

**Appellate Advocacy
Student Advisor
Handbook**

Fall 2001

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I. INTRODUCTION

This Handbook is designed to aid you, the student advisor, to provide effective, constructive and accurate feedback to your student advisees in the Appellate Advocacy class. It is an attempt to try and provide you with some guidance as to what you should be looking for in your students' work and what type of feedback you should be providing. Our hope is that you will provide your students with substantive comments that will improve their appellate advocacy skills in addition to the grammatical, punctuation and spelling errors that you may find in your students' writing. In addition to this Handbook, you should feel free to draw from the practical knowledge that you have gained and provide your students with any tips or advice with which you were provided.

If you have any questions or concerns, please feel free to contact either of the Appellate Advocacy Co-Directors and they will do their best to assist you.

II. ELEMENTS OF A BRIEF

Title Page

The caption in the title page of a brief identifies: (1) the court in which the appeal is pending; (2) the term of the court and the docket number; (3) the case name; (4) the court from which the appeal is taken; (5) the party submitting the brief; (6) that party's counsel.

Question(s) Presented

This section is critical because it is the first persuasive section of the brief. The questions presented section should carefully and precisely define the issues on appeal. Each question presented should weave both law and the facts together while generally remaining only one sentence long. At the same time, avoidance of long, run-on sentences is critical. Since the brief will feature a summary, as well as the complete text, of the argument, the questions presented does not need to be a compression of the entire case into one sentence; it should cover only primary and determinative issues.

The question presented should compel an answer that supports the advocate's position. Such loaded questions should motivate a court to answer affirmatively in response to the question.

Table Of Contents

The Table of Contents can help the court get a grasp of the argument in an "outline" form. Thus, it should include all of the point and subpoint headings and provide a page number for each heading.

Once the advocate finalizes the brief, he/she should check whether the page number references in the Table accurately. Inaccuracies will irritate the court.

Page number references should be “flush right,” i.e., the last digit of each page number should be flush against the right margin. The page number for each heading should appear on the last line of text for that heading and periods separated by spaces should be extended from the last word to the page number.

The text of each heading should be single spaced and indented in outline form with a double space between each separate heading. The advocate should type point headings in a style matching the headings in the text.

Table Of Authorities

This is a complete list of all the cases, statutes and other authorities cited in a brief. If the court views a particular authority as important, it may wish to focus on the specific passages in the brief that discusses that authority. As with the Table of Contents, the advocate should make sure that each authority cited in the brief appears in the Table, that the page number is accurate and flush right.

When an authority appears frequently throughout the brief (5 pages or more), the advocate should use “passim” rather than listing each page in which the authority appears.

Organization of the Table of Authorities should be by type in the following order: cases; statutes; and other authorities such as treatises or law review articles. Cases can be further subdivided into cases decided by the U.S. Supreme Court, the U.S. Courts of Appeals, U.S. District Courts and state courts, in that order.

Standard Of Review

Many appellate courts, including the Ninth Circuit, require litigants to state in their briefs what they believe is the applicable standard of review. Where this applies, it is very important to understand and articulate the standard of review that the court will be applying in the advocate’s and think about how the application of that standard affects the position and argument of the advocate’s client. The standard of review will have implications for both written and oral advocacy.

The standard of review defines the extent of the actions an appellate court can take with respect to the issues before it, as well as the deference it must give to the lower courts’ decisions. Potential standards of review run the gamut from *de novo* review to *abuse of discretion* or *clearly erroneous* review, with the standard of review varying based on the nature of the question presented.

In some cases it is not clear what the standard of review should be. In such cases, it is important that the advocate persuade the court to adopt a standard of review that favors his/her position. For example, if the advocate is trying to seek affirmance, he/she should argue for the standard that gives more deference to the lower court’s decision; conversely, if he/she seeks reversal, he/she should argue for a *de novo* standard of review.

Statement Of Jurisdiction

Jurisdiction is of paramount importance to a court. A court has the duty to investigate its own jurisdiction even if the parties raise no question about it. The statement of jurisdiction cites the statute and applicable facts that confer jurisdiction upon the court hearing the appeal.

Statement Of The Case

The statement of the case is a critical component to the brief. This section is composed of two sections: (1) the procedural history and (2) the statement of facts.

The procedural history describes all procedural events prior to the hearing before the appellate court. It should fully explain the lower court proceedings, and indicate what relief is being sought in the appellate court. Generally, a chronological presentation of the history works best.

The statement of facts is the client's story. The parties, especially the advocate's client, should be introduced early. Although the statement must be objective and accurate, it should fully and favorably present the material facts and motivate the court to view the client's position with sympathy. It should be persuasive. The statement of facts should not contain any argument of law. The advocate should stick to the facts, but emphasize the equities of the case and personalize his/her client to help the judges realize that there are living, breathing people who are depending on their decision. Conversely, the advocate should depersonalize their opponents and portray them as unsympathetically as possible while remaining factually accurate.

While emphasizing favorable facts the statement of facts must remain fair and objective in order to preserve credibility with the court. All material facts, including those damaging to the position being presented, should be included. Material facts are those that affect the outcome of the case. Hiding such facts never works because the opponent will seize upon the omission and emphasize it. Silence will only call more attention to adverse facts.

By candidly confronting damaging facts, the court will be impressed by the confidence displayed. Good advocates help courts overcome damaging facts in virtually every case. Furthermore, raising adverse facts gives the advocate the opportunity to characterize them in a way that minimizes damages to the case.

The advocate should try and develop a persuasive theme for the statement of facts if there is a single principle or idea that runs through the client's story. The advocate should state this principle at the beginning of the statement, using the facts to strengthen this theme.

Students, as a rule, have considerable difficulty with facts. They are so preoccupied with learning the law that they almost never grasp easily the idea that the facts can be the most significant part of any case. The most common failings in dealing with facts include:

- 1) The omission of bad facts; students invariably want to tell only their client's

version of the facts.

- 2) The omission of favorable facts; students frequently fail to see the significance of facts that are not part of the actual narrative of the sequence of events and how small facts can be used to advance a client's cause;
- 3) The inclusion of unnecessary facts; students who have been lectured about including all legally significant facts tend to get nervous and add facts simply to show "atmosphere" when atmosphere is irrelevant, or to include facts relevant to an issue not being raised on appeal. For example, it is a rare student confident enough to leave out lengthy testimony concerning the identification of appellant simply because appellant has conceded his identity.
- 4) Overuse of the word "alleged" to dispute facts that are unfavorable. Its repeated use sounds defensive. Advocates should definitely not use the term if there has been a stipulation of facts, a trial, or any findings of facts because those facts are established as true.
- 5) Adding or manufacturing facts that cannot be fairly found in the record or failing to cite to the record. Students must cite every sentence included in the statement of the facts to a page in the record. Citations should be accurate so that the court can verify it if it so chooses. In addition, the advocate should make sure that the method for citing is consistent throughout the brief.

Introduction/Summary Of Argument

The Summary of Argument is another section that the court will read for a quick overview of the argument. The advocate should write the summary in concise paragraphs conveying only the most important points as they appear in the argument. The advocate should state each main point as a topic sentence and the rest of the paragraph should provide supporting facts and legal reasons. The law and the facts should both be woven together. Legal authorities should not be cited unless a particular one has overwhelming importance to the argument.

Argument

This is the heart of any brief. The argument section sets forth the advocate's contentions, legal analysis and supporting authority. After identifying the legal, factual and policy issues, the advocate should try and unite them into a core theme. The advocate should also consider the possible themes that the opposing side will present and find a way to counter them.

The argument should muster facts and law to persuade the court to rule in the advocate's favor. A skillful advocate will attempt to incorporate facts into every paragraph of the argument.

A brief may respond to the opponent's arguments and in most circumstances should. The advocate should try and show the illogic of the opponent's argument by demonstrating how the facts fail to support the legal conclusion. However, the brief

should attempt to address the other side's argument as part of the affirmative presentation of the advocate's own case. The brief should also not summarize the other side's argument. This wastes space and puts the advocate in a defensive position.

When properly used authorities aid in convincing the reader to adopt the propositions asserted. The authorities with the greatest relevance and the greatest weight should always be cited. The most relevant are usually those with similar facts. Parenthetical explanations may also effectively and concisely summarize a case, holding, or set of facts.

The argument headings should serve as signposts for the reader. They should explain, clearly and persuasively, the facts and analysis to follow. The headings should be phrased as complete, grammatical and declarative sentences. They should be written with an affirmative argumentative tone that asserts the proposition of that section. Argument headings should contain both law and fact and summarize the argument at each stage. Generally headings should not exceed 5 lines. Include text between point headings. A heading should never directly follow the previous heading.

If further detail is necessary, an advocate should employ subpoint headings. At least two subpoint headings should be used under a main heading or they should not be used at all. Three levels of analysis and headings should suffice. Further subdivision usually adds little to the argument except to add more complexity and confusion.

Most appellate lawyers know how difficult it is to write a good point heading so it is not surprising that students have trouble writing them. Most students make their point headings much too long. Another sizeable group fails to make theirs sufficiently fact-specific, e.g., "Appellant's guilt was not proven beyond a reasonable doubt."

Conclusion

The conclusion is a short paragraph (often one sentence long) prayer for relief; a statement which indicates whether the court should affirm or reverse the immediate lower court decision.

Under this statement should be the date and the advocate's signature over his/her typed name.

III. PERSUASIVE WRITING

The goal of every appellate brief is to persuade the court. Good persuasive writing results from mastering three fundamental and complimentary principles: clarity, brevity, and accuracy.

Content and Organization

A brief is not a novel and therefore an appellate brief should not leave the court in suspense at any point. An advocate should state conclusions immediately at the argument's outset followed by supporting legal reasoning and facts.

The advocate should follow the IRAC method—Issue, Rule, Application—Analogy, Conclusion. After the advocate has announced the conclusion in the beginning of each section of the argument, the advocate should state the issues and the governing rules under each rule and then show how the rules apply to the relevant facts. The conclusion should then be emphasized again.

Using the IRAC method helps the advocate escape two traps: spending too much time discussing abstract principles of law without relating them to the facts of the case and discussing the facts without explaining their legal significance. The IRAC method weaves law and fact together by moving the discussion from law to fact repeatedly.

Within each argument, the advocate should get to the point immediately and stay with it. They should focus on the specific legal questions in the case and not digress into interesting but incidental legal questions that are irrelevant to the outcome of the case.

The following questions will aid you in addressing the content of the argument:

- Are there any conceptual gaps that appear in the author's reasoning? Is there enough information so that reader will feel that each contention is properly supported or does the author need to provide additional information?
- Are the sources used to support the contentions credible?
- Has the advocate omitted too many details? Have the necessary details that are needed to understand the argument been included?

The following questions will aid you in addressing the overall organization of the argument:

- What is the overall organizing theme of the brief? Is the organization by topic or by chronological order? Will another arrangement of the material be more effective?
- Has the author provided the necessary forecasting and transitional sentences that the readers will need to understand how different ideas relate to each other?
- What changes in the format of the brief will make the prose more readable? Should the author use fewer or more subheadings?
- Do the supporting points follow an effective, logical progression? What additional evidence or reasoning can the author provide to be more convincing?
- Should whole paragraphs be shifted in their order in the text?
- Should existing paragraphs be cut into smaller segments or merged into longer ones?
- Should a later paragraph be combined with an earlier one?
- Will readers understand the logical connections between paragraphs? Do any additional sentences need to be added to clarify the logical relationship between ideas?

- Will reordering sentences clarify the logic?

Use Of Law And Facts

Mastery of substantive law and the record is the foundation of all good legal writing. When a case is cited it must fairly support the proposition attributed to it. The advocate should not stretch a case's holding beyond its reasonable scope. If there are no holdings directly on point, or if the advocate is relying on dicta from an opinion or a dissenting opinion, he/she should admit it. Admitting the unfavorable to the court will increase the advocates credibility before the court, whereas being too "creative" with precedent will detract from the advocates overall credibility.

A frequent mistake is to string-cite several cases when one would be sufficient. The advocate should cite and analyze only the best authorities and fully explain why they are helpful. When using case authorities, the advocate should briefly summarize the facts of the cases and their holdings and then compare (or contrast) them to the facts of his/her case.

Writing Style

The sentences in the brief should be written in active voice (Indeed, the advocate should write the sentences in the brief using the active voice ☺). You should encourage the advocate to use short sentences and not be afraid to be punchy and direct. Short sentences force the advocate to focus on their points and be precise in his/her language.

Quotations & Parentheticals

Advocates should selectively quote cases and should use quotations only if they are brief, relevant, and well expressed. Long quotations are tolerable only if they are so clear and well written that paraphrasing would detract from their forcefulness.

While the advocate must discuss major cases at length, he/she may sometimes effectively summarize others by using parentheticals. In some instances, the most effective way to use a case is to paraphrase the principle it stands for and follow that with a citation. Parentheticals, abstracting the facts of the case, and/or quoting critical language aid the reader by explaining the relevance similarity, or difference of the cited case to the case at hand. Indeed, an effective quote often makes the best parenthetical, as it both summarizes the advocates point and represents legal authority.

Key Editing Questions

- Is the advocate simply and clearly saying what they mean to say?
- Does each section, paragraph, sentence, and word advance his/her argument?
- Is each section, paragraph, sentence, and word necessary?
- Is each section, paragraph, sentence, and word in the order which makes the most

logical sense and which makes the advocate's argument flow?

IV. ORAL ARGUMENT

Introduction

One of the difficulties of teaching appellate advocacy to law students is that moot court arguments are very different from most arguments in real courts. As a general rule, moot court arguments are more civilized than real ones. Moot court judges are almost invariably well prepared, they ask thoughtful questions, and the arguments are generally conducted for the very purpose of allowing students to show off their advocacy skills to the best of their abilities. Real judges, of course, are often overwhelmed with cases, have not read the briefs and simply want attorneys to make a few brief points as quickly as possible and sit down. Woe betide the attorney in most real courts who attempts to begin with a road map of the argument and ends with a conclusion tying together all the points just made. And woe betide the moot court advocate who fails to do these things.

On the other hand, although real courts interrupt unmercifully, while moot court judges allow students a few consecutive sentences, real judges are far more tolerant of a wide range of attorney behavior than are moot court judges. It is doubtful if real judges even notice that an attorney's eyes have not swept the bench or that the attorney has failed to say, "Your Honor" after every sentence, both serious *faux pas* in moot court arguments.

The Hearing Process

Usually the hearing will be before a panel of three or more "judges." The advocate will face the panel from behind a lectern or podium. There may not be a microphone, so the advocate will have to speak loudly so that the "judges" can hear the argument.

Each side will have 20 minutes to argue. The petitioner argues first. If he or she wishes to reserve time for rebuttal (strongly recommended), he or she may request this at the beginning of the argument. The respondent argues next. The respondent is not given an opportunity for rebuttal. In preparing students for oral argument, it is important to remind respondents that their job is somewhat different from appellants'.

Respondents should realize that they should not act as though nothing had been happening for the preceding twenty minutes during which appellant was arguing by beginning all over again with "The issue in this case is..." Rather, they should tie their arguments to appellant's: "Appellant has mischaracterized the issue in this case..."

During each advocate's argument, the judges will interject questions and comments to which the advocate must respond.

Preparing For Oral Argument

Preparation for oral argument should begin when the advocate begins reading through the record and writing the brief. As questions occur to him or her, they should be

written down.

Once the advocates write and exchange their briefs, they should examine and analyze the opponent's brief. He or she should review each relevant fact and determine how it can best be used when responding to questions. The advocate should be familiar with the facts and holdings of each case cited in both briefs. Judges will often ask for explanations of how the cited authorities support the contentions being advanced. Similarities or differences in fact patterns may be a factor upon which the court bases its decision. The best way to assure that the advocate can handle any argument is to be thoroughly familiar with the record on appeal, the briefs, the applicable legal authority and the policy considerations implicated by the case. The advocate also should be sure to check for any new law that has come down since the brief was written.

Outlining The Argument

After reviewing the briefs, the applicable legal authority and the record, the advocate should construct a short outline (even if he/she does not plan to use it during the argument). He or she should only include what can be covered in the limited time allotted.

The outline should serve three purposes: 1) framing the boundaries of the argument; 2) serving as a guide for the structure of the argument; and 3) facilitating the responses to possible questions of the court. By following the outline and discussing the relevant facts, legal authorities, and policy considerations supporting the advocate's positions, he/she can present a thorough, logical, and persuasive argument. Additionally, when confronted with a question, the advocate can glance at the outline to remind him/her of the points to include in the answer. If a question takes him/her out of the context of the argument, the outline may suggest a path back to the place where he/she left off.

In most cases the outline for the oral argument will resemble (but not copy) the Table of Contents of the brief. It should list the major contentions in the brief and be filled in with only the most important facts, authorities, and policy considerations to support each contention. It should also address the unfavorable authority and set out ways to counter it. The advocate should delineate at the outset the contentions of the argument, so as to give the court an overview of the argument.

The outline should use key words and abbreviations, not long quotes from cases. The outline should be short—about 2-3 pages at most. During argument, the advocate should not do more than scan their notes to ensure they cover all of the points. For this reason, the advocate should not bring a written speech to the podium. In fact, many courts prohibit reading a prepared argument. The advocate should be prepared to the point where he/she does not have to rely on the outline at all.

Structuring The Argument

Generally, the oral argument contains an introduction, prepared argument, possible answers to questions from the court, transitions back to the argument, summary of uncovered issues and a conclusion of what the advocate wants the court to do.

The introduction should identify the advocate and his/her client. If appropriate, this would be where the advocate should request rebuttal time. It should then briefly state what the case is about, what the contentions are on appeal, and what issues the advocate plans to cover.

The introduction should begin with a salutation (i.e., “May it please the court” or “Good evening, your Honors”). The advocate should use a thesis statement to capitalize on the court’s initial attention and to set the tone of the argument. Generally, the advocate should not spend time reciting the facts of the case.

The introduction is followed by a prepared argument. It should begin by providing the judges with a roadmap—the two to three issues that the advocate plans to cover. This will give the judges the framework for the entire argument. If there are more issues that were addressed in the brief, the advocate should pick the 2-3 key issues and focus on them. If time permits, the advocate can then go into the additional arguments.

Most likely, the court will ask the advocate to answer contentions of opposing counsel. These answers are most effectively presented within the framework of the advocate’s own argument. An affirmative posture is more persuasive than a point-by-point refutation of contentions raised by the opposing counsel. Rather than debating specific legal principles with opposing counsel, the advocate should couch responses within the framework of their own argument.

No matter how tempting, the advocate should not ignore or gloss over adverse authority or unhelpful facts; the panel will likely call him/her on these points. If the panel does not, the opposing counsel will. Instead, the advocate should be prepared to distinguish weaknesses or to show the panel why the admitted weaknesses are less compelling than they may seem. If they are not dealt with, the advocate’s credibility will be destroyed.

Transitioning Back To The Argument After Questions From The Panel

Oral argument may take the form of a prepared speech where very few questions are asked. This is rare. Often the advocate will not get past the introduction before questions are asked and the entire argument becomes a question and answer session.

The advocate should be prepared to deviate from their outline and be flexible in his/her approach. Questions must be answered in the most responsive, complete and persuasive way possible. After completely answering the questions, a polished advocate will be able to transition back to his/her argument smoothly.

Questions from the bench usually fall into three main categories: factual information, legal authority and policy considerations. The advocate should also have a precise answer for any question on the standard of review, the precise nature of the claim and the relief being sought.

The advocate should always respond to the question asked by a judge immediately, even if it deviates from the outline he/she has prepared. Delaying a response only increases the court’s apprehension and leaves the judges with the impression that the

advocate is ill-prepared or has no answer to the question.

The advocate should also resist the temptation to answer questions he/she does not fully understand. Instead, the advocate should politely ask the judge to repeat or rephrase the question.

**Not all questions asked by the court will be meant to challenge the advocate's position. Some may be designed to draw out a particular line of reasoning that the court finds appealing or to redirect the advocate to dispositive issues. For this reason, the advocate should take a second to evaluate the question before responding.

The advocate should also repeat the thesis statement mentioned in his/her introduction within the context of the responses to questions asked by the court, in transitions from one issue to another, and in conclusions to individual arguments and the arguments as a whole. The need for repetition of the theme is especially important when the court is actively questioning.

Other Issues

- The advocate should not discuss facts that are not in the record. If the court asks about such matters, the advocate should answer the question if he/she can but remind the court that the information is not in the record. Guessing is never a good idea! The same advice applies if the court poses any question that cannot be answered by the advocate.
- When citing a case, the advocate should provide the court with a brief description of what the case was about, who won and why. The advocate should then relate that case to the case at bar and present the court with the conclusions that should be reached.