

THE RECORDER

YOUR SKILLS

Basics of a Sound Appeal

Understanding the standard of review and the mechanics of a brief are essential to effective appellate argument

Michael Reedy

I love writing appellate briefs because they provide lawyers an opportunity to explain and win their case. Good appellate writing uses the same framework as the best historical nonfiction: It provides a compelling narrative that identifies the most important information accurately, while telling a full and consistent story.

TELL A COMPELLING STORY

Make your brief interesting by telling your client's story. As with all types of writing, you can improve your skills by reading great writers. If you want to know the best way to tell a nonfictional story, I recommend reading *Team of Rivals*, Doris Kearns Goodwin's book about the Lincoln presidency and Cabinet, which tells a complex story convincingly — how President Abraham Lincoln worked with and won over the men who ran against him for the 1860 Republican presidential nomination.

I also recommend Erik Larson's book, *The Devil in the White City*, which tells the story of the 1893 Chicago World's Fair by interweaving chapters about a serial killer with chapters about designing and building the modern American city. It shows how rural

Americans were dazzled by electricity and beautiful architecture, while the large and shifting population kept police from finding a horrific criminal.

Both books benefit from distinctive characters, but they methodically build the case for their theories, chapter by chapter: that Lincoln was a master politician and the promise of the modern city allowed criminals to exploit city residents. In a similar way, lawyers should build their appellate arguments fact by fact, argument by argument, while telling a single overarching story.

If you make your client's story compelling, supported by facts and underlying law, you have a better chance to persuade the appellate court.

Every part of your appellate brief should serve and support the underlying story of what happened to your client,

and why the appellate court needs either to affirm or to reverse the lower court's decision. If you make your client's story compelling, supported by facts and underlying law, you have a better chance to persuade the appellate court.

UNDERSTAND THE FRAMEWORK OF THE STORY

The framing device for every appellate argument is the standard of review. It's the beginning, middle and end of the court's analysis. In general, there are three standards of review: (1) abuse of discretion, (2) substantial evidence and (3) *de novo*. You must understand what the standards mean and how to use them.

These standards are not as simple as they seem. In 1951, U.S. Supreme Court Justice Felix Frankfurter characterized the standards of review as "undefined defining terms," and said "precise definition is impossible."

In general, the "abuse of discretion" standard of review applies to decisions that are based upon the trial court exercising its discretion, such as when a judge applies the law to a set of facts and has options about

how to decide the matter (i.e., a decision to award attorney fees or about what evidence is admissible). These decisions are upheld unless the appellate court finds the trial court clearly abused its discretion, or that a miscarriage of justice would result if the decision is not reversed.

The “substantial evidence” standard of review applies when there is a question of whether the factual evidence considered was sufficient to support the decision, especially when the facts are disputed. The appellate court is not limited to considering only the facts that support the prevailing party, but it will view the evidence in the light most favorable to that party and draw reasonable inferences from the evidence. It is a question about the quality of the evidence, and whether it is reasonable and credible. This standard is not quite as imposing as “abuse of discretion,” but it’s a high hurdle.

If you need to reverse the trial court, the *de novo* standard gives the best opportunity to do so. It applies primarily to issues decided as questions of law, but also can apply to mixed questions of fact and law if legal issues “predominate.” Under the *de novo* standard, appellate courts review the decision independently, with no deference to the lower court or the trier of fact.

You must identify the standard of review for every appellate issue. The standards are fluid, not fixed. If you need a reversal, position the issue as a *de novo* standard of review by showing that there are no “material disputed factual issues,” that the trial court made a legal error.

The way you tell your story depends on the standard of review that applies. If the trial court exercised its discretion, you must prove that the court abused it. If the decision is based on factual evidence, you must prove that the evidence is flimsy and not reliable. If it’s a decision based on interpreting the law, you get a fresh start.

TRIM THE FAT AND BUILD THE TRUST

If you are appealing, you may be tempted to throw everything at the wall to see what sticks. Avoid that temptation. If you make a losing argument out of desperation, you lose credibility. It’s better to focus on the issues where you have a chance to win rather than to contest everything.

Prior to writing the appellate brief, you should look at every possible issue that could be appealed. That’s how you determine which are worth appealing. Look at the basis for each decision, and determine which standard of review applies.

Keep in mind that it’s always more difficult for the appealing party to prevail. You need to win the trust of the appellate court by showing that you understand facts of the case and the applicable law. Discuss all the pertinent case law, whether it supports your position or is contrary to it. If the latter, you need to distinguish the case. You lose credibility with the appellate court if you discuss only the favorable facts and law. Read all the cases, know all the cases.

If pertinent, read the legislative history of the underlying laws. Do not trust summaries or synopses. Make sure that the cases you cite are accurate, and the holdings are complete. Do not overstate or misrepresent the case law.

You have to be certain that every fact and every argument you make is already part of the appellate record. The appellate court cannot consider new evidence that was not presented to the trial court, or new legal arguments that were not raised below, except in unusual circumstances.

Since appellate courts require you to cite to the appellate record, you have to be sure that it contains every pleading, order and transcript to which you are citing. That does not mean you designate every pleading in the case as part of the record, especially if the trial court filings are voluminous. But you have to be sure that everything to which you

cite is included in the appellate record.

If you have a novel or complicated issue, especially if the appellate court rulings are not consistent, you have to develop a public policy argument. In that situation, you should review as many law review articles and essays on the topic as possible. But use these articles judiciously, and determine whether the scholarship is accurate and thorough before you cite to them.

Your appellate brief may be lengthy, but its points should be concise and logical. In telling your story, you either are building a house or creating a pathway. Each step in your process logically should build on or follow the previous, so that you end up with a complete structure or at the final destination. You want the appellate court to agree that the end point of your story is the logical place to stop.

THINK LIKE AN APPELLATE LAWYER

Finally, if you want to be a successful appellate attorney, it helps to think like one. In addition to well-written historical nonfiction, your reading should include briefs written by the best appellate lawyers on issues that interest you. I highly recommend the blog for the U.S. Supreme Court, www.SCOTUSblog.com. It often provides links to Supreme Court decisions and briefs. If reading those briefs and decisions thrills you as much as reading *Team of Rivals*, you’re an appellate lawyer.

Michael Reedy is a partner with McManis Faulkner. His practice focuses on appellate matters with an emphasis on family law and constitutional issues. Reedy can be reached at mreedy@mcmanislaw.com.