The Art of Appellate Advocacy

by Susan Whaley Fox, Tampa

I. FOCUS ON THE FACTS

The facts will win or lose the case. "Let the narrative of facts tell a compelling story. The facts are, almost without exception, the heart of the case on appeal . . . . The facts generate the force that impels the judges' will in your direction." Justice Albert Tate, Jr., *The Art of Brief Writing, What a Judge Wants to Read*, Litigation, Volume 4, No. 2, P. 14 (American Bar Association Section of Litigation, 1978). "It may sound paradoxical, but most contentions of law are won or lost on the facts. The facts often incline a judge to one side or the other." Justice Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions For Effective Case Presentations*, 37 ABA J 801, 803 (1951).

Upon first examination of an appellate issue, make note of concerns about the facts because these facts will probably be the same ones that will trouble the judges and represent the ultimate pitfalls that must be successfully navigated to obtain a favorable result. The ability to objectively perceive these points will soon be lost in the heat of advocacy.

II. DEVELOP A THEORY

The core theory is the unifying theme of the argument around which all issues should revolve. The core theory requires consideration of not only facts and law, but policy, fairness, and the proper standard of review. These considerations are often fact based and logical. The core theory should be a single idea that is short, simple, and succinct. It must capture the essence of the case. The theme will continue to be refined throughout the entire appellate advocacy process. Once the theme has been developed, it guides virtually every other facet of the appeal.

Be wary of developing the theme around impressions given by trial counsel alone. Begin by reading opposing counsel's trial brief or closing argument (if you are the appellee), or the JCC's order (if you are the appellant), and taking everything he or she says as true. If this does not result in a solid conviction of error, look for legal errors in the evidence or for statements that are not supported by evidence. Remember, every reversible error must also be ***harmful*** and ***preserved*** for appeal. If it is not preserved, barring fundamental error, the argument will be a waste of time. Begin to study the record, with those provisional issues in mind.

III. KNOW THE FLORIDA RULES OF APPELLATE PROCEDURE

Observance of the rules begins with a timely and properly drafted notice of appeal and ends with the mandate, neither of which should be taken for granted. There are rules that apply to everything in an appeal.

The First District has internal rules. A copy of these will be mailed with the acknowledgment of the appeal. Read them thoroughly and keep a current copy on hand with the effective date (located at bottom of first page) highlighted so as to easily tell at a glance if the latest copy sent by the Court has been revised. If it was revised, read it to find out what is different.

IV. OBTAIN AND STUDY THE COMPLETE RECORD

When Appellant, Get a Complete and Accurate Record. As appellant, immediately consider the items needed in the record to prevail on appeal, and make sure those items will be within the "automatic" record. Then, check the record upon receipt to be sure these are included. It looks foolish to suddenly move to supplement the record on the day the brief is due, especially after several extensions.

Read the Entire Record. Resist any temptation to get by with just reading the "important" parts of the record. Trial counsel should not rely on memory as to what is in the record -- it may seem like someone else's trial when it is reduced to a transcript! Read everything that the Court will read, and read it in the same order and in the same form.

Index the Record. Develop and use a shorthand to quickly summarize key points and testimony. Locate in the record where each of presumed errors has been preserved for review. This index will help in preparing proper citations in the brief and will allow a quick record review before oral argument. The index will be useful at the podium during oral argument.

V. AVOID MOTION PRACTICE

Almost without exception, the appellate courts hate motions. They complain of acute "motion sickness." *Dubowitz v. Century Village, East, Inc.*, 381 So.2d 252, 253 (Fla. 4th DCA 1979); *Elliott v. Elliott*, 648 So. 2d 135 (Fla. 4th DCA 1994); *Sarasota County v. Ex*, 645 So. 2d 7 (Fla. 2d DCA 1994).

If opposing counsel files a spurious motion, the Court will appreciate restraint in responding, because one questionable filing often results in a volley of unnecessary counter motions, responses, replies, answers, etc. "Lawyers need to realize that appellate motion practice is not a game of ping pong in which the last lawyer to serve wins." *Sarasota*

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County v. Ex, at 7-8.

VI. FOLLOW THESE STEPS FOR WRITING AN APPELLATE BRIEF

Start with an Outline. Think the issues all the way through before writing the first paragraph. Skipping this step causes writing to be loose and confusing; time will be wasted in later editing and revisions. A good outline leads to a concise brief, which is the essence of the art of appellate advocacy. "Succinctness of argument is a beneficial trait in the art of appellate advocacy." *State v. Bonnell*, 61 Ohio St. 3d 179 (1991).

Narrow the Points on Appeal. Concentrate fire on the strongest points and don't sweat the small stuff. "Choosing the most effective arguments for presentation . . . is the hallmark of good appellate litigation." *State v. Cruz*, 175 Ariz. 395, 857 P.2d 1249 (1993) (en banc).

Pace Yourself. Good writing requires planning and discipline. Always allow adequate time in the briefing schedule for the entire process, and cushion it with a few extra days for things that will surely go wrong.

Write the Statement of the Case and Facts. If the JCC has made detailed findings of fact, there is no need to restate the facts not challenged on appeal. It is a waste of the court's time to do so, and often seduces the writer into violating the standard of review. Instead, accurately describe the JCC's unchallenged findings and then focus on the facts not supported by the record. Always be accurate and grasp your nettles firmly. Discuss the unfavorable portions of the record. Remember to state the facts in the light most favorable to Appellee and to the JCC's ruling unless presenting a pure issue of law reviewable de novo. See *Fawaz v. Florida Polymers*, 622 So. 2d 492, 495 (Fla. 1st DCA 1993) (noting that the Appellee, as the prevailing party, is entitled to the benefit of all reasonable inferences that can be favorably drawn from the evidence).

Write the Standard of Review Section. Be sure to understand the standard of review before attempting to write the argument portion of the brief. *Swanigan v. Dobbs House*, 442 So. 2d 1026 (Fla. 1st DCA 1983). There are three basic standards: (1) competent, substantial evidence, which applies to fact findings; (2) abuse of discretion, which applies to procedural and discretionary rulings; and (3) de novo, which applies to questions of law.

Write the Argument. If you are struggling here, perhaps an earlier step has been skipped, for example, preparing the outline. Include subheadings if it helps organization and flow. Subheadings are an excellent way to emphasize key points without undue repetition.

Write the Conclusion. Include the specific relief sought.

Write the Summary of Argument. Write this last because it is impossible to summarize what has been said before the argument has been written. Many judges and staff attorneys read the summary first, so be sure to write a clear, concise statement. It must not be more than five pages and should rarely exceed two pages. Fla. R. App. P. 9.210 (b)(4).

Rest for a few days, then edit. Allow several days between writing and editing for the brief to become stale in order to effectively evaluate and proofread the brief. Otherwise, the writer will read what he or she meant to write rather than the words that actually appear on the paper. This time will also allow reevaluation of the brief's organization and elimination of unnecessary repetition or surplusage. On this step, edit for completeness, clarity and structure. Is the best argument first? (Like Pat Benatar sings, "Hit me with your best shot.") Readers assume the brief is presented with the strongest points first and may discredit interior points. Be sure that every factual allegation is supported by a record cite. Get rid of long sentences and long paragraphs. Check for use of passive voice. Delete adverbs and adjectives.

Rest again, then perform a second edit. Proofread. Check record cites. Clean up citation form. Check style and consistency of reference. Delete any repetition. Edit out string cites. If working by computer, print a draft and read the hard copy. Many mistakes are hard to see on the computer screen.

Enlist an Editor. Have a third person (maybe a colleague who was a staff attorney at the court of appeal or an executive editor of law review) read the brief. Send a draft to trial counsel. If there are sections these readers find unclear, consider rewriting these sections.

Run Westcheck. Check the accuracy of cites using Westcheck or a similar citation checking service. Staff attorneys will use often the disk sent to the court to run Westcheck, so it is best to consider any negative information that will be returned. Or, if not using Westlaw, check citations the old-fashioned way.

Perform Proofreading and Editing. Proofread for typos and proper formatting.

Refer to Submission Checklist. The checklist should include: original brief; three copies of brief; original and one copy of motion for attorneys' fees (if applicable); stamped plain envelopes with court's return address to serve all counsel for each motion filed; original and one request for oral argument (if desired); labeled diskette containing brief; transmission letter to clerk; copy of transmission letter for clerk to stamp and return; and, a stamped, self-addressed envelope for return of transmission letter.

VII. ORAL ARGUMENT

Anticipate the questions the court will ask. Create a list of the worst possible questions, because someone in Tallahassee is probably doing the same. Update research at least two weeks ahead of time, and send a notice of supplemental authority (if needed) two weeks before argument. (Supplemen-

tal authority submitted later will not make it in the summary delivered to the judges.) Cram for the argument just like a final college exam by rereading the briefs as well as record notes and cases the day or morning before argument. Use visual aids where appropriate — one picture can be worth a thousand words — and thus can save an enormous amount of unnecessary words during the 10 minutes (!) now allotted. Remember judges are human, so make eye-contact and call them by name.

VII. THE ENEMIES OF GOOD APPELLATE ADVOCACY[1]:

a. The Rabid Dog: This lawyer attacks the other lawyer and party at every turn.

b. The Kitchen Sink: This lawyer cannot file a brief that is less than 50 pages, and includes the date and details of every doctor visit and deposition whether relevant to the issues on appeal or not and raises too many issues on appeal.

c. The President of the Repetitious Redundancy Club: This lawyer repeats everything at least three times to make sure the judges got the message.

d. The Busy Procrastinator: This lawyer started writing the brief just before the third extension, but then discovered that the record was incomplete, and filed a tolling motion. Then after a "no furthers" order, this lawyer's Aunt Gertrude passed away, prompting an emergency motion for further extension.

e. The Used Car Salesperson: This lawyer's statement of the facts is a fabrication of half-truths and arguments rejected by specific findings of the trial judge.

f. The Computer Geek: This person sits at his computer screen and cuts and pastes the current brief together using sections from past briefs and downloaded quotations. Every now and then, this lawyer inserts a connecting sentence.

g. The Medical Expert: This lawyer is an expert in his specialized field of injury and uses jargon that nobody else understands. He does not explain arcane or technical terms.

h. The Do-It-Yourselfer: This lawyer mainly handles real estate and the occasional small claims or worker's comp case. This lawyer did an appeal once, about ten years ago, and it turned out okay, but is not too sure about appellate rules and procedures, let alone Rule 4-1.1 of the Rules Regulating the Florida Bar, which states that a "lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

i. The Frustrated Creative Writer: This lawyer dreams of writing The Great American Novel . . . wait a minute . . . that's me!

VIII. CONSIDER ENGAGING APPELLATE COUNSEL

An appellate specialist is often better able to execute the appeal than a non-specialist. Appellate lawyers may have a better understanding of the issues most likely to be successful on appeal and are better able to see flaws that are not apparent to trial counsel. Experienced appellate counsel will know how to avoid common pitfalls and posture the appeal in the most successful way.

Footnotes:

[1] The idea behind many of these familiar types was borrowed from Judge Chris Altenbernd, "Brief Writing: True Confessions of a Legal Grease Monkey," Vol. X, No. 4, The Record: Journal of the Appellate Practice Section of The Florida Bar (June 2002).

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