
S A N F R A N C I S C O

BARRISTER

The Other Half of Appellate Practice

By Elliot L. Bien

It has recently been said, with complete justification: "Your brief is the heart of your appellate case." Pregeron, "The Seven Sins of Appellate Brief Writing and Other Transgressions," 34 UCLA L.Rev. 431, 433 (1987). Brief writing deserves all the attention it receives and Judge Pregeron's recent article is one of the best on that subject.

But the heart is only part of the body. Your brief is only *part* of your appellate case.

The other half of appellate practice is less exciting, less noticeable, and certainly less familiar to the great majority of attorneys. But it has this knack of becoming extremely exciting and noticeable and familiar all of a sudden—for example, when the motion to dismiss your appeal arrives in the mail...when your client's bank account is attached because you didn't post an undertaking...when your best argument is rejected for the lack of a proper record...or when you and your client are hit with sanctions for a frivolous appeal.

The other half of appellate practice might seem dry, picky, and annoyingly opaque, but it can't be ignored. Your soaring appellate rhetoric will land with a thud. You might never even make it to the runway.

Overview: The Four Phases of Appellate Practice

There are four main phases of appellate practice. Each has its special opportunities and special pitfalls, but each requires an informed appreciation of the entire appellate process.

Phase One is not always recognized as part of appellate practice. It is not always recognized, period. It is the vital and often treacherous transition

from the trial court to the appellate court. It requires an objective evaluation of the merits of the prospective appeal or writ petition, the identification and timely invocation of the correct appellate remedy, and the establishment of an appropriate *status quo* regarding enforcement of the judgment pending appellate review.

Phase Two is the fulfillment of the early procedural requirements in the appellate court: for example, designating and physically procuring an appropriate record for the appeal. This is also the appropriate time for the respondent (state court) or appellee (federal court) to mount any procedural challenges to the appeal, concerning such matters as the appealability of the trial court's order, and the timeliness or correctness of the appellate remedy which was invoked.

Brief writing is only Phase Three of an appeal, but it extends over several phases of a writ proceeding. In either case, however, your excellent writing will not suffice without compliance with some important technical requirements, and a command of all applicable substantive rules on the scope and standard of review. The appellate brief or writ petition cannot be simply a new and improved version of the trial court brief.

The fourth and final phase can loosely be called the disposition, which begins with notice of the scheduling of an oral argument. It concludes with the issuance of the remittitur (state court) or mandate (federal court) on an appeal, and the appropriate writ in a writ proceeding. In between are petitions for rehearing, requests to modify or publish the opinion (or depublish it, in

California practice), and any proceedings in the state or federal Supreme Court.

This article will be no compendium of wisdom on any of those topics; indeed, it will mainly focus on Phase One. Its purpose is simply to defend the thesis stated at the outset—that the brief may be the heart of appellate practice, but the heart does not function in a vacuum. It does sustain the organism, but not by itself, and not without sustenance *for* itself.

The Transition from Trial Court to Appellate Court

This is, by far, the least understood and most dangerous phase of appellate practice. It demands your immediate attention to the big picture of the case, and simultaneously to the technical minutia of the prospective appeal or writ petition. This is the time when post-judgment remedies and appellate arguments can be forfeited, surprise execution attempts can occur, "judgments" can turn out not to be judgments, and appellate rights can be lost altogether through missed deadlines or pursuit of the wrong appellate remedy.

If consultation with an appellate specialist is being considered, this is the time to do it. Far too often, the first consultation does not take place until the briefing phase, when it is usually much too late for important decisions and procedural steps to be taken.

Remember, too, that appellate practice does not always begin with a jury verdict. It also begins when you receive a ruling on a motion or some other interlocutory proceeding. You tear open the envelope and read the

order. You jump for joy, or slump down in your chair.

But what do you do next? Jumper or slumper, you face a number of important and complex issues. They are broadly practical, but at the same time highly technical. They implicate client relations just as significantly as litigation strategy.

Evaluating The Appellate Case

What, for example, should you be telling your client? To be sure, you were the winner or loser on the ruling. But this was only round one. Will the ruling hold up in the appellate court? How do you gauge the chances there? What is the appellate remedy, if there is any at all?

Round one losers have a certain natural tendency to blame the umpire, or the other team's unfair tactics. This mentality fosters a certain overestimation of the chances of success in the appellate court. So don't give your client a hasty opinion. You'll both regret it later, and thousands of dollars later.

Moreover, round one *winner*s have a certain natural tendency to overconfidence. This mentality, too, fosters a certain overestimation of the chances of success in the appellate court. So don't give your client a hasty opinion after a win, either. The regrets can be equally expensive.

Your appellate case is a whole new ball game. Only the litigants are the same. The process is different, the judges and clerks are different, and the climate and even the grounds for the decision making are different. Your strong trial court case may be much weaker in the appellate court, and *vice versa*. Besides, the law can even change by the time of the appellate decision.

Win or lose round one, therefore,

be reasonable in your predictions about the ultimate outcome. If a transcript is involved, you might even consider reading it before finalizing your prediction on how an appellate court will react to the case. True, your opinion could be delayed for several months. But your client might really prefer that you see the lab results before deciding on surgery.

In addition, your evaluation must certainly take into consideration the standard of appellate review applicable to the ruling in question. Vastly different standards exist, ranging from extremely deferential to extremely undeferential. Some appellate presumptions favor the judgment, others favor its reversal. Judge Pregerson calls the standard of review "the keystone of appellate decision making." 34 UCLA L.R. 431, 437. It cannot be ignored in your evaluation.

While providing competent representation should be incentive enough for a thorough evaluation, other incentives are increasingly being brought to bear. Sanctions are increasingly being sought and assessed for the prosecution of a frivolous appeal, to deter resort to appellate remedies for the mere purpose of delay, or for contentions that are clearly indefensible. Hopefully, though, sanctions will never chill zealous or creative advocacy.

Finally, bear in mind that not every nonfrivolous appeal or writ petition ought to be prosecuted. Settlements can take place on the steps to the appellate courthouse, too. Nor are appellate judges unfamiliar with or hostile to that prospect. Conferences can be arranged, and are sometimes even required.

In sum, your evaluation of the case should be a practical one, not just a check for frivolity. Bruised or elated

feelings from the trial court ruling must be discounted. The client needs an objective and informed appraisal of the strength of the prospective appeal or petition.

Identifying and Invoking the Correct Remedies

Your excellent evaluation might only haunt you, of course, if you choose the wrong appellate remedy or bungle the right one. The first phase of appellate practice also demands a quick and correct identification of your proper remedy, and the time and procedure for invoking it. In some instances, too, further trial court remedies must be exhausted as a prerequisite to appellate review.

As long as you're waiting for that reporter's transcript before finalizing your opinion, you might just check the statutes and case law before opining that there is any appellate remedy at all. Is the order a "final" one? Is it the last contemplated action by the trial court, or is a further order or proceeding to follow on the same or a related issue? Does the ruling dispose of all pending claims between the litigants affected by it? In a federal case, does it dispose of all claims between all *other* parties, too? (*See* Fed.R.Civ.Proc., Rule 54(b))

Those are just some of the initial factors that will determine whether an appeal will lie. For even if the ruling does not meet the criteria of "finality" alluded to above, an appeal might still be the appropriate remedy. Federal and state statutes and case law provide for an appeal in numerous situations involving "nonfinal" orders. (*See, e.g.*, 28 U.S.C. § 1292 and Code Civ.Proc. § 904.1) Practitioners who fail to invoke that remedy do so at their grave peril. The writ petition is not a safety

net. A universal requirement for a writ is that the prescribed remedy by appeal is inadequate, not that it was overlooked.

If your remedy is an appeal, it is axiomatic that the time to invoke it is of the essence. While federal court practitioners have some limited hope for an extension of time for the notice of appeal (Fed. R. App. Proc., Rule 4(a)(5)), state court practitioners have none. Accordingly, in both jurisdictions it is vital to identify (1) the prescribed time limit for filing the notice of appeal, and (2) the event in the trial court that triggers the prescribed period. The trigger is far from clear in some situations. Many attorneys also forget that orders granting motions are not the same as judgments, or even dismissals of a pleading.

If your research shows that the order is not an appealable one, however, Phase One still requires you to evaluate the prospects for a writ petition. The standards for availability are highly practical ones, and the standard of review is typically much more stringent than on appeals.

But don't tarry over your evaluation of a potential writ petition. Unlike appeals, a full-blown petition must be filed at the outset, and California's special writ statutes create one of the greatest dangers in all of appellate practice. There are at least eight kinds of interlocutory rulings which have special provisions as to review by writ: Code Civ. Proc. § 64 (emancipation of a minor), § 400 (change of venue), § 404.6 (coordination of actions), § 409.4 (expunging *lis pendens*) § 418.10 (quashing service of process), § 437c (summary judgment denied or summary adjudication granted or denied), § 877.6 ("good faith" of a partial settlement), and § 1245.260 (inverse

condemnation). Some of these statutes have very short deadlines for the writ petition, and the deadlines vary. As with appeals, there appears to be no inherent power to grant additional time past the statutory deadline.

In sum, identifying the correct appellate remedy is a vital and sometimes challenging task, aggravated by pressing time constraints. Attorneys can all too easily "simplify" that task through ignorance and default.

Enforcing Or Staying The Judgment Pending Review

As if Phase One were not difficult enough, the question of the enforceability of the judgment or order also arises at this time. Does the invocation of an appellate remedy deprive the trial court of jurisdiction to proceed with any or all related matters in the litigation? This problem arises on the whole gamut of issues, from execution on a money judgment to the duty to comply with a discovery order. The transition from the trial court to the appellate court on each of these matters must be carefully and quickly analyzed.

As elsewhere in appellate practice, there are some significant differences between the federal and state rules. For example, the federal system provides an automatic 10-day stay of the enforcement of most judgments. (Fed. R. Civ. Proc., Rule 62(a)) In California state practice, however, money judgments are *immediately* enforceable by writs of execution, unless an appropriate undertaking has been filed pursuant to Code Civ. Proc. § 917.1. Some lawyers have learned this the hard way, through an angry telephone call from a client whose bank account has been frozen, or whose office has been visited by the sheriff as a "keeper,"

in that quaint phrase. This is no way to keep a client.

Establishing an appropriate *status quo* pending appellate review can be a complex and vigorously disputed matter. And, as is typical of Phase One, it must be addressed under severe time constraints. If relief is not available or forthcoming in the trial court, urgent motions or petitions for a writ of supersedeas must be filed in the case of an appeal, or urgent stay applications must accompany your urgent writ petition.

If appellate brief writing is the most reflective aspect of American litigation, appellate stay disputes are surely among the most frenetic. Phase One is no time for sitting back and sulking over a loss, or gloating over a win.

A Glimpse At The Remaining Phases

Once you successfully negotiate the transition to the appellate court, your journey there is just beginning. The appellant or writ petitioner immediately faces the responsibility of procuring a record adequate to support the contentions to be made. The other side faces the converse responsibility, insisting that such a record is procured, and procured promptly. Both sides may have to participate in "docketing" or "prebriefing" programs, or in subsequent efforts to prepare a joint appendix or other form of record.

By whatever method appellate review has been sought, and however important the issues may be, there will be no review unless all procedural requirements are fulfilled. The appellate process is not rigid. There is ample room for common sense, and even justice. But there are some established requirements that must be met in a timely manner. If they are not,

the appeal or writ petition will simply be dismissed. The merits will never be reached.

The same is true regarding the parties' *contentions* on the merits. In the court's discretion, arguments can be disregarded as "not cognizable" for any number of reasons. For example, the appellate brief writer must be careful to note what points have been raised in the trial court. Appellate contentions can sometimes be deemed precluded by waiver or admission below.

On a more practical level, appellate contentions can be significantly embarrassed by a contradictory assertion below.

Thus, as stated at the outset, the appellate brief does not function in a vacuum. It has a history, a procedural framework, and a number of requirements as to form and content. (See, e.g., Fed.R.App.Proc., Rules 28-32; Ninth Circuit Rule 13; and Cal. Rules of Court, Rules 13-15) Excellent writing is necessary, but far from sufficient.

Conclusion

Remember. The "seven sins" are only of the heart. There are sins of the rest of the body, too; and those can cause much more trouble than the seven.

Elliot L. Bien is an appellate specialist with Bronson, Bronson & McKinnon in San Francisco. He chairs the Committee on Appellate Courts of the Bar Association of San Francisco, and is a member of the California Academy of Appellate Lawyers.