

Top 25 Tips for Civil Appeals

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Biography

John S. Addams is a certified appellate specialist through the State Bar of California, Board of Legal Specialization with over 25 years of experience in civil appeals and writs. He has an AV rating through Martindale-Hubbell and is admitted in California, Nevada, and Arizona. John has been recognized by Super Lawyers® as an appellate attorney since 2013. In 2014, the Daily Journal listed his firm (then Niddrie, Fish & Addams LLP) as one of the top five appellate boutiques in California.

At Niddrie Addams Fuller Singh LLP, John's practice focuses on civil appeals and writs and major motion work in trial courts. From 2000-2010, he was the owner of Law Offices of John S. Addams, APC, where he specialized in civil appeals and insurance law. John began his career with Wingert, Grebing, Anello & Brubaker, a prominent San Diego litigation firm, where he was a partner from 1996 through 2000. At the Wingert firm, John first chaired several jury and bench trials and led the firm's appellate and insurance coverage practice groups.

John is a Master in the San Diego Appellate Inn of Court and also active with the Lopardo Inn of Court.

Stages

Before the Appeal

Perfecting the Appeal

Writing the Brief

Oral Argument

Before the Appeal

Tip 1

Know your standard of review

Chance of success is largely influenced by which standard applies.

Like jury instructions for trial lawyers, the applicable standard governs how you will present the appeal.

Significance of Standards

The Compass for the Court

“However convoluted the facts, or complex the issues, the standard of review is the compass that guides the appellate court to its decision. It defines and limits the course the court follows in arriving at its destination. Deviations from the path, whether it be one most or least traveled, leave writer and reader lost in the wilderness.”

(People v. Jackson (2005) 128 Cal.App.4th 1009, 1018)

Substantial Evidence Standard

Whether there was *sufficient evidence* to support the appealed judgment or order (commonly arises in judgments following trials).

Trial court's resolution of disputed facts must be affirmed if supported by "substantial" evidence.

"Substantial" means "of ponderable legal significance. . .reasonable. . ., credible, and of solid value. . . The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record." (*Kuhn v. Dept. of General Services* (1994) 22 Cal.App.4th 1627, 1633)

Focus is on quality, not quantity. Testimony of a single witness may suffice.

Conflicting substantial evidence and reasonable inferences will be resolved in favor of the judgment.

Usually an easy standard for Respondents to meet. Reversals are rare.

Abuse of Discretion Standard

Applies to discretionary trial rulings.

Appellate courts will disturb discretionary trial court rulings only when there is a “clear case of abuse” *and* “a miscarriage of justice.” (*Blank v. Kirwan* (1995) 39 Cal.3d 311, 331.)

Discretion is abused whenever the court “exceeds the bounds of reason, all of the circumstances being considered.” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

Like substantial evidence, considerable deference to the trial court is given—a difficult standard for Appellants to meet.

Independent/De Novo Standard

Applies to pure questions of law.

No deference given to the trial court, but instead decides the matter anew.

Easiest standard for Appellants.

Before the Appeal

Tip 2

Assess prejudicial error

Appellate court will reverse only for “prejudicial” (as opposed to “harmless”) error.

Definition of prejudicial error: when it is “reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error.”

(Cassim v. Allstate Ins. Co. (2004) 33 Cal.4th 780, 800.)

- “a ‘probability’ in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.” *(College Hosp. Inc. v. Superior Court (8 Cal.4th 704, 715.)*

Before the Appeal

Tip 3

Do you have an adequate record?

A fundamental rule of appellate review: An appealed judgment or order is *presumed to be correct*.

Appellant must provide an adequate record—a judgment must be affirmed where appellant failed to present an adequate record for review.

A common problem area: Make sure record reflects what the jury heard from a videotaped deposition.

Before the Appeal

Tip 4

Must you file a motion for new trial?

Ordinarily, errors are not waived on appeal by failing to bring a motion for new trial.

A significant exception: If you want to make a claim for excessive or inadequate damages on appeal, you must first bring a timely motion for new trial.

Consider also filing to supplement the record.

Perfecting the Appeal

Tip 5

File early, file often

Normally, 3 possible deadlines (*the earliest one governs*) to file the Notice of Appeal:

- 60 days after clerk's notice of entry of judgment or a file-endorsed copy of the judgment, with proof of service;
- 60 days after party's notice of entry of judgment or a file-endorsed copy of the judgment, with proof of service; or
- 180 days after entry of judgment.
(CRC 8.104)

No extension of time for service by mail.

Check for special statutory, CRC deadlines.

If you are not sure if an order/judgment is appealable, appeal from it anyway—Better safe than sorry.

Perfecting the Appeal

Tip 6

Attach a copy of the order or judgment you are appealing to the notice of appeal

Not necessary, but may be helpful if you misstated the date or identified the wrong order/judgment in your notice of appeal.

Perfecting the Appeal

Tip 7

To be safe, calculate the deadline to appeal from the date of the order or judgment you are appealing

Avoids the possibility of an untimely appeal because you were unaware of a Notice of Entry of Judgment or service of a file-endorsed copy of the judgment.

The deadline to appeal is jurisdictional; you cannot ask for relief from an untimely appeal.

Perfecting the Appeal

Tip 8

If you are relying on additional time to file an appeal by filing a motion for new trial or JNOV, make sure they are *valid*

When a motion for new trial/JNOV is denied, the time to appeal from the judgment is extended for all parties until the earliest of: (a) 30 days after the clerk or party serves an order denying the motion or a notice of entry of order, (b) 30 days after denial of the motion by operation of law, or (c) 180 days after entry of the judgment.

No extension with an invalid motion

Perfecting the Appeal

Tip 9

To be safe, also appeal from the costs award

If you want to challenge both a final judgment *and* a costs award, the safest practice is to appeal both (whether in a single notice of appeal, or 2 separate appeals).

Perfecting the Appeal

Tip 10

Use an Appendix instead of a Clerk's Transcript

For many appeals, you won't know what you want to designate for the Clerk's Transcript until you write the Opening Brief.

As appellant, check box 1b on the Notice Designating Record on Appeal (an appendix under rule 8.124).

Vendor often used by appellate attorneys:
National Data Support, e-briefs.com.

Perfecting the Appeal

Tip 11

Cost savings tips for the Reporter's Transcript

Contact the court reporter for an estimate or waiver.

(Otherwise, you need to deposit \$650 for proceedings lasting longer than 3 hours and \$325 for shorter proceedings. For proceedings previously transcribed, the costs are \$160/\$80.)

You may borrow appellant's copy of the record (RT/CT) if within 20 days after filing of the record, you send a *written* request to borrow it. Appellant must deliver the copy of the record to you when they file their brief. (CRC 8.153.)

Writing the Brief

Tip 12

Know where you want to go before writing the brief. One suggested approach, the **Flowers Paradigm**:

Madman (*full of ideas, writes crazily and perhaps sloppily, gets carried away by enthusiasm—the madman's nemesis is the Judge*)

Architect (*takes the Madman's work and starts planning the structure*)

Carpenter (*starts building the draft and writes rapidly, without editing*)

Judge (*the editor*)

Betty S. Flowers, *Madman, Architect, Carpenter, Judge: Roles and the Writing Process*, 44 Proceedings of the Conference of College Teachers of English 7-10 (1979); Bryan A. Garner, *The Winning Brief* (1999).

Writing the Brief

Tip 13

Consider preparing the Appendix and outlining the Reporter's Transcript *before* you start writing the brief

Writing the Brief

Tip 14

Be mindful of the standard of review

The Advocate's Guide

Knowing the proper standard is **fundamentally** important to the presentation of an effective appeal.

“Arguments should be tailored according to the applicable standard of appellate review . . . Failure to acknowledge the proper scope of review is a concession of a lack of merit.”

(Sonic Mfg. Technologies, Inc. v. AAE Systems, Inc. (2011) 196 Cal.App.4th 456, 465.)

Writing the Brief

Tip 15

Strive to make the brief short and simple

Justices commonly complain that briefs are too long.

It takes a lot of effort to get to a short brief. Edit, edit, and edit some more.

Only argue your best issues.

Don't reargue points, make them persuasive the first time.

Writing the Brief

Tip 16

Achieve continuity (readability)

Smooth flow of ideas, sentence after sentence, paragraph after paragraph.

- use good headings (many Justices read the headings first)
- when you can, use chronological order
- link your sentences (pronouns, pointing words, a repeated word or phrase, explicit connectives)
- bridge from paragraph to paragraph
- shoot for an average sentence length of 20 words

Writing the Brief

Tip 17

Avoid legalese and fancy words (Write in plain English)

Write like you would talk

("subsequent to" → "after")

Favor the active voice

("The penalty was called by the referee"
→ "The referee called the penalty")

Writing the Brief

Tip 18

Keep the tone respectful

Another common complaint by Justices: Incivility directed to opposing counsel or the trial judge.

When you use “fighting words,” your argument loses credibility.

Writing the Brief

Tip 19

The introduction

A good introduction:

Gets the court situated.

Captures the reader's interest—why they should care about your appeal.

Gives the reader a quick and easy roadmap.

Writing the Brief

Tip 20

In your conclusion, tell the court what you want

Writing the Brief

Tip 21

Get more time if you need it

The parties may stipulate to extend the period to file their brief (before the brief is due) by up to 60 days. (CRC 8.212.)

If opposing counsel won't agree, you can apply to extend the period by up to 60 days. (*Id.*)

You can use Rule Time (an extra 15 days following notice of default). **Caution:** no Rule Time for reply briefs. (CRC 8.220.)

Writing the Brief

Tip 22

Create a toolbox

Writing guides

Usage dictionaries

Online resources

Oral Argument

Tip 23

The preparation

Prepare outlines and reduce them to bullet points.

If you get into the minutiae, make sure you have time to fly back up to 20,000 feet.

Don't forget to reread the briefs again the day before argument.

Identify questions likely to be asked and practice your answers.

Go for a walk and talk.

Oral Argument

Tip 24

How to calm the nerves

Shut down preparation by late afternoon the day before argument (ideally).

Focus on your message and not you.

A breathing technique to consider. . .

Oral Argument

Tip 25

The argument

The Goal: A dialogue.

Keep tone respectful and conversational.

Listen to the questions and answer them directly.

Do not interrupt.

Know the record, and if you don't know the answer, don't guess!