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Write a superior opening brief

LET THE STANDARD OF REVIEW HELP YOU KEEP YOUR BRIEF ON POINT

You lost an issue in the trial court. You timely filed a notice of appeal. You have received the briefing schedule and calendared the due date for the opening brief. Now what?

Knowing where to begin when you need to get a high-quality opening brief on file in the appellate court – while managing the rest of your busy litigation practice – can feel downright overwhelming. But breaking this project down into concrete steps can help you write a polished opening brief and put forth the best possible presentation of issues for your client.

Whittle down the issues using the standard of review

It may seem strange to tackle your opening brief by starting with the standard of review rather than the facts or the introduction. However, taking a hard look at the standard of review will help determine what issues to pursue on appeal and how to go about writing an effective brief. It also helps you to resist the urge to pursue every issue on appeal.

Start by jotting down the potential claims to appeal. Next, conduct some quick research into the standard of review for each of those issues. If the standard of review makes it clear that pursuing a particular claim will be an uphill battle that might damage your credibility, consider not raising that issue on appeal. If, however, the standard of review is in your favor or even neutral, allow that standard to act as a guide for how to structure your entire brief – from the introduction through the conclusion.

Think of the process akin to opposing a summary judgment motion in the trial or district court. In seeking summary judgment, a defendant attempts to convince the court that there is "no triable issue" or "genuine dispute" as to any material fact. (Code Civ. Proc., § 437c, subd. (3)(c); Fed. Rules Civ. Proc., rule 56, 28 U.S.C.) Opposing such a motion requires showing that genuine disputes or triable issues do in fact exist. That principle governs the entire approach to drafting an opposition to the defendant's dispositive motion. The same dynamic exists in deciding what issues to appeal and in crafting a persuasive opening brief.

This article discusses several standards of review in turn. Generally speaking, however, if the standard of review is de novo, then you should feel more comfortable challenging the issue. If the standard of review is abuse of discretion and the judge did not do anything that seems terribly off kilter, then you should exercise caution in challenging the issue. If the standard of review is substantial evidence, then the court of appeal will give deference to the jury's verdict.

What if the standard of review is de novo?

Courts of appeal review issues of law de novo. (*Shannon v. Rhodes* (2001) 92 Cal.App.4th 792, 796; *Exxon Co. v. Sofec, Inc.* (9th Cir. 1995) 54 F.3d 570, 573.) When an appellate issue is subject to de novo review, use care to avoid focusing on the trial court's specific errors. The reviewing court will examine the motion in the first instance without any deference to the lower court's decision.

Summary judgment provides a helpful example. Appellate courts review grants of summary judgment de novo. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 121; *Zetwock v. County of Yolo* (9th Cir. 2017) 850 F.3d 436, 440.) The appellate court applies the same standards as the trial court, including viewing the evidence and its attendant inferences in the light most favorable to the nonmoving party to determine whether there are any genuine disputes as to material facts. (*Powell v. Kleinman*, *supra*, 151 Cal.App.4th at pp. 121-22; *Zetwock v. County of Yolo*, *supra*, 850 F.3d at p. 440.)

Thus, the overarching approach for opposing a summary judgment motion or appealing the grant of summary judgment remains the same: Use the record to highlight conflicting testimony as to a material issue, whether in the form of expert reports, percipient witnesses, or physical evidence. In looking at the issue de novo, the appellate court will not focus on the trial court's specific reasoning or errors, so time spent on those issues is not productive. An opening brief may note glaring instances where the lower court erred by making factual determinations or weighing the witnesses' credibility. Just be sure to acknowledge these errors in passing rather than make them the focus of the opening brief.

What if the standard of review is abuse of discretion?

Appellate courts review issues "left to the discretion of the trial court" for an abuse of discretion. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 957.) In California, an abuse of discretion occurs where the trial court acts outside the scope of the applicable principles of law or where substantial evidence does not support the court's decision. (*MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036, 1047-1048; *Tire Distributors, Inc. v. Cobrae* (2005) 132 Cal.App.4th 538, 544.) In the Ninth Circuit, "[t]he district court necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." (*Harris v. Board of Supervisors* (9th Cir. 2004) 366 F.3d 754, 760.)

Some examples of the kinds of decisions subject to the abuse-of-discretion standard include the following:

See LippSmith, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2018 Issue

The decision to grant or deny a preliminary injunction (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 527; *Harris v. Board of Supervisors, supra*, 366 F.3d at p. 760);

The dismissal of a complaint (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 810; *Cooper v. Tokyo Electric Power Co., Inc.* (9th Cir. 2017) 860 F.3d 1193, 1210);

The denial of leave to amend a complaint (*Fox v. Ethicon*, *supra*, 35 Cal.4th at p. 810; *Gardner v. Martino* (9th Cir. 2009) 563 F.3d 981, 990);

Evidentiary rulings (*Employers Reinsurance Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 919; *Glanzman v. Uniroyal, Inc.* (9th Cir. 1989) 892 F.2d 58, 59);

Decisions as to discovery sanctions (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 1000; *Fjelstad v. American Hondo Motor Co., Inc.* (9th Cir. 1985) 762 F.2d 1334, 1337);

Decisions to grant, lift or modify a protective order (*Raymond Handling Concepts Corp. v. Superior Court* (1995) 39 Cal.App.4th 584, 591; *Phillips ex rel. Estates of Byrd v. General Motors Corp*, (9th Cir. 2002) 307 F.3d 1206, 1210);

The enforcement of a settlement agreement (*Greyhound Lines Inc. v. Superior Court* (1979) 98 Cal.App.3d 604, 609; *Adams v. Johns-Manville Corp.* (9th Cir. 1989) 876 F.2d 702, 704);

The decision to bifurcate a trial (*Ortiz v. HPM Corp.* (1991) 234 Cal.App.3d 178, 181; *Exxon Co v. Sofec, Inc.* (9th Cir. 1995) 54 F.3d 570, 575);

The formulation of jury instructions (*Moreno v. Fey Manufacturing Corp.* (1983) 149 Cal.App.3d 23, 28; *Cooper v. Firestone Tire and Rubber Co.* (9th Cir. 1991) 945 F.2d 1103, 1106);

The denial of a motion for a new trial (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 588–589; *Glanzman v. Uniroyal*, *supra*, 892 F.2d at p. 59);

A plaintiff's entitlement to prejudgment interest (*Bullis v. Security P. Nat. Bank* (1978) 21 Cal.3d. 801, 814; *Adams v. Johns-Manville*, *supra*, 876 F.2d at p. 704);

Certification of a class action or approval of a class action settlement (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1805-1806; *In re Volkswagen* (9th Cir. 2018) 895 F.3d 597, 606); and

The award of fees and costs to class counsel (*Lealao v. Beneficial Cal., Inc.* (2000) 82 Cal.App.4th 19, 26; *In re Bluetooth Headset Products Liability Litigation* (9th Cir. 2011) 654 F.3d 935, 940).

When appealing a decision subject to the abuse-of-discretion standard, the appeal focuses on the specific decision the trial court made. Examine the trial or district court's order with a fine-tooth comb for a legal or factual error. Did the court apply the incorrect law? Did the court choose the correct legal standard but misinterpret or misapply it? Did the court impose an additional burden on your client not otherwise required by law, such as by getting the burden shifting wrong or applying the wrong standard of proof?

Alternatively, the court may have made a factual error. Did the court ignore any aspect of the evidence presented? Did the court misunderstand or misconstrue the evidence presented? Did the court make factual findings unsupported by the record or make factual determinations where issues were in dispute?

A discretionary error that involves the incorrect application of the law or that relies on an erroneous factual conclusion presents a solid issue for appeal. By contrast, think carefully about appealing an issue reviewed for abuse of discretion that does not involve an apparent legal or factual error.

What if the standard of review is substantial evidence?

Alternatively, the issue on appeal may be subject to the substantial evidence standard. For example, appellate courts review a judgment notwithstanding the verdict for substantial evidence. (*Mason v. Lake Dolores Grp., LLC* (2004) 117 Cal.App.4th 822, 829; *Raynor Bros v. American Cyanimid Co.* (9th Cir. 1982), 695 F.2d 382, 385.) In California, "[t]he ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." (*Roddenberry v. Roddenberry* (1996) (44 Cal.App.4th 634, 652.) In the Ninth Circuit, "[t]he jury's verdict should be accepted if it could reasonably have been reached." (*Raynor Bros. v. American Cyanimid*, *supra*, 695 F.2d at p. 385.)

The substantial evidence standard shows great deference to the jury's verdict. The decision about whether to appeal a JNOV depends on who won the trial. If the jury found for your client, the trial court took away that verdict in granting a defendant's JNOV, and any conceivable evidence supports the verdict, the substantial evidence standard is in your favor. If, on the other hand, the jury found for the defendant, the plaintiff thereafter sought judgment notwithstanding the verdict, and the court denied the plaintiff's motion, the likelihood of winning an appeal challenging the denial of JNOV is exceedingly low. Tread carefully in making that issue the focus of your appeal.

Of course, there may be other standards of review to think about before drafting an opening brief, such as clear error or the standard for prejudice. Whatever the standard, be sure to take some time before diving into the brief to assess the potential issues, research the applicable standard of review, and make an informed decision about what issues to pursue on appeal and how best to frame them.

Let the issues shine with good writing practices

Writing a high-quality opening brief does not mean using flowery sentences, copious block quotes, or arcane synonyms found in an online thesaurus. Oftentimes, less is certainly more. Try using short sentences and short paragraphs. If a sentence exceeds several lines, break it up into more than one sentence. If a paragraph spills beyond half a page, consider breaking it up into smaller paragraphs.

Where possible, use active voice, descriptive verbs, and detailed adjectives. Rather than writing that Jane's car was hit by Bob, write that Bob plowed his heavy-duty pickup truck into the driver's side of Jane's compact hatchback, at 45 miles per hour on a rainy, summer morning.

See LippSmith, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2018 Issue

Consider skipping long footnotes. The occasional footnote to explain an abbreviation or other convention makes sense. This sort of footnote states that "AA" stands for Appellant's Appendix or "ER" stands for Excerpt of Record. Otherwise, consider using footnotes sparingly. Where you have written a footnote that gets into an extensive argument that advances the analysis, try copying and pasting the text of that footnote into body of the brief to see if it works. Burying discussion of the issues in footnotes may squander an opportunity to make a cogent and helpful point where the reviewing court most expects it.

The facts are everything

Unless you are appealing a pure issue of law, such as the interpretation of a statute or an issue of first impression, the facts are everything. The facts allow you to tell your client's story the way you want to tell it. The facts allow you to highlight evidence that paints your client in the best or most sympathetic light, even if those facts do not have much bearing on the legal issue before the court. The facts allow you to humanize your client and bring her injury to light in a way that is not tethered to the legal analysis but that can prove beneficial to the presentation of your case.

Start by introducing your client. Instead of writing that John Doe sued Bob Smith for damages following an automobile accident, take the opportunity to tell the reader about Jane first. A more effective approach might say something like the following:

> Jane Doe, a 35-year-old mother, lives in Santa Monica, California with her husband, John, and their two daughters. Jane recently left her job as an accountant to focus on raising her children. In the summer of 2012, Jane dropped her daughters off at summer camp. When she exited the parking lot, she turned left on a green arrow. A speeding pickup truck broadsided Jane's car midturn. Jane remains in a persistent vegetative state. John sued Bob Smith, the driver of the pickup truck, for damages related to Jane's accident.

That Jane used to work as an accountant, lives in Santa Monica, and took a break from her career to raise her children has little to do with whatever legal issue may be the focus of the appeal. However, many jurists in California (and their law clerks or staff attorneys) know a woman who resembles Jane. Helping the reader see Jane's humanity cannot hurt.

When writing the facts, keep the standard of review in mind. In appealing an issue of law, set forth the facts in the light most favorable to your client's reading of the applicable law. In appealing the dismissal of a case following a demurrer or motion to dismiss, ground the facts in the allegations set forth in the operative complaint. In appealing a grant of summary judgment, portray the facts in the light most favorable to John, the nonmoving party.

Sometimes, in appealing a grant of summary judgment, it works to casually mention conflicting evidence on material factual issues in the fact section in order to queue up the legal analysis. For instance, Bob may argue that Jane's bad driving caused the accident. The fact section can be a place to beat back this idea, well before the brief even gets to the analysis. For example, the factual explanation of the accident might read as follows:

> John presented evidence from the summer camp's security camera that Jane turned left out of the camp parking lot on a green arrow. Other evidence in opposition to Bob's summary judgment motion included a police report in which the officer concluded Jane was driving within the speed limit at the time of the accident. A camp counselor also testified at his deposition that he observed Jane driving carefully just before the accident. However, a passenger in Bob's car testified that Jane unexpectedly turned in front of the pickup truck, against the traffic light, and that the roads were slick with rain.

This brief statement about Bob's competing evidence plants a seed that there are, in fact, triable issues of material fact in dispute, and the trial court got it wrong in granting summary judgment to Bob.

When writing the facts, make a conscious decision about what to do about the bad facts. Every case has them. Awful facts that cannot be presented in a better light on appeal may end up on the chopping block. Another option can be to just include a bad fact as plainly and quickly as possible before moving on to the rest of the factual background.

Sometimes, though, bad facts can be presented in a new light. Remember that the appellate court has no familiarity with the case. The facts the trial court fixated on in deciding a motion or presiding over trial may not interest the appellate panel nearly as much. Try to take a step back and look at the facts with fresh eyes. Talking over the case with a colleague unfamiliar with the matter can help to determine which facts to gloss over and which to showcase.

Ditch the boring recitation of procedural history

Nothing proves more mind-numbing than a brief that ticks off a rote recitation of the procedural history. Everyone has read this kind of brief. It goes something like this: On January 1, 2018, John sued Bob for negligence. On January 15, 2018, Bob answered the complaint. On February 1, 2018, Bob served discovery on John. And so on for pages and pages.

Unless the dates have some particular significance, such as when the statute of limitations is at issue, the procedural history need not include every single date. Even if you opt to include the date of every filing, try to avoid writing every sentence to follow the exact same format. An alternate approach might be the following: On January 1, 2018, John sued Bob for negligence in Los Angeles County Superior Court. Bob timely answered the complaint.

Avoid including every single filing in the procedural history. Instead, include only the ones that count. If, for instance, the appeal concerns a grant of summary judgment, which followed extensive rounds of demurrers, there is no reason

See LippSmith, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2018 Issue

to include a listing of each filed demurrer, opposition and trial court ruling on the demurrers. Simply sum up the procedural history before the summary judgment motion and move on: After extensive briefing on Bob's demurrers, John filed the operative Third Amended Complaint. Thereafter, Bob brought a motion for summary judgment on the issue of causation.

Make the cases work for you by analogizing and distinguishing

The outcome of any appeal depends on the existing precedent. Citing a case for a proposition and then following that citation with a string of cited cases along the same lines, often with extensive parentheticals, does little to secure a win. Instead of an endless stream of citations, pick one case or several cases and delve into them in detail.

When discussing analogous or distinguishable cases, use an easy-to-follow format. State up front whether your appeal is analogous to or distinct from the case being discussed. Second, explain the facts of the cited case. Last, explain how the cited case aids the analysis. This kind of paragraph would flow as follows:

> This case is similar to *Smith v. Jones*. In that case, the defendant crashed head-on into the plaintiff, who turned left on a green arrow out of a parking lot. The appellate court found triable issues of fact existed as to causation and reversed a finding of summary judgment.
>
> Here, Bob drove into Jane's car at a high rate of speed as she turned left on a green arrow out of a parking lot. Just as in *Smith v. Jones*, the trial court erred in finding there were no disputed issues of material fact on the issue of causation. Following *Smith v. Jones*, this court should reverse.

A good discussion of a similar or distinguishable case may go on for more than a page. Take the time to read the case cited closely, to describe in detail the facts of that case, and to explain the case's holding and reasoning. Then use care to discuss how the cited case helps the appellate court decide your case.

Save the introduction for last, but make it count

Save the introduction for last. By then, you have referred to the facts time and again to conduct the necessary legal analysis. You have read and re-read the cases discussed in that analysis. You have revisited whether a specific issue should be raised or cut from the brief. At this point, the narrative of the case has emerged from all of the writing and rethinking.

Do not start the brief with a tedious, pedestrian statement of procedure. Too many briefs start out this way: John appeals the trial court's grant of summary judgment to Bob. Certainly, the reviewing court needs to know the procedural posture by the end of the introduction, but starting out with that procedural posture does nothing to pique the reader's interest. Instead, think about what the case is really about.

Imagine that you ran into a law school classmate at the courthouse and took the elevator together several floors on your way to an appearance. Your classmate asks what you are working on. In that short elevator ride, what would you tell that classmate about the opening brief you are writing? In other words, distill the case down to its essence and write that as the first sentence of the introduction. One possibility for the hypothetical case of *John Doe v. Bob Smith* could be as follows:

> The trial court erroneously decided the issue of causation at summary judgment in a lawsuit concerning a tragic automobile accident. That decision leaves Jane, who remains in a persistent vegetative state, and her family saddled with enormous hospital bills and unable to obtain any recovery whatsoever. This Court should reverse the trial court's decision granting summary judgment and remand for trial.

Conclusion

To write a top-notch opening brief, be judicious in deciding what claims to appeal. Carefully consider the standard of review in order to figure out what to appeal and how to go about it. Write with clarity and precision. Take extra care with the factual background, hewing closely to the lens through which the court of appeal will look at the facts. Put extra effort into positioning the appeal within the case law, doing that analytical work for the court. And take every opportunity to tell your client's story, your way.

MaryBeth LippSmith is the founder of LippSmith Law *in Los Angeles, where she specializes in appeals. She served as a term law clerk to the Honorable Dorothy W. Nelson on the Ninth Circuit Court of Appeals from 2002 to 2003 and as her career law clerk from 2011 to 2015. You can reach her at marybeth@lippsmithlaw.com.*