



Crafting Appellate Arguments

*State Bar Appellate Section:
Appellate Practice Outreach Course*

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Wearing two hats: trial advocacy versus appellate advocacy

- Trial: if the law is against you, argue the facts
- Appellate: no matter what is against you, argue the law
- Trial: object to everything reasonably calculated to help your client
- Appellate: pick your best 2-4 arguments and hammer them home
- Trial: persuasive to the factfinder (sometimes judge) concerned with the distinct facts of this case and what's equitable
- Appellate: persuasive to a group of judges concerned with following what higher courts have said to do in similar areas



Picking your arguments

- “Try to strike the jugular and let the rest go.” ~ Justice Oliver Wendell Holmes
- Trial lawyers likely know and remember everything that went wrong at trial. Whether you or another attorney is handling the appeal, you have to pick what hills to die on.
- Find the outcome-determinative mistakes.
- No matter what, make sure they’re preserved. If you’re not sure and there’s still time – raise in a MNT or JNOV motion



How many points of error?

c/o 3d. Cir. Judge Ruggero Aldisert

Winning on Appeal: Better Briefs & Oral Argument

| No. of Issues | Judge's Reaction |
|---------------|---|
| 3 | Presumably arguable points. The lawyer is primo. |
| 4 | Probably arguable points. The lawyer is primo minus |
| 5 | Perhaps arguable points. The lawyer is no longer primo. |
| 6 | Probably no arguable points. The lawyer has not made a favorable initial impression |
| 7 | Presumptively, no arguable points. The lawyer is at an extreme disadvantage, with an uphill battle all the way. |
| 8 | Strong presumption that no point is worthwhile |



Arranging your issues

- Think through the order of the issues: what makes sense to go first, second, and third? Is one dispositive of the whole thing? Is one particularly egregious?
- Logically consider how to lay out the issues in a way that will let the Court find for you on multiple points:
 - As a primary matter, the issue is waived because they didn't object
 - Second, the trial court did not err when it _____
 - But even if the Court disagrees, reversal is not necessary because the error is harmless



Mastering legal research

- Once you pick your issues, you have to switch hats again and research both sides. You're looking for all binding caselaw on the subject so you can best set your argument apart.
- Start here – not with your facts or even your conclusion. Get a roadmap of what the law actually looks like before deciding exactly how you'll take the court down your trail.
- Don't be sneaky – if there is (binding) bad caselaw on one of your points, acknowledge and distinguish it.

See TEX. R. DISC. PROF'L COND. 3.03



A brief note on brief writing

- You have thousands upon thousands of words—don't use them all.
- Tell your client's story; be persuasive everywhere you can
 - Statement of the case: strait-laced and to the point. Must cite to record.
 - Fact section: pick only the persuasive facts that matter. Don't summarize life stories and the whole trial. Don't use dates if they don't actually matter. Make sure there is a fact that correlates to arguments made later. Style is fine, but don't overdo it. **MUST** cite to the record.
 - Point headings: make them matter (reading the TOC)
 - Summary of the argument: your elevator speech; most judges start here and then move on. Do not necessarily need to cite to the record or caselaw here.

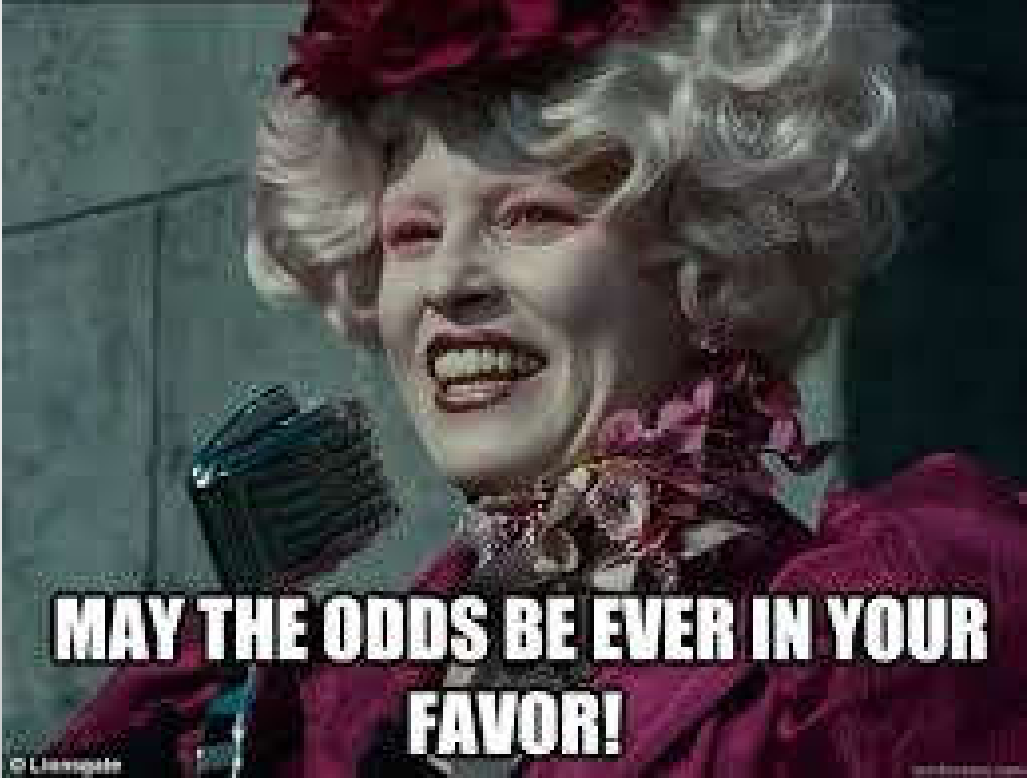


A brief note on brief writing, cont.

- Argument Section:
 - This is not a jury argument. The time for fact finding has passed; lead the appellate court down the easiest road to finding for you and following their precedent to do so.
 - DON'T:
 - Use ad hominem attacks; insult the parties, counsel, or the trial court; say “lower court”; pearl clutch; cite to large swaths of the record; make the Court go looking for your record cites OR the caselaw
 - DO:
 - Write in plain English; back up your arguments with *both* record cites and caselaw; repeat yourself as necessary to display and remind the Court of your theme; consistently drop bread crumbs for the Court to follow why your argument isn’t breaking new ground and (if appropriate) is just an easy continuation of what the law already says



Oral Arguments (First Court of Appeals)





Questions?

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