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Effective Appellate Advocacy before the Federal Circuit

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Effective Appellate Advocacy before the Federal Circuit

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1

Procedure – Rules

2

Resources

- Federal Rules of Appellate Procedure and Federal Circuit Rules (“Local Rules”) and Practice Notes
<http://www.cafc.uscourts.gov/images/stories/rules-of-practice/rules.pdf>
- Administrative Order Regarding Electronic Case Filing (13 “Rules” about filing and service)
http://www.cafc.uscourts.gov/images/stories/Final_ECF_Administrative_Order_5-17-12.pdf
- *See also*: Internal Operating Procedures, “Top Ten” Lists, “guides” and other documents on Federal Circuit website
Under “Rules of Practice” tab

3

Three Things to Do Right Away

- Make sure that was a final judgment / appealable order
 - If not, is there another basis for appeal?
- If you’re the appellant, consider whether to cross-appeal
 - *TypeRight v. Microsoft*, 374 F.3d 1151 (Fed. Cir. 2004)
 - *Lazare Kaplan v. Photocopy*, 714 F.3d 1289 (Fed. Cir. 2013)
- Consider treatment of confidential/sealed material
 - Fed. Cir. Rule 11(d) /17(f)
 - Fed. Cir. Rules 27(m), 28(d), and 30(h)
 - *In re Violation of Rule 28(d)*, 635 F.3d 1352 (Fed. Cir. 2011)

4

Timing

- 3 briefs (4 in cross-appeal), appendix, argument, decision
- Days to file: 60-40-14-7 or 60-40-40-14-7
 - Can be extended?
- Argument
 - Scheduled after briefs and appendix filed (~6 weeks notice)
 - Court sits first full week of each month
 - Generally available in all appeals with counsel on both sides
 - Usually 15 minutes per side
- Decision
 - Rule 36 (1-7 days after argument)
 - Written decision (usually 2-4 months; no deadline)

5

Joint Appendix

- Appellant's responsibility; cooperative endeavor; court only sees final product
- Federal Circuit Rule 30(b) is a default procedure; parties can agree among themselves re: assembling appendix
- 2 common ways to assemble appendix: (1) designate everything in advance, following procedure in Fed. Cir. 30(b); (2) assemble appendix on a rolling basis with designations served with the briefs

6

Writing Persuasive Briefs

7

Appellate Briefs Are Different

- Standard of Review
(it's not a "do over")
- New Audience/Perspective
- Formal Structure
(layers of advocacy)

8

You Can Judge A Brief By Its Cover

- Follow the Court's rules
- Style
- Eliminate typos
- Identify the brief conspicuously
(e-briefs usually don't always have colored covers)

9

Tips for Appellants

- Look for a clean shot
(ideally a legal issue)
- Explain why you win
under standard of review
(must be comprehensive)
- Keep focused
(no kitchen sinks)



10

Tips for Appellees

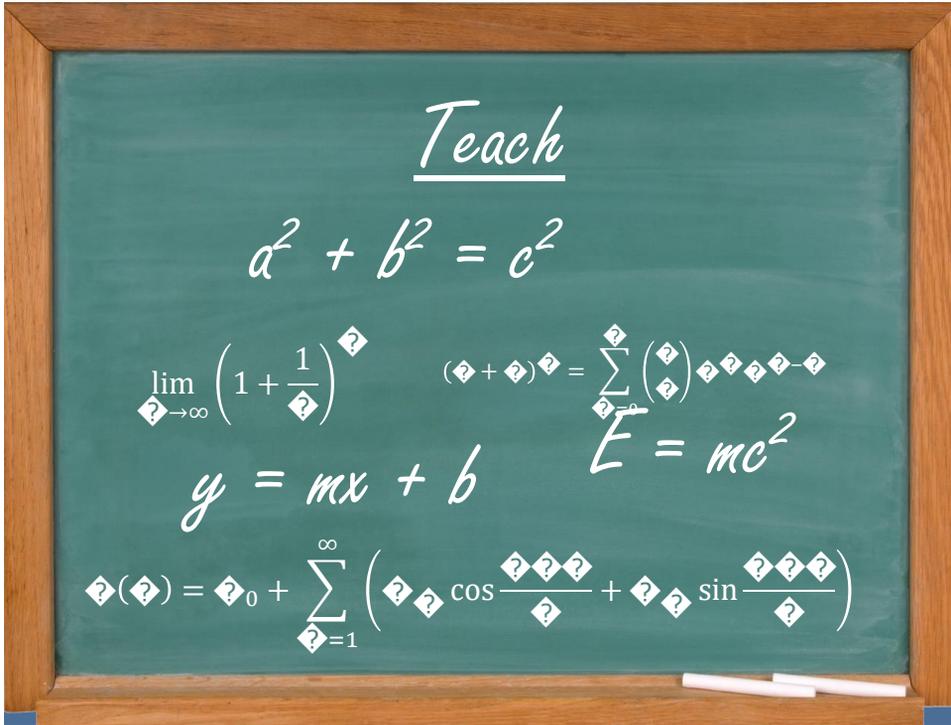
- Reframe the issues
- Identify easy way to affirm
- Use the standard of review



11



12



13



14

Other “Don’ts”:

- Don’t disparage opposing counsel
- Don’t say “lower court”
- Don’t mischaracterize the law
- Don’t misstate the record
- Don’t exaggerate

15

The Brief

- Cover
- Certificate of Interest
- Table of Contents
- Table of Authorities
- Statement of Related Cases
- Jurisdictional Statement
- Introduction
- Statement of the Issues
- Statement of the Case Setting out the Facts
- Summary of the Argument
- Argument
- Conclusion
- Certificate of Service
- Certificate of Compliance

16

Commonly Overlooked Sections

- Cover
- Certificate of Interest
- **Table of Contents**
- Table of Authorities
- Statement of Related Cases
- Jurisdictional Statement
- Introduction
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- **Summary of the Argument**
- Argument
- Conclusion
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17

General Principles

- Clarity
“Judges are not like pigs, hunting for truffles buried in briefs.”
United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991).
- Brevity
“[E]ye fatigue, even irritability, sets in well before page fifty.”
Justice Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C.L. Rev. 567, 568 (1999).
- Get to the Point
“[I]n the ‘Argument Section,’ I often find a great deal of chaff and not very much wheat.”
Judge Paul R. Michel, *Sixteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 193 F.R.D. 263, 281-82 (1999).
- Make concessions where appropriate

18

Selecting Arguments

- What's your best path to victory?
- Does your argument "feel good"?
- Get real
- Make hard choices
- Pare down

19

Ordering Arguments

- Power consideration—strongest first?
- Procedural consideration—lead with procedural argument or substantive argument?
- Logic considerations—chronological? law then policy? Pure legal issues?
- Writing considerations—what's cleanest? how best to avoid repetition?

20

Writing Concisely and Effectively

- Know how your client wins
- Identify and expose opponent's weaknesses
- Build on themes/issues
- Show why your client should win
(show why the other side is wrong)

21

Using Legal Authority

- Focus
 - No need to belabor well-settled law
 - Avoid over use of string cites and block quotes
- Intellectual Honesty
 - Confront "bad" cases
 - Don't misstate legal authority (you'll get caught)
- Style
 - Bluebook, but avoid law-review fetishism

22

Considerations for Response Brief

- Track opening brief or re-structure?
- Use cross-references to opening brief
- Make your argument clear
(avoid simply responding)
- Make sure to see the forest from the trees
- Not everything deserves an answer

23

Considerations for Reply Briefs

- Use to re-focus the Court
- Not a re-hash of opening brief
- O.k. to be high level
(e.g., “As explained in our opening brief . . .”)
- Explain why your client wins

24

Oral Argument

25

Overview

- In most cases, the oral argument does not sway the court
 - In a majority of cases, the judges make a decision based on the briefs that is not changed by the oral argument
 - In a minority of cases—frequently the close cases—it can have an impact
 - Easier to lose a case on oral argument than to win it
- More accurately named the “oral discussion”
 - It is not an “argument” with the court
 - It is a chance for you to answer the court’s lingering questions after review of the briefs

26

Strategy

- It is not possible to cover all issues raised in briefs
 - Plan to cover two, maybe three, discrete issues
 - Plan to cover the hard issues—leave the easy issues
 - Plan to start your argument saying why you win (a recitation of the facts is not needed)
 - Give the court a roadmap
- It is good to have a “plan,” but you should immediately go where the court directs you
 - DO NOT stick to a script
 - DO NOT defer questions

27

Key Points

- The single most important thing you can do in the oral argument is to ANSWER THE JUDGES’ QUESTIONS (and try to tie it to your themes/strategy)
- Dodging questions hurts your case
 - Prepare for hypotheticals
 - Start all answers to questions with “yes” or “no”
- Explain why you win
- Sometimes you will get a “softball” question (be ready)

28

Key Points

- Clarity is extremely important
- Credibility is extremely important
 - Be prepared to concede certain weaknesses
 - Be familiar with the record, cases, and briefs
 - DO NOT misstate the record
 - Maintain decorum
- NEVER talk over or interrupt the judges (but they can)
- Do not run over your time (unless asked)
- If you are finished, sit down
- Avoid demonstratives

29

Questions?

Feel free to contact us:

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30