



Insurance Coverage Litigation Committee CLE Seminar

March 4–7, 2015
Loews Ventana Canyon
Tucson, AZ



“Well, That Didn’t Go Right” – The Judges’ Panel On Perfecting Your Appeal

Tips For Perfecting Your Appeal

Authors:

Daniel H. Rylaarsdam, Counsel
Kilpatrick Townsend & Stockton LLP
Beverly Hills, CA

Heather W. Habes, Associate
Kilpatrick Townsend & Stockton LLP
Beverly Hills, CA

1. Introduction

No one likes to lose, especially after spending years in preparation and zealous advocacy in support of a client’s position. Yet, as with any on motion, summary judgment, and especially at a trial, someone will not win. In fact, many times both sides have significant issues that must be addressed on cross-appeals. Because an appeal can be the last chance to obtain a beneficial result or protect one’s bargaining position, the issues selected for appeal, the briefing itself, and oral argument could determine the outcome of the entire case.

Equally important, you do not want to lose before you even address the issues – by failing to protect the record, waiving arguments that should have been preserved, or focusing on too many issues that will obscure the facts or the law.

Finally, although some of the issues below might seem elementary, this checklist is something everyone should consider before any appellate briefing or oral argument. In 2015 at The Judges’ Panel On Perfecting Your Appeal, three appellate court justices and the Chief Judge of the Northern District of Illinois reminded both new and seasoned insurance coverage practitioners about the intricacies of

appellate practices, and how we as insurance coverage attorneys can assist the judges to help us win. Additional considerations include the following: carefully analyzing the applicable standard of review, picking your best issues to raise on appeal and leaving the rest behind, writing a short brief that is devoid of legalese, being prepared to answer questions posed by your panel and answering those questions directly.

2. The Decision To Appeal:

a. Consider The Standard Of Review.

What standard of review will the court employ in deciding the appeal of your coverage case? Is the standard *de novo* review, abuse of discretion, substantial evidence or something else? For example, issues of law on appeal are reviewed *de novo*. See *Salve Regina College v. Russell*, 499 U.S. 225, 232-33 (1991). Under a *de novo* standard of review, “no form of appellate deference is acceptable.” *Id.* at 238. In other words, the appellate court considers the legal issues anew, and independently decides how best to interpret and apply the law. *Id.*

On the other hand, discretionary decisions by the trial court are reviewed under an abuse of discretion standard. Applying the abuse of discretion standard, the question is not whether the appellate court “would as an original matter have [acted as the trial court did]; it is whether the [trial court] abused its discretion in so doing.” *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). For instance, a trial court’s dismissal of an action to sanction a party for failing to answer interrogatories, while extreme, was not found to be an abuse of discretion by the trial court. See *id.* at 643.

Yet another standard of review is whether there is substantial evidence to support the trial court’s ruling. *Alpine Ins. Co. v. Planchon*, 72 Cal. App. 4th 1316, 1320 (1999) (substantial evidence standard, not a *de novo* one, governed appellate review of a trial court’s factual determination). In *Alpine*, the appellant contended that the standard of review was *de novo* review claiming that the trial court was interpreting policy language. *Id.* On the other hand, the respondent argued that the standard of review was “substantial evidence.” The appellate court held that the respondent was correct because the trial court was not interpreting policy language but applying it. *Id.*

Examine your insurance case carefully and the errors that you believe will be presented to the court of appeal for review. Put yourself in the place of an appellate judge, apply the proper standard of review, and determine the likelihood that the court can overturn the decision you seek to have reversed. Consider also whether the trial court’s error or errors are “harmless,” or if they are of such magnitude as to require reversal on appeal. Only after you conclude that you can satisfy the applicable standard of review and that the error or errors require reversal, should you consider other factors, such as cost and time – and what issues to pursue.

b. Likelihood Of Success On Appeal.

Even if there is a valid basis for an appeal, one should also consider the particular court’s record in deciding appeals. To illustrate, for the 12-month period ending on June 30, 2014, and in rounded numbers, the U.S. Appeals Court for the Fifth Circuit reversed only 5.9% of the 4,272 cases decided on the merits. See U.S. Court of Appeals for the Fifth Circuit, Practitioner’s Guide *available at* www.ca5.uscourts.gov. More broadly, statistics from the Administrative Office of the U. S. Courts show that about 13.9% of non-prisoner “Private Civil” cases resulted in reversal. *Id.*

With these statistics and the applicable standard of review in mind, consider whether it is worth the risk of creating new law and precedent that may be detrimental to your typical clients' (i.e., insurer or insured) positions in other cases, even if there might be a tactical advantage to pursuing an appeal. For example, while you might develop a novel or creative coverage argument that you believe in good faith is worthy of being tested in a lower court, an appellate court's rejection of that argument in a published opinion can have more wide-spread consequences on those clients that you typically represent.

c. The Consequence Of A Frivolous Appeal.

A frivolous appeal is one when the result is obvious and the arguments of error are wholly without merit. *Flexible Mfr. Systems Party Ltd. v. Super Prod. Corp.*, 86 F.3d 96, 101 (7th Cir. 1996) ("An appeal is frivolous within the meaning of Rule 38, when it [is] prosecuted with no reasonable expectation of altering the district court's judgment and for purposes of delay or harassment or out of sheer obstinacy." [citations omitted]). If the court finds that an appeal is frivolous, it can award damages and single or double costs, pursuant to Federal Rules of Appellate Procedure, Rule 38. The court may also award costs against counsel if the lawyer is at fault.

3. Writing An Effective Appellate Brief:

a. Write The Opinion For The Court.

Well written briefs make the jobs of the court and its clerks easier. As one commentator stated: "the most effective [appellate brief] style is one that writes the court's opinion for them. Write the decision that you want published." Burney Law Firm LLC, *5 Tips for a Killer Appellate Brief*, Burney Law Firm Blog (August 13, 2009), <http://burneylawfirm.com/blog/2009/08/13/5-tips-for-a-killer-appellate-brief/> ("5 Killer Tips"). Indeed, new appellate judges are often surprised to learn how little time there actually is for writing an opinion. Caryn L. Bellus, *Parting Thoughts – A View Upon Leaving the Bench – Justice Raoul G. Cantero*, The Appellate Practice Section of the Florida Bar, http://www.flabarappellate.org/cle_tips.asp.

Just as importantly, strive to persuade the court that a ruling in your client's favor is the right and just result. As Judge Gurfein of the Second Circuit has expressed: "It is still the mystery of the appellate process that a result is reached in an opinion on thoroughly logical and precedential grounds while it was first approached as the right and fair thing to do." *Litigation Manual: Special Problems and Appeals* 269 (John G. Koeltl, John Kiernan, eds., A.B.A. 1999).

b. Drop The Legalese.

Educate the judges regarding the substantive area of insurance law you need to address. Do not assume they are familiar with insurance issues, terms and subtleties. A good tip is to consider incorporating a glossary created for the underlying court to assist the appellate judges' understanding of common insurance terms that coverage counsel commonly use (deductible, SIR, occurrence, wrongful acts, etc.) If the definitions of insurance terms that will play a part in the appeal are not in dispute, consider submitting a joint glossary to the court.

c. Keep It Short.

A long brief is not effective where the issues on appeal are not complicated. The brief's complexity and length should be consistent with the coverage case. Of course, because coverage cases sometimes involve an underlying lawsuit, the brief might need to discuss the facts and rulings in that case as well. Make sure

that your brief clearly transitions between the details of the coverage case and the underlying liability action, as the descriptions of multiple actions could confuse an appellate court.

If a brief will exceed the court's word or page limit, most courts require that the party file a motion for leave in advance of the brief's due date. *See, e.g.*, Eighth Circuit Rule 28A(i)(1). Papers that do not comply with the length requirement are in danger of being rejected or the appellate panel might simply stop reading after the designated limit. As the Eighth Circuit warns, "Overlength briefs are strongly discouraged." *See* U.S. Court of Appeals for the Eighth Circuit, "Pointers on Preparing Briefs" available at <http://www.ca8.uscourts.gov/appeal-preparation-information>.

d. Choose Wisely And Put Your Best Foot Forward.

Pick the issues that you want the court to consider that are most likely to garner the relief sought – do not use a "shot gun" approach. More is often not better. Stronger arguments on the coverage issues may be diluted by weaker arguments that have little chance of carrying the day. And, do not ignore the time-tested strategy of addressing your strongest argument first. *5 Killer Tips*, <http://burneylawfirm.com/blog/2009/08/13/5-tips-for-a-killer-appellate-brief/>. Although difficult, consider selecting only the issues on which your client has the best chance of succeeding and leave the remaining arguments out. As the U.S. Court of Appeals for the Fifth Circuit advises:

Spend time in drafting the statement of the issues or questions presented for review. Stress the main issue and make an effort to present only a few questions. The questions you select should be stated clearly and simply. A brief that assigns a dozen errors and treats each as being of equal importance when some are clear losers, may suggest that none are very good. As Justice Frankfurter once said, "a bad argument is like the clock striking thirteen, it puts in doubt the others."

U.S. Court of Appeals for the Fifth Circuit, Practitioner's Guide available at www.ca5.uscourts.gov.

e. Jurisdictionally Speaking...

Federal Rule of Appellate Procedure section 28(a)(4) requires that the jurisdictional statement in the appellate brief include the following information: (1) the basis for the agency or lower court jurisdiction; (2) the basis for appellate jurisdiction; (3) the dates to establish the appeal is timely; and (4) a statement the appeal is from a final order or judgment which disposes of all claims or information establishing the basis for the court's jurisdiction. Do not forget this important part of your appellate brief if it is required as part of your appeal.

Coverage cases might have complex jurisdictional issues that may or may not have been resolved in the court below. For example, in federal courts, an appeal can be dismissed for lack of federal jurisdiction even if the issue was not raised below. *See, e.g., California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1009-10 (9th Cir. 2000); 14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3721 (3d ed.1998) (defects going to the removal court's subject matter jurisdiction are not waivable and may be raised at any time after the removal"); *see also Luehrs v. Utah Home Fire Ins. Co.*, 450 F.2d 452, 454 (9th Cir.1971) (raising *sua sponte* the jurisdictional issue of whether removal was properly based on diversity jurisdiction where the complaint failed to allege diversity of citizenship). So, if there are unresolved jurisdictional issues or jurisdiction may be in doubt for any reason, it is worth double checking that you are in the right court.

f. Standards matter.

In addition to the pre-appellate consideration, tell the court clearly the standard of review they should apply to your coverage case and what relief you seek. The Federal Rules of Appellate Procedure require that the appellant provide the applicable standard of review for every issue raised. *See* Fed. R. App. P. 28(a)(9)(B). For instance, a ruling may be reviewed *de novo* or for abuse of discretion. *See Salve Regina College*, 499 U.S. at 232-33 (issues of law on appeal are reviewed *de novo*); *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir.1999) (applying abuse of discretion standard where the motion for a new trial was “grounded on the assertion that the jury’s verdict was against the clear weight of evidence”). The standard may be placed either as a separate heading before the discussion of each issue or at the beginning of the discussion of the issue. And, as part of your briefing, make sure you not only state the correct standard of review but that you properly apply it to the facts and issues on appeal. Little success can be achieved in the appeal of a coverage case if you argue in your brief that based on *de novo* review the court should rule in your favor if the correct standard to be applied is abuse of discretion.

g. Stick To The Relevant Issues.

Do not waste time briefing issues on appeal that have not been raised below. Absent special circumstances, appellate courts, will consider an issue to be waived for purposes of the appeal if it was not raised below. *Corn Plus Co-op v. Continental Cas. Co.*, 516 F.3d 674, 680 (8th Cir. 2008) (insured waived right to argue that language of exclusion was ambiguous on appeal because it did not raise the issue in the trial court). Accordingly, if you did not participate in the case in the trial court, make doubly sure the issues you want to raise on appeal were properly presented and preserved below.

h. Specific Cites To The Record.

Accurate and complete citations to the record are critical. They are the responsibility of counsel, not the court. Indeed, appellate courts have repeatedly held that it is not their responsibility to locate information in the record on appeal when there is no citation provided. *See, e.g., Wilson v. Jotori Dredging, Inc.*, 999 F.2d 370, 372 (8th Cir. 1993) (holding that appellate court would not search the record on appeal for errors when the appellant’s failure to properly cite to the record); *Shankman v. Aspinook Corp.*, 215 F.2d 902, 904 (1st Cir. 1954) (refusing to consider the alleged error on appeal where the appellant failed to cite to the record).

As one court has so eloquently noted, “[i]t is not the job of an appellate court to go on a fishing expedition through the record to find facts favoring or disfavoring an appellant’s arguments.” *Green v. Johnson*, 106 F.3d 1029, 1036 n.2 (5th Cir. 1998); *Mansell v. Bd. Of Admin.*, 30 Cal. App. 4th 539, 545 (“We are not required to search the record to ascertain whether it contains support for Mansell’s contentions.”); *Del Real v. City of Riverside*, 95 Cal. App. 4th 761, 768 (2002) (failure to cite to the record constitutes a waiver of the appellant’s arguments and may result in the court striking the offending document). Instead, the party must supply in its brief relevant record cites so that the court may properly review the party’s arguments. *Id.* Based on these decisions, an attorney should not underestimate the importance of having adequate and accurate citations.

i. Proper Citations To Legal Authority.

Every brief must include proper citations to legal authority. As the California Court of Appeal has explained:

[I]t is established that “an appellate brief ‘should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.’ [¶] ... This court is not inclined to act as counsel for ... appellant and furnish a legal argument as to how the trial court’s rulings ... constituted an abuse of discretion.”

In re Marriage of Schroeder, 192 Cal. App. 3d 1154, 1164 (1987) (citations omitted). Because it is not the court’s function to serve as “backup appellate counsel,” the appellate court might decline to speculate as to what the law is or what argument could have been made and contend that the party has waived certain unsupported contentions. See *Mansell*, 30 Cal. App. 4th at 546.

When citing to legal authority, you also must know when it is acceptable (or not) to cite unpublished cases. In California state court for example, unless narrow circumstances apply, citation of unpublished cases from California state courts is not permitted, while citation of unpublished federal cases is permitted. *City of Hawthorne ex rel. Wohlner v. H&C Disposal Co.*, 109 Cal. App. 4th 1668, 1678 n.5 (2003) (explaining that California Rules of Court do not bar citation of unpublished federal decisions but such cases are only persuasive); *Pacific Shore Funding v. Lozo*, 138 Cal. App. 4th 1342, 1352 n.6 (2006) (same). And, in the Ninth Circuit, it can consider unpublished state court opinions. *Nunez v. City of San Diego*, 114 F.3d 935, 943 n.4 (9th Cir. 1997).

j. How Do I Look?

The first thing a judge will notice is how the brief looks, so spend some time considering the length of sentences and paragraphs, style of headings, white space, and other aesthetic elements. An appeal of a complex coverage case might be even more daunting for the appellate court if the brief reads like a Charles Dickens’ or Ernest Hemmingway novel. Paragraphs should usually never be more than three or four short sentences. Sylvia H. Walbolt & D. Matthew Allen, *The Ten Commandments of Writing an Effective Appellate Brief*, <http://www.cfjblaw.com/files/Publication/4e3cb5bc-fba8-4621-a1ff-028c70667b5f/Presentation/PublicationAttachment/ff36a810-77fc-413f-8434-0d0f84dc125c/TheTenCommandmentsofWritinganAppellateBrief.pdf>. Make every effort to make the text of the brief visually appealing and easily readable and understandable.

Keep in mind that from the court’s perspective, a lawyer that fails to adhere to formatting and style requirements may be perceived to be more likely to misstate the law or the facts. Hon. John C. Anderson, *Appellate Practice – Ten Tips to Improve Your Case on Appeal*, Illinois Bar Journal, July 2013, Vol. 101, No. 7, Page 352. Thus, it is critical to consult the local rules for that appellate court’s formatting and style requirements. For example, the U.S. Court of Appeals for the Eighth Circuit publishes a “Pointers on Preparing Briefs.” These pointers include not only the statutory mandates for briefs, but also illustrates acceptable font types:

The Federal Rules of Appellate Procedure require all briefs to contain no more than 10½ characters per inch when using monospaced typeface and to use 14-point or larger type when using proportionally spaced typeface. See Fed. R. App. P. 32(a)(5). When using proportionally spaced typeface, the font must contain Serifs. Headings and captions need not use a font with Serifs. The following samples are acceptable types. While these examples were prepared with WordPerfect, Microsoft Word and other word processing programs have similar fonts and font sizes.

Monospaced Typeface:

This line is prepared using WordPerfect for Windows 8.0 Courier New Font Face in Font Size 12.

Proportional Spaced Typeface:

This line is prepared using WordPerfect for Windows 8.0 Times New Roman Font Face in Font Size 14. This font contains serifs.

This line is prepared using WordPerfect for Windows 8.0 Arial Font Face in Font Size 14. This font may be used only in headings and captions as it does not contain serifs.

U.S. Court of Appeals for the Eighth Circuit, “Pointers on Preparing Briefs” *available at* <http://www.ca8.uscourts.gov/appeal-preparation-information>.

The U.S. Court of Appeals for the Fifth Circuit recommends that the brief divide factual statements by appropriate headings.

Little is more discouraging to the judicial eye than a great expanse of print with no guideposts and little paragraphing. Short paragraphs with topic sentences and frequent headings and subheadings help the court follow and understand the points you are making.

U.S. Court of Appeals for the Fifth Circuit, Practitioner’s Guide *available at* www.ca5.uscourts.gov.

Even if such guidelines are not available from the court in which your appeal will be filed, aesthetic elements, headings, readability of a brief, etc. should be considered before any appellate papers are filed with the court.

4. Preparing For Appellate Oral Argument:

a. Outline Your Key Points.

In one page, have an outline of your argument structure that you can reference or assist your argument in the event your nerves momentarily get the best of you, or so that you can get back to the points you want to make if questions from the appellate panel require you to stray from your planned argument. The outline should include concise statements on: (1) the procedural posture of the case; (2) each issue in the case; and (3) the critical facts of the case.

b. Keep In Mind The Applicable Standard Of Review.

The issues on appeal might be very different from those that were the hardest fought at the trial of your coverage action, and the reason will likely be the standard of review. Knowing the standard of review for each issue helps you focus on the appellate court’s decision-making process, and will make you better prepared for their inquiries.

c. The Rules Have It.

Almost all intermediate and supreme courts have their own rules regarding the manner in which oral argument is to be presented in that specific court. Although the panel might have graciously granted additional time in a recent argument, many courts will stick to their strict time requirements. Review and take note of all rules concerning arrival time, attire, time allotments, use of exhibits, and other rules concerning courtroom etiquette.

d. Be Ready To Answer Questions.

The phrase “oral argument” is a misnomer; oral argument is a conversation. The court must make a decision, and it needs your assistance to clarify and answer any outstanding questions. Accordingly, it is important to brainstorm on possible questions the court might have, and how you intend to answer those questions.

e. Be Prepared To Concede A Point That Hurts You.

Consider how you might be able to turn a weak point in your coverage case around, and be prepared to tell the court that despite the apparent weakness, you still win. For instance, if there was an error below, rather than argue there was no error, a better outcome might be had if you concede the error but then argue that it was harmless.

5. During Oral Argument:

a. Questions Might Not Be What They Seem.

Do not attempt to glean how the court is going to decide based on their questions. An appellate judge might be playing devil’s advocate, or trying to encourage you to clarify or argue a point for another judge on the panel. Questions asked by one judge may also be that judge’s way of bringing issues to light that he/she wants other judges on the panel to consider. Responding to the judges’ questions is more critical than going over points you may have already made. If possible, in responding to a question, use that opportunity to persuasively argue the merits of your case and demonstrate why your client should prevail. Andrew Frey, *Preparing and Delivering Oral Argument*, Appellate.net (1999), <http://www.appellate.net/articles/prepdel799.asp>.

However, do not alienate your panel by telling a judge that has asked a question that you will get back to the question later. When a question is asked, answer the judge’s question before trying to finish a point you were trying to make. Donald Capparella & Amy J. Farrar, *Tips for Becoming a Better Appellate Advocate – Oral Argument*, <http://www.dodsonparker.com/publicationsfldr/Tips%20for%20Becoming%20a%20Better%20Appellate%20Advocate-%20The%20Oral%20Argument.pdf>.

b. Be Prepared And Be Quick On Your Feet.

You should bring with you to oral argument all briefs and related appellate filings, pertinent parts of the record and important cases and authorities. *Id.* Do not let questions from the panel derail your oral argument. Be prepared to modify your argument to fit the time constraints that may be ever shrinking if the panel has a lot of questions. Be prepared to respond to those questions and then get back to the important arguments you want to make. If time is running short, you may have to jettison less important issues in favor of more critical ones. *Id.*

c. Observe.

If possible, take the time to watch oral argument before your panel of judges before your own argument. Try to understand the pattern of the judges, and familiarize yourself with the courtroom.

d. Judge, Not Jury.

Do not treat the appellate panel as a jury. In other words, refrain from emotionally-charged arguments, or one that hinges on a witness's credibility, and focus instead on the legal issues at hand. And do not – as one attorney did in a recent argument in California appellate court–start the appellee's argument by saying that you hope that the panel's questions do not signal that your legal fees are in jeopardy.

e. Some Final Thoughts On Oral Argument . . . Be Sure To Avoid:

- Reading verbatim from a prepared statement;
- Interrupting the court;
- Aggressive behavior or impolite statements to opposing counsel;
- Repeating your opponent's arguments too many times;
- Ignoring a question from the court or not answering the question posed;
- Misstating the law or the facts (or not being intimately familiar with the applicable law and facts);
- Not saving time for your rebuttal; and
- Talking simply because there is time remaining on the clock - once your argument is complete, sit down.