do not ask the judge to wait while you address some other issue first, promising to get to the question "in just a minute or two." And pay attention when the court asks questions of the other side. Those questions—and your adversary's answers—are critically important to your presentation.

Speaking

The second rule of oral advocacy is to prepare as though you are about to conduct a press conference, not give a speech. It drives appellate judges crazy when an advocate walks up to the lectern and starts reading from a prepared text, showing no inclination to engage the bench. Think of oral argument as a dinner-table discussion, not an actual "argument." Discussions require give-and-take as well as reading body language to determine when a judge is particularly excited or bothered about an argument or legal issue.

Preparation

The best way to have a press-conference discussion is to prepare for one. Break the case's major issues, sub-issues, and problem points into discussion "modules." In each module, prepare two to four bullet points that are most crucial to that aspect of the case. If you write these modules on index cards (as United States Supreme Court Chief Justice Roberts used to do when he prepared for argument as a practitioner[7]) and practice them in different orders, you will improve at moving quickly from one topic to another. And if the court interrupts with a tangent, it will be easy to shift gears because you are not tied to a text.

Big picture

Appellate arguments are different from trial-court arguments because the outcome affects other cases, not just yours. You need to prepare to discuss these impacts. Use hypotheticals to explain how your rule works, and answer candidly when the court presents its own hypotheticals. You will never persuade a court to your side by responding, "Those aren't the facts of this case."

Conclusion

Appeals are a different world, but even a novice can successfully navigate that world. Learn the rules and follow the basic principles of effective written and oral advocacy, and you'll be well on your way. And if you run into trouble, just remember there are many experienced Michigan appellate lawyers who would be delighted to help! ■

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ENDNOTES

1. MCR 7.204(A) ("The time limit for an appeal of right is jurisdictional.") and MCR 7.212(C)(1) (regarding the requirement to request oral argument).
2. Shannon & Gerville-Réache, eds, *Michigan Appellate Handbook (3d ed)* (ICLE, 2018) and Livingston, ed, *The Appellate Practice Compendium* (ABA, 2012).
3. Bursch, *Storytelling in Brief Writing*, Warner Norcross+Judd LLP (April 1, 2004) <https://www.wnj.com/Publications/Storytelling-in-Brief-Writing> [https://perma.cc/XM7U-6T79]. All websites cited in this article were accessed February 1, 2019.
4. See, e.g., Garner, *How to frame issues clearly and succinctly for effective motions and briefs*, ABA Journal (March 2017) <http://www.abajournal.com/magazine/article/effective_pleadings_issue_framing> [https://perma.cc/8FAT-K7LJ].
5. *Id.*
6. *Does Oral Argument Really Matter?*, Dodson Parker Behm & Capparella PC (April 8, 2016) <https://www.dodsonparker.com/does-oral-argument-really-matter/> [https://perma.cc/9N8J-GAXK].
7. Gordon, *Preparing For Oral Argument*, New York Law Journal (September 30, 2005) <https://web.law.asu.edu/Portals/35/Files/Moot%20Court%20Documents/Competition%20Materials/Oral%20Argument%20-%20Advocacy%20Tips.pdf> [https://perma.cc/YS4U-XX9W].