

What the Court Needs to Know About Your Appeal

By Herb Fox

Imagine the drudgery. Day in, day out, appellate judges throughout the country (and their hapless clerks) wade through tens of thousands of pages of dense, dry prose in pleadings that promise to be “brief” but are anything but. Among the criticisms of briefs expressed by appellate judges, the first is “Too long. Too long. Too long.” (*Aldisert, Winning on Appeal* (NITA, 2d Ed., 2003) §2.4).

Compounding the sin of excessive length, many attorneys waste words by padding the brief with unnecessary information. Some briefs are filled with lengthy quotes from cases, statutes, and the record – all of which are easily located elsewhere by appellate judges and their staff. Other briefs present a laundry list of minor procedural and evidentiary errors, regardless of substance or prejudice. Trial proceedings are rarely perfect, and minor errors usually do not warrant reversal on appeal proceedings (Eisenberg, Horvitz & Wiener, *Cal. Prac. Guide: Civil Appeals & Writs* (The Rutter Group 2003) ¶ 8:294).

What is missing from many briefs is a focus on what the appellate court needs to know about your case. Who is your client? What brings them here? What happened at trial that amounts to a miscarriage of justice? And, what do you want the Court of Appeal to do about it?

Are we in the right place at the right time? The first thing a Court of Ap-

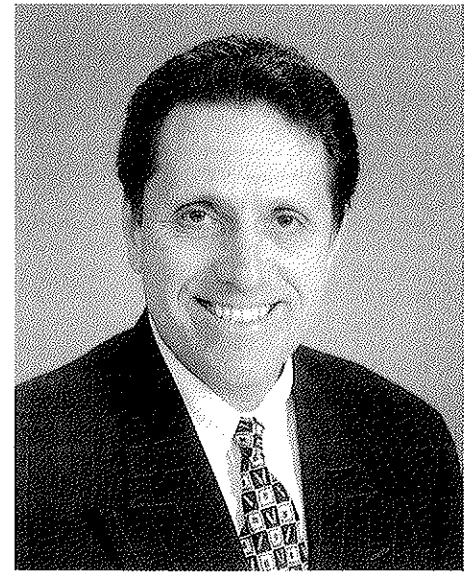
peal needs to know is whether it can hear the case. Is there a statute that confers appellate jurisdiction over the order or judgment appealed from, and was the Notice of Appeal timely filed? (*Fitzgerald, Appellate Jurisdiction in the Ninth Circuit* [Office of Staff Attorneys, U.S. Court of Appeals for the Ninth Cir., 1999].)

Appellants must include in their opening brief a statement that the judgment on appeal is final, or, if not, explain why the order is appealable (*Rule of Court 14(a)(2)(B); Ninth Cir. R. 28-2.2*). Often the appellate court’s jurisdiction is a given; other times it is a significant and complex threshold issue that appellants dare not overlook.

Who are the parties? Clients are more than party nomenclature. Individual clients are real and (usually) alive. Even business entities have names, faces, and lives animating the enterprise. Appellate judges are alive, too, and like most of us, they respond better to living things than to inanimate objects. Humanize your client so the appellate court remembers that real people are affected by the order or judgment that is challenged on appeal.

At the same time, don’t demonize the opposing party or attorney with ad hominem attacks, insults, or other deprecatory language. Such attacks are rarely effective and cast more of a shadow on your cause than on the other party.

What’s this case all about? Most court cases are real life stories cloaked



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by procedural and substantive rules and judicial customs. Strip out the excess and let the story shine. These stories may be well known to attorneys who have lived the case for months or years, but the appellate court knows nothing about it. Appellate judges, like all people, enjoy a good story, so tell it from the beginning. Make the story compelling but above all, be accurate (i.e., don’t argue against the record!)

What is the prism for review? Courts of Appeal are obsessed with the standard of review; so should counsel. Many appeals are won or lost in the battle for the proper prism through which the trial court proceedings are observed. If there is any ambiguity over the correct standard of review, this portion of the brief could well be the most important.

If you’re an appellant and have a shot at it, fight for your right to de novo review. When the appellate court gives no deference to the trial court’s reasoning or finding, appellants have a true second bite at the apple. Appellants should be aware of favorable standards of review applicable to particular cases. For example, the Courts of Appeal will independently review writings where

there is no conflicting extrinsic evidence (*Parsons v. Bristol Develop. Co.* (1965) 62 Cal.2d 861), and, in ruling on a summary judgment or order dismissing a case for failure to state a cause of action, will construe the moving papers in the light most favorable to appellant (*Stratton v. First Nat'l Life Ins. Co.* (1989) 210 Cal.App.3d 1071; *In re Silicon Graphics Inc. Securities Litigation* (9th Cir.1999) 183 F.3d 970, 983.)

If you're the respondent/appellee, on the other hand, try to downgrade the standard of review to abuse of discretion or substantial evidence. Never underestimate the breadth of a trial court's discretion or how flimsy evidence is transformed substantially on appeal. Don't overlook the appellate presumptions that the evidence supports the judgment and that the judgment is correct (*Ketchum v. Moses* (2001) 24 Cal.4th 1122; Goelz & Watts, *Cal. Prac. Guide: Federal Ninth Circuit Civil Appellate Practice* (The Rutter Group 2003) ¶7:201.)

What is the error? Errors of law are the name of the game at the Courts of Appeal, but it's common for appellants to drown the error in a sea of verbiage. Don't make the appellate court readers search hard for the main points. Call out the errors crisply and cleanly in a separate Statement of Issues and in headings and introductory paragraphs. Don't treat these summaries and headings summarily. Some appellate judges actually read the Table of Contents first to get a flavor of the case, and first impressions count.

What is the prejudice? Errors of law may be the name of the game, but appellants can't win without prejudice, too (*Code of Civil Procedure* §475; 28 U.S.C. §2111). All too often appellants demonstrate error but stop short of convincingly showing how the trial level result would have been different but for that error. This is critical for respondents/

appellees as well. When defending the trial court, the lack of prejudice should take equal footing with the lack of error. And when faced with likely error, use the record to show that the judge or jury would have reached the same conclusions notwithstanding the error.

Where is the prejudicial error? Appellants must demonstrate not only that the trial court committed prejudicial error, but must also show where in the record to find it (*Ketchum v. Moses, supra*; *California Rule of Court* 14(a)(1)(C); *F.R. App.* 11(a); *Ninth Cir. R.* 28 - 2.8). Failure to adequately cite to the record can lead to striking of the brief, dismissal of the appeal, waiver of argument, or monetary sanctions (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761).

There is more to accurate and complete citations to the record than complying with rules, however. To be effectively persuasive, the brief writer should demonstrate mastery of the record and lead the appellate court through the arguments with convincing confidence. There is no way to accomplish this if the appellate court cannot quickly locate in the record the evidence or issues under discussion.

Brief writers should not make work for the appellate courts, but instead should make it as easy as possible for the court to follow the argument. Thus appellants must carefully comb the record and painstakingly record the exact page and line numbers where the evidence or other points can be found.

What should the Court of Appeal do? Just as civil complaints

include a prayer setting forth the relief requested, appellate briefs should do so as well. Courts of Appeal have discretion to do more than utter "reversed" or "affirmed". Courts of Appeal can also vacate or modify the judgment or order; may direct the proper judgment or order to be entered; and may direct a new trial or further proceedings be had (*Code of Civil Procedure* §906; 28 U.S.C. §2106). Appellants should expressly request the most advantageous relief available to them.

On the other hand, where appellants have made a strong case for prejudicial error, respondents/appellees should consider cutting their losses by proposing modification or entry of a different judgment or order in lieu of a reversal and remand. ■

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