Winning an Appeal

Revised Edition

MYRON MOSKOVITZ

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A step-by-step explanation of how to prepare and present your case efficiently and with maximum effectiveness, with a sample brief

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This book is dedicated to the author's parents, Esther and Jerry Moskovitz, with much love.

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Preface

I have had quite a bit of experience with the appellate process. I served as a law clerk to a justice of the California Supreme Court, where I saw hundreds of appellate briefs and many oral arguments, and I saw how the judges reacted to them. Most of these were in proper *form*, but very few had much effect on how the court decided the case. They weren't particularly persuasive, and they seldom dealt with the truly difficult issues in the case. If someone had asked me, I might have been able to say what was wrong with the brief or oral argument in the particular case, but I know of few general principles which could help appellate counsel in all cases.

I have also handled many appeals myself, with some measure of success, and with compliments from attorneys and judges who have seen my work. With no formal training in appellate advocacy, I naturally assumed that my aptitude was due solely to native intelligence and keen intuition — modest fellow that I am. Here again, I believed that there were not many (if any) general principles for winning appeals which one could communicate to other lawyers or law students.

In 1976, my employer, Golden Gate University School of Law, added a course in Appellate Advocacy to its curriculum, and I was asked to teach it. Though I agreed to do so, I was reluctant. While I could teach the proper *form* of an appeal, how could I teach the substance, i.e. what it takes to win, when this seemed to depend on native talents, which by their very nature cannot be taught. The most I could do would be to go over *particular* briefs and oral arguments with the students, and hope they would absorb my particular comments and somehow "get a feeling" as to how to do it generally, so they could apply this "feeling" when they got out of law school. Once again, I assumed that there were few, if any, general principles on how to win which I could expressly communicate.

Gradually, I learned how wrong I was in making that assumption.

As I was forced to *try* to explain how to persuade, I had to seek to formulate general principles. I read and re-read students' briefs, lawyers' briefs, and my old briefs. I watched many oral arguments, having served as a judge on many moot court panels. I was almost

invariably surprised (and dismayed) to see the judges and coaches discuss at length the proper *form* of a brief or oral presentation with the students, but seldom say much about how to *win*. Slowly the principles began to emerge.

They were there all the time, of course. In fact, I already knew most of them (as do most experienced appellate attorneys), though not consciously. Teaching the course simply compelled me to raise these principles from intuition to articulation. I was surprised that so many of them involved no brilliant insights, but mere common sense — flavored with a healthy dose of experience.

Once law students learned these principles (over the course of a semester), the quality of their work improved enormously.

This book recounts what I have learned.

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Table of Contents

Chapter 1

AN OVERVIEW

§ 1.1. The Purpose of This Book

This book is meant to give you some ideas which may help you win in an appellate court, whether you represent the appellant or the respondent. These ideas can't guarantee victory — nor can anything you do — because there are too many key factors beyond your control, such as the record on appeal and the attitudes of the judges assigned to your case. But proper application of certain techniques can substantially increase your chances of success, and permit you to do the best job in the least amount of time.

The appellate court is seen as foreign territory by most lawyers, who view it as an arena for quiet, scholarly debate far from the rough-and-tumble, think-on-your-feet type of practice common in the trial courts. Because of this perception (largely correct), lawyers are often uncomfortable writing briefs and arguing before appellate courts, and frequently their primary concern is simply to get through the ordeal without looking foolish. Therefore, such lawyers will look at other briefs or at the court rules to see that their briefs are in the "proper form," and then just do their best to present a respectable argument.

This book is intended for the lawyer who wants to get past that point, the lawyer whose chief concern is victory for his client.

This book is not about the form of an appeal. It is about the substance of an appeal. Examples of many of the brief-writing techniques discussed appear in the sample brief in the appendix.

§ 1.2. How Appellate Courts Differ From Trial Courts

Appellate courts are different from trial courts in several ways that directly affect how a lawyer should handle an appeal.

First, the appellate court has more time: time to read the record and the lawyers' briefs, and even time to do independent research. Not only do the judges themselves have more time to explore each point of law than do trial court judges, but appellate court judges have law clerks to help them perform these functions.

Second, the appellate court has a much greater interest in properly arriving at *and explaining* its notion of a "correct" decision than a trial court judge does. The appellate court will publish many or all of its decisions, which serve as precedent throughout the jurisdiction (and sometimes beyond it). These decisions will be read by thousands of lawyers, and the judge wants to be seen by them as an erudite scholar. While trial court judges often try to avoid explaining their decisions (fearing that this increases the risk of reversal), the appellate court judge takes pride in explanations. He (or she) has been selected to be an appellate court judge because he is more scholarly than other judges — at least he thinks this is so — and he wants to let the world know it.

These two differences have a major effect on how the lawyer should prepare his case in the appellate court. Whereas in the trial court it may be safe to avoid mentioning arguments adverse to your position — in the hope that neither your opponent nor the judge will think of them — this may be deadly in the appellate court. Even if neither you nor your opponent mentions a good point in briefs or at oral argument, a judge or his law clerk may think of it, and

you will never have had the opportunity to rebut it. Similarly, lawyers arguing in the trial court often rely on cases and statutes which are fairly easy to distinguish, in the hope that both their opponent and the judge will be too hurried to pick up on these — or simply not have the ability to see such distinctions. This tactic will seldom work in the appellate court. Usually it will backfire, making your case look weaker and you less credible.

The appellate court judge has a responsibility (and an audience) well beyond your case, client, and self, and he is not about to let your mistakes (or those of your opponent) mess up the law or his reputation. Ironically, because of this independent attitude on the part of the judge, it often happens that a lawyer does a poor job in the appeal and yet the decision comes out in his (or her) favor. This lawyer has nothing he can take pride in, because his efforts did not influence the court. The court simply ignored his brief and oral argument, did its own research and analysis, and wrote an opinion which bore no resemblance to the lawyer's brief, but which fortuitously arrived at the same result. The techniques discussed in this book may help you influence the court so that the victory may truly be yours.

§ 1.3. Some Basic Principles for Influencing an Appellate Court

You are there to win. The most important principle to remember throughout your work on any appeal is that everything you do should be designed to influence the court to decide the case your way — within ethical limits, of course. This applies both to your brief and to your oral argument. All other principles are subordinate to this one. Usually, getting the court to like you will help you win. But there will be times when you must tell a judge something you know he or she doesn't want to hear if you want to have

a chance of winning the case. Usually, following the customary form for briefs and oral argument will help you win. But there will be times when a departure from custom can be very effective in turning the court your way. It is your case, and don't let tradition trap you into weakening it. (There are actually very few court rules which require you to do things a certain way.)

Keeping your focus on winning will help you omit from your brief unimportant statements which detract from the impact of your best arguments.

Pay attention to everything. Virtually everything you do in an appeal can have some influence on the court. Do not think that only the Argument part of your brief counts. Your Statement of Facts can be very important. Indeed, particular words in your Statement of Facts can have some effect. An emotional conclusion can influence the court. Pay attention to every detail, and use every opportunity to present yourself and your case in a favorable light.

Try to make the judge's job easier. If you want your brief to influence the judge, make him enjoy reading it. While an appellate court judge's job may seem glamorous to some, it can be quite tedious to read hundreds of briefs which are dull, shallow, or sloppy. Even if such briefs contain good arguments buried in them somewhere, the judge is likely to be half-asleep by the time he gets to them or to be predisposed to reject them because he is annoyed by what came before. Try to tell an interesting story, be concise, and be well organized. Make it easy for the judge to find things by checking to see that all of your citations are accurate. Remember, you can make sure that your brief is filed with the clerk, but you can never be sure that the judge will read your whole brief carefully if he or she is in no mood to do so. A major part of your job is to create that mood.

Be credible, be reliable. A judge is more likely to accept your arguments if he accepts you. Whether he accepts you depends in large part on whether he thinks you are merely some sharp lawyer who is trying to slip something by him or, instead, someone who recognizes the difficult parts of the case and is trying to help the judge write a good opinion — in your client's favor, of course. If you want the judge to trust you, never misstate a fact in the record, never cite a case for a proposition for which it doesn't really stand, and never make arguments that fly in the face of common sense. At times, it is even useful to tell the court arguments *against* your position — and then rebut those arguments. It may seem paradoxical, but the most effective appellate advocate is often the lawyer who appears to be the least one-sided in his presentation. The need for credibility and reliability also explains why a good appellate lawyer should seldom (if ever) face any ethical problems: any tactic which might possibly be unethical will usually also be tactically unwise; it will hurt the lawyer's effectiveness even if it turns out to be "legal."

Chapter 2

PREPARING YOUR WORKING OUTLINE

Your first task in representing the appellant will be preparation of a Working Outline. Later, you will modify this into an Outline of Argument, which will appear at the outset of your brief.

Your Working Outline — which the court will never see — is in many ways the most important paper you will prepare during the appeal. Careful preparation of this Outline will structure your legal analysis of each issue, organize the issues in the most presentable form, and — if done diligently — can end up saving you an enormous amount of time. An extra hour of work on your Outline can save you four hours later on reorganizing the brief or repairing faulty reasoning.

Read the transcripts. To prepare your Working Outline, first thoroughly review the record which has been filed in the appellate court (even if you were the trial lawyer and think you remember everything). This will include the pleadings, motions and other documents filed in the trial court, bound together in a book often called the clerk's transcript. The record will also include transcripts of the trial or other hearings, usually called the reporter's transcript. Make sure that the copies of these two transcripts which you use have the same page numbers as the transcripts filed in the appellate court, because in your brief you will need to refer the court to certain pages.

Read the clerk's transcript first. It will give you some background to help you understand the reporter's transcript

more quickly. If the clerk's transcript is long, get an overview of the case by first reading a trial brief, opening statement, findings, motion for new trial, or memorandum decision in the transcript.

While going through these transcripts, do two things: (1) list the issues you see which may give rise to an argument for reversal, and (2) make your own working *index* of each transcript. Sometimes these transcripts will already include indexes prepared by the clerk or reporter, but these will be of limited use to you. What you need are indexes which tell you where there are key rulings and useful bits of testimony. You will use these indexes not only in preparation of your Working Outline, but also in working on all parts of the brief (especially the Statement of Facts) and even during oral argument. Writing working indexes now may slow down your review of the transcripts a bit and may seem like a chore, but the time spent on this will be paid back manyfold during your work on the appeal — especially if the transcripts are long. Use of a dictating machine can make this job easier.

Spotting the issues. In trying to spot the legal issues which may lead to reversal, you should get some assistance from documents in the clerk's transcript, such as motions and memoranda of points and authorities. When reading the transcripts, be alert for issues involving the admissibility of evidence and the correctness of jury instructions. These issues frequently arise during a trial.

Quite often, an issue to raise on appeal will stand out clearly because trial counsel argued the issue extensively. But just because an issue was not argued extensively at trial does not necessarily mean it should be ignored on appeal. Trial counsel may have dealt with the issue

cursorily because he did not know the law or because he felt the issue was not important in affecting the outcome of the trial. Your objective is a different one — to win the appeal — and the issue might be more useful for this purpose.

You may have to do some legal research to help you spot the issues, especially if you are not very familiar with the area of law involved in the case.

Make sure that each issue was raised below and was thereby preserved for appeal (or is automatically preserved). If there is any doubt about this, then this is *another* issue which should be included in your Working Outline.

What issues to include. Upon your first review of the transcripts, include all possible issues in your list — even ones you are not too sure about. Be overinclusive.

Later, after further reflection and research, drop the issues which turn out to be without merit, i.e. those which no reasonable judge is likely to accept. Inclusion of weak issues can give your brief an aura of desperation, and it may lead the judge to question your judgment.

After dropping all "unreasonable" issues, should you keep *all* "reasonable" issues?

On the one hand, marginal issues might divert the judge's attention from some much stronger issues you have. Also, if you list nine or ten grounds for reversal in your brief, some judges might find it inherently incredible that a trial judge would commit that many reversible errors, and your credibility may suffer from this. On the other hand, keep in mind that it is very difficult to predict what issues a judge will tend to favor. Many an appellate lawyer has been surprised to win a case on what he felt was a minor issue.

If you are faced with such a dilemma, consider a compromise: leave the minor issues in, but treat them in a way that