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Briefly: Five tips for presenting your appeal

By: Ryan W. Marth and Ryan B. MacDonald November 22, 2021

It's been quite the slog. Hundreds of depositions. Millions of pages of documents produced. Multiple expert reports. And a series of trial war stories worthy of a novel. Now, after years before the familiar district judge, your case rests in the hands of three relative strangers to your case. How can you take advantage of your new forum to give your client the best chance of success?

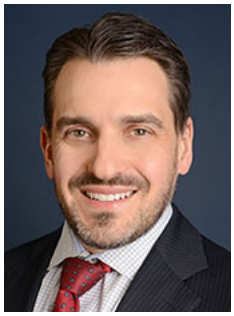
Narrow the issues: Particularly in complex and high-stakes matters, trial courts make myriad rulings that can impact your case, and it is easy to get frustrated with a judge who you think just doesn't get it.

But with word limits and short oral arguments, not every setback is worth bringing to the court of appeals. There are two questions counsel should ask themselves when deciding what issues to appeal: How strong is your argument? And, if you win the argument, what is the effect on your case?

Most lawyers are familiar with answering the first question. It simply requires that counsel honestly consider the likelihood that the court will agree with them, taking into account the facts presented by the appellate record and the governing law. Counsel should take care not to clutter their briefs, and expend precious pages or words, on arguments that are not likely to succeed.

The second question requires consideration of the type and procedural posture of the ruling at issue. For instance, winning an appellate challenge to an evidentiary ruling at trial generally means that the court will order a new trial. If your client has no interest in proceeding to a new trial, there is little reason to brief the argument. Reversal of some rulings would have no effect on the outcome of the case, and therefore such rulings should not be appealed, even if they are clearly incorrect.

Understand the applicable burden and standard of review, and let them do the work for you: Appellate courts do not simply review rulings of lower courts to decide whether they were "right" or "wrong." Instead, they consider whether the appropriate burden was met, applying the appropriate standard of review. As an example, the proponent of expert evidence has the burden to establish that the evidence is reliable and reliably applies to the facts at hand; the standard of review requires the appellate court to determine whether the trial judge abused her discretion in deciding whether or not this burden was met.



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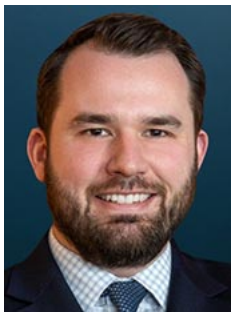
It is tempting to treat the "standard of review" section of your brief as a pro forma obligation to plug in before getting to the meat of your case. But experienced appellate counsel understand how burdens and standards of review work together and integrate them early and often in their advocacy. For example, an attorney appealing admission of expert evidence should carefully phrase the description of the standard of review to emphasize that the district court's discretion is not boundless. And subsequent analysis should explain, not just how the district-court judge was wrong, but how her errors constituted an abuse of discretion. A strong appellate defense of the admission of expert evidence should contain a broad description of the district court's discretion, weaving in procedural facts and findings of the court, and relating them to that standard. The analysis in this brief would highlight less-reliable methodologies that appellate courts concluded were within the district court's discretion to allow.

Explain complex legal topics: Most appellate judges, like their trial-court colleagues, were practicing lawyers before they took the bench. And like most lawyers, they probably specialized in one or a few areas of the law. Thus, while we correctly view appellate courts as having expertise in interpreting and applying precedent, statutes, and other sources of law, it is unlikely that the judges assigned to any particular appeal will be as knowledgeable as counsel about the legal principles at play. Appellate judges may be even less familiar with the relevant law than trial-level judges who often become aware of the parties' positions well in advance of summary judgment or trial rulings.

Successful appellate counsel understand this dynamic and provide clear, nuts-and-bolts explanations of legal topics, particularly when there is some degree of complexity involved. Avoid buzzwords (e.g. "relevant market," "*Noerr-Pennington* Doctrine," "ambiguity rule") without defining and tagging them. Judges will appreciate that this back-to-basics approach minimizes the amount of time she must spend reviewing a brief or consulting outside sources before she feels comfortable enough with the law to make a decision.



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Resist the urge to share the saga: By the time cases make their way to an appellate court, they have a history. Perhaps the trial court allowed for "scorched earth" discovery, much to the frustration of an important client. Maybe opposing counsel was a disagreeable obstructionist seemingly oblivious to the existence of Rules 11 and 37. What about that evidence your client thought to be very persuasive, but the trial judge found inadmissible?

Each of these issues likely shaped the litigation in some meaningful way. But the client's or lawyer's frustrations are seldom grist for persuasive and effective brief writing.

The role of appellate judges when assessing procedural rulings is to determine whether those rulings were not only erroneous *but also sufficiently prejudicial* to justify a new trial. Appellate judges expect counsel to present facts and authority in a manner that aids in this relatively narrow undertaking. It is necessary to provide the court with relevant context for why any particular ruling was so prejudicial that it would justify a new trial. However, lawyers handling appeals who brief diatribes about perceived procedural unfairness in the trial court not only risk muddying their positions and wasting their allotted page or word limit, but also convey a misunderstanding of the appellate court's task at hand.

Consider bringing in expert appellate counsel

No one knows a case better than the attorneys who saw it through to resolution on the merits. Therein lies the problem. Trial counsel's mastery of the facts and procedural history often come at the expense of objectivity and perspective. Appellate counsel can help focus the issues and present them in a way that is most likely to resonate with appellate judges with less familiarity with the case. They can also help navigate the idiosyncrasies of the appellate court's rules and the backgrounds of the panel judges. And appellate counsel needn't take over your case and can often offer more limited engagements, from assisting with briefing to mooting trial counsel for oral argument. In a high-stakes appeal with nuanced and novel issues, hiring an appellate specialist could well give your client the edge.

Conclusion: Whether defending a hard-fought victory or seeking to correct a bad result, lawyers handling appeals are most effective when they understand the nuances of the forum and the scope of the court's role. This requires carefully selecting the issues that make it into the brief and arguing them in a way that demonstrates why the court must rule in your favor.

the appeal.

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