

Five Tips For Effective Citation to Legal Authority In Appellate Briefs

The effective use of legal authority in appellate briefs is both an art and a science. In both California state and federal appellate courts, legal arguments in appellate briefs must be supported by relevant legal authority. California Rule of Court, Rule 8.204(a)(1)(B) requires that an appellate brief must “support each point by argument and, if possible by citation to legal authority.” Similarly, Federal Rule of Appellate Procedure, Rule 28(a)(9)(A) requires “citations to authorities.”

The failure to provide legal authority in an appellate brief can result in the appellate court determining that the argument has been forfeited on appeal. This article discusses five suggestions for how to use citations effectively.

1. Apply The Rule of Primacy

In any appellate argument, the most relevant and important case should be cited and discussed first. Of course, to determine the most relevant case, you must know what is binding precedent in the particular appellate court where the appeal is pending. If the case is pending in a California intermediate appellate court and there is California Supreme Court law on point, the Supreme Court case should be cited first. If there are only “Cal. App.” cases then you should pay attention to which intermediate appellate court and which division of that court issued the opinion because a decision by one court of appeal is not binding on other courts of appeal.

If the appeal is pending in the Ninth Circuit and it involves an issue of federal law and there is United States Supreme Court precedent on the issue, then that Supreme Court precedent should be the lead case. If there is only Ninth Circuit authority, then you must pay attention to whether any of the cases were issued by the court en banc.

2. More Is Not Necessarily Better

Long string cites are usually ineffective and often waste space in an appellate brief. String cites can clutter the page and bog down the reader. The tendency of many readers is to rush through them or even skip over them.

In the event that a string cite is necessary and appropriate, my rule of thumb is never to cite more than three cases in a string cite and to draft careful parentheticals for each case cited. In that situation, my goal is to put the court’s mind at ease that the legal issue is settled and not subject to debate. I want to demonstrate that even though my adversary is contesting this particular legal point, it is well-established law and the court need not waste significant time on it. Often, while drafting the parentheticals, I realize that the

case I was about to bury in a string cite deserves more discussion and my string cite should be eliminated all together.

The one rare exception to my short string cite rule is when I am trying to explain a majority or minority position on an issue. A long string cite in that limited situation can be effective to list the jurisdictions that have followed the majority or minority position. My preference, however, is to put such a long string cite in a footnote so as not to break the flow of the argument and distract the reader.

3. Be User Friendly

A brief should be user friendly to the judges or justices and the law clerks or staff attorneys that need to read and analyze your appellate brief. First, for every case citation, there should be a pinpoint cite directing the reader to the precise page or pages in the case that you are relying upon. This is a matter of both courtesy to the court and effective appellate advocacy. The court does not have time to wade through a lengthy decision to try to discern the portion of that decision that is relevant to your appeal.

Second, the brief should use the proper legal citation format. California appellate courts use the *California Style Manual* in their opinions. The California court rules allow litigants to use either the *California Style Manual* or *The Bluebook: A Uniform System of Citation*. California Rule of Court, Rule 1.200 provides the option for either format, but requires that the “same style must be used consistently throughout the document.” However, the Advisory Committee Comment to Rule 8.204 provides that “brief writers are encouraged to follow the citation form of the *California Style Manual*.” Using the *California Style Manual* assists the court because the opinion will be in the *California Style Manual*, and thus, the court does not need to re-format the citations in your brief.

The Ninth Circuit uses the *Bluebook* for the citations in its opinions. However, the rules do not require a particular citation format for appellate briefs. It is my recommendation that all citations are in Bluebook format because it is the format that is used in the Ninth Circuit opinions.

4. Be Meticulously Accurate

Of course, all attorneys have an ethical duty of candor to the court. However, beyond this ethical duty of candor, the effective appellate advocate wants to win the confidence of the appellate court. The appellate court needs to know that you are an accurate and trustworthy source for both the facts and the law. One of the quickest ways to lose all credibility is through inaccurate citation to legal authority. I have seen the problem of inaccurate citation take on many different forms, including: (1) inaccurate descriptions of cases in the text of the brief or in parentheses; (2) inaccurate quotations from cases; (3)

citing cases that are overruled; (4) failing to acknowledge adverse precedent; (5) citing intermediate appellate decisions as if the decision is a California Supreme Court decision; (6) typos in the citation; and (7) citing unpublished decisions as if they are precedential. Some of these inaccuracies may be due to sloppiness or haste, others appear to be intentional. The result is the same – a loss of credibility in the eyes of the appellate court.

5. Update Your Cases On The Day Of Filing

While I was a law clerk at the Ninth Circuit I had the unfortunate experience of the United States Supreme Court issuing a decision overruling long-standing precedent on the day that I was finalizing a draft opinion on that very issue. I had shepardized my cases the day before I turned in the draft. However, because I did not update the cases that very day, I missed the new opinion and both my judge and I suffered significant embarrassment.

The lesson I learned is that the law is changing every day and thus, it is necessary to use Lexis or Westlaw to ensure that all of your cases are good law on the day that you file your brief.

Conclusion

Appeals are won on the law. A good appellate brief must present the relevant legal authorities in a manner that assists the appellate courts in reaching the correct result.

Peg Carew Toledo is a partner at Mennemeier, Glassman & Stroud LLP, a Sacramento civil litigation boutique. She is 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.

C. Athena Roussos contributed to this article. Roussos is an attorney in Elk Grove, California, and is also certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. Roussos can be reached at (916) 670-7901 or athena@athenaroussoslaw.com.