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**Presenting Arguments on Appeal:**  
**The Beginning Steps Before Writing the Brief**

After the notice of appeal has been filed and the record is prepared, the next step in an appeal is the briefing process. There is much to be done before any writing takes place. The appellant's attorney must identify the potential arguments on appeal, conduct extensive legal research, and determine which arguments should be presented on appeal. Further, the attorney should carefully reflect on how best to frame the issues and present the arguments persuasively and cohesively.

**Identifying Potential Arguments on Appeal**

The process of writing a brief begins long before any writing takes place. The appellant's attorney must first identify all of the potential arguments that could be made on appeal, and then assess the strength of each argument. Therefore, when tackling an appeal, begin by meticulously reviewing the record. This is particularly important if the attorney was not the counsel of record in the trial court. In the California courts, the record on appeal includes the reporter's transcripts of the proceedings and the clerk's transcript (or appendix) with the pleadings and other relevant documents filed in the lower court. No matter how many volumes the record might be, the attorney should closely review *everything* in the record. If the record is large, take notes and tab important documents or testimony. It is important to spend the time it takes on this critical step; it will provide a complete picture of the case and what the appellate justices will be reviewing.

Any potential arguments on appeal will usually appear on the face of the record. With a few exceptions, parties may not raise new issues on appeal that were not raised below, so the issues are generally identified in the pleadings, motions, or by objections in the transcript. If the case has gone through a trial, I also consider whether there is substantial evidence to support the judgment. In addition, I always try to speak with the trial counsel, if possible, to make sure I understand what issues he or she believes should be raised on appeal.

Reviewing the record also helps to determine if anything is missing or unavailable. In many superior courts, court reporting services may not always be provided in civil cases unless the parties make specific arrangements before the proceedings. Or, a court reporter might have been unavailable during part of the proceedings. So, a full reporter's transcript may not be available. Without a transcript, certain arguments may be precluded, especially arguments regarding evidence presented at trial. If the trial attorney made certain objections or arguments orally in court, and not in writing, the lack of a transcript may also prevent those arguments from being raised on appeal. On appeal, if the information isn't in the record, it didn't happen.

## **Evaluate the Arguments Independently**

After reviewing the record and identifying potential arguments, the next step is to evaluate each potential argument through legal research. This step also takes a lot of time and effort; it cannot be rushed. But since clients do not usually have unlimited funds, the time spent on research must be as efficient as possible. Keeping a research log is helpful to avoid repeating steps. I also save my research electronically and separate cases and other authorities in folders by research topic, so I can easily pull up cases when I want to refer to them.

For each potential argument, identify the standard of review that will be applied on appeal. The standard of review can be outcome-determinative in an appeal. If the standard of review for a particular issue is abuse of discretion or substantial evidence, that could make it very difficult for an appellant to prevail (and conversely, it is more favorable for a respondent). An issue subject to independent or *de novo* review is more favorable to an appellant, since no deference is given to the trial court's determination under this standard.

During this part of the process, the attorney must be as objective as possible. Think about each argument and what counter-arguments will be raised by the other side. I think about how comfortable I would feel making the argument to a panel of justices grilling me with questions. It is crucial to understand the strengths and *weaknesses* of each argument.

At this point, it is time to consider which arguments to include on appeal. Consider not only the strength of each argument, but which arguments will lead to the best result for the client. If the client succeeds on appeal, and the result is a remand for a new trial or other proceedings, the client may ultimately still lose the case. If another argument can be made that judgment should have been entered for the client, rather than having further proceedings, that is a far better result. Focus, however, on the strongest arguments. Avoid making weak arguments simply for the sake of making every possible argument on appeal. A weak argument can take away from the strong ones. But, before deciding *not* to raise an argument on appeal, be careful. If the argument has some potential (but is not a *weak* argument), you may want to include it. I have been surprised at times when an appellate court has rejected what I thought was my strongest argument, but embraced an argument I thought was less compelling.

## **Frame the Issues Persuasively**

The next step is to decide how to frame the issues. In the California appellate courts, the rules do not require issue statements in briefs, but it is sometimes helpful to include them. Even without issue statements in the brief, thinking about how best to frame the issue is a big part of constructing the arguments in the brief. Consider how to present each argument in the most persuasive way for the client.

Framing the issues is a way of getting the justices to see the case in a way the way you want them to see it. It is a matter of perspective. As every lawyer knows, two people might view a set of facts and legal rules entirely differently, based on their perspectives. The appellate lawyer's job is to present the facts and arguments in a way that conveys the client's perspective of the case. The lawyer should not only convey the client's perspective, but also show why the court should not view the case the way the other party wants the court to see it.

### **Have a Winning Theme**

A related task is to identify an overall "theme" of the case. Having a good theme will link the arguments together and leave more of an impression of the whole case than just a series of legal arguments. A theme is not necessarily a legal argument, but it is the common thread that underlies the arguments. Think about using a theme in the literary sense. If you were going to describe the case to a non-lawyer, how would you describe it? What is the case *really* about? Try to avoid overly vague themes like "fairness" and "justice," since those concepts apply in just about every case. Think more about the overarching concepts involved in the case based on the specific facts and legal issues. At the same time, remember your audience. Do not tug at the justices' heartstrings in the same way you might to a jury. Be subtly persuasive.

In summary, the beginning of the briefing process requires significant investigative work before any writing takes place. This includes thoroughly reviewing the record, identifying potential arguments, and comprehensively researching each potential argument, while maintaining objectivity. Next, the attorney should determine which arguments to present, considering which arguments are strongest and which ones will lead to the best possible result. Finally, consider carefully how to frame the issues persuasively using an overall theme to give cohesiveness to the arguments. These steps will lead to a more effective and persuasive brief on appeal.

C. Athena Roussos is an attorney in Elk Grove, California, and is certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. She also teaches at McGeorge School of Law in Sacramento. Roussos can be reached at (916) 670-7901 or [athena@athenaroussoslaw.com](mailto:athena@athenaroussoslaw.com).

Peg Carew Toledo also contributed to this article. Toledo is a partner at Mennemeier, Glassman & Stroud LLP, a Sacramento civil litigation boutique. She is also certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. Toledo can be reached at (916) 551-2592 or [toledo@mgsllaw.com](mailto:toledo@mgsllaw.com).