THE ART OF STRUCTURING A WELL-WRITTEN APPELLATE ARGUMENT

At a minimum, every appellate argument must accomplish four tasks. In plain English, those four tasks are:

1. Procedural history: what happened in the court below.
2. Legal analysis: why what happened was error.
3. Prejudice: how the error harmed your client.
4. Remedy: what you want the appellate court to do about it.

No matter how articulate the writing or how shocking the error below, an argument that fails in one of these four areas will fail, period.

If at the outset you find that your argument is weak or impossible in one of these areas, you should reevaluate whether you have an appellate issue at all. If you cannot address your issue without going outside the appellate record – i.e., if you cannot conclusively tell the court *what happened* – then your issue probably cannot be raised on direct appeal. If you cannot establish a legal *error*, then you do not have an appellate issue. If you cannot establish *prejudice* (or argue convincingly that no showing of prejudice is needed), then your argument will fail. And if no appropriate remedy exists, then the issue is probably pointless.

In sum, the court wants to read your brief and immediately be informed of a legal error that happened on the record that prejudiced your client and can be corrected by the Court of Appeal. This discussion will focus on how to accomplish that task efficiently and thoroughly, with an emphasis on organizational approaches and effective advocacy.

Effective Organization

Organization is more than a simple editing issue. Nowhere is the link between form and substance more apparent than in the way you organize an argument. If you have difficulty organizing an argument, it may be helpful to rethink the organizational difficulty as a *substantive* problem, because often the organizational difficulty stems from a weakness in the argument. And the corollary is also often true: by organizing the argument during the research phase rather than as an after-the-fact editing task, you may spot weakness in your research and logic. In other words, if you are having trouble arranging your argument in a logical progression from Point A to Point C, your problem may be that you don't really understand, or don't have quite enough support for, Point B.

Most organizational concerns will depend on your issue and the length and complexity of your argument. While no one-size-fits-all approach will fit all situations, the following suggestions will apply to most appellate arguments.

DO include an introduction. Every argument requires an introduction. Far too many appellate briefs begin with a boilerplate statement of the law that may continue for several pages before the reader has any idea of what happened below and why the issue matters to the appellant. The

easiest way to introduce your argument is with a four or five-sentence paragraph that covers the four issues outlined above: what happened, why it was error, how it harmed your client, and what you want the court to do about it. The introduction need not be elaborate:

> Prior to trial, appellant moved to suppress unlawfully seized evidence on the grounds that the search was unreasonable under the Fourth Amendment because the officers failed to knock and announce their presence prior to entry. The court found that he lacked standing and denied the motion. This ruling was incorrect because a homeowner always has a reasonable expectation of privacy in his home. The trial court's ruling deprived appellant of a full hearing on the motion to suppress. This court should reverse the order and remand the case for a full hearing.

Not only does an introduction like this one provide the reader with a clear road map of your argument, it likewise provides you, the attorney, with a similar road map of what your argument needs to accomplish. In addition to this brief introduction, you might wish to give the court another paragraph or two outlining your argument, depending on the length and complexity of the argument.

DO NOT overwhelm the court with boilerplate. While an argument can be organized in a number of ways, probably the least helpful approach is to begin with several pages of general boilerplate before delving into the specific area of law. For a busy reader, obvious boilerplate may be an unconscious signal to begin skimming rather than reading. You don't want the court to start skimming before it has even had time to learn the gist of your argument.

While it is important to cover all the essential points of your argument, it is rarely necessary or desirable to belabor well-established law, particularly at the beginning of an argument. This approach takes the focus off of the actual error that occurred in your case, and of course that is where you want the court to focus. On the other hand, you probably do want to very *briefly* summarize the relevant law and the standard of review at the outset. It is not a bad idea to preface this brief summary with a quick recap of your specific issue.

Some authorities suggest that it is best to go from the general to the specific in organizing an argument. This is probably good advice, but be careful how you define "general" in this sense. The court does not require multiple pages of boilerplate and string cites reiterating unchallenged principles of law. The specific error is where you want the court to focus, so make it the centerpiece of your argument, not a mere afterthought.

DO include a discussion of the relevant facts and procedure. After the introduction you will probably want to include a more detailed summary of the facts and procedure specific to this particular argument. While the statement of case provides a general outline of what happened below, and the statement of facts describes the facts surrounding the offense, in the argument itself you should consider including – with citations to the record – a more detailed look at the facts and procedure involved in the specific issue you are raising. For instance, if you are challenging the denial of a motion to suppress under Penal Code section 1538.5, you will want to include a separate statement of facts describing the details of the search in your argument. If you

are challenging the exclusion of some evidence, you will want to recount in the argument the procedure surrounding that exclusion. This is the "what happened" portion of your argument.

DO include subheadings if they are helpful. A lengthy argument might demand subheadings, whereas subheadings might be distracting in a very short argument. Subdivisions of arguments can include new issues not included in the general argument point heading (Cal. Rules of Court, rule 8.204(a)(1)(B)), but the best practice is still to put the issue in the main header.

DO be flexible, logical, and creative in organizing your argument. As noted above, it is impossible to craft one-size-fits-all approaches, but as a general rule, if you are having difficulty with the organization, consider the possibility that you are not yet comfortable with the substance of your argument. Often a problem with organization points back to a lapse in the logic of your argument, or a need for additional research. If you cannot outline your argument in a logical fashion, the argument itself may need more work.

Cover All Points Essential to Your Argument

In addition to the modified "IRAC" (Issue-Rule-Application-Conclusion) rule of thumb outlined above, you should create a mental checklist of essential points that need to be covered for every issue you raise. Some key points that are often missed:

1. Introduction. As discussed above, every argument requires an introduction. Subheadings may also require a brief introduction, depending on their complexity.

2. Facts and Procedure. Include detailed citations to the record. Even if you do not provide a separate factual summary in the argument, you must at least be sure to apply the relevant law to the facts of your case, and the more detail you include, the better.

3. Standard of Review. Unless the appropriate standard of review is in dispute, you need not belabor the point, but you must note the standard of review, usually near the beginning of your argument. Also briefly note any presumptions on appeal. Near the end, if relevant, you should also discuss the standard required for reversal.

4. Error. Be specific about the error that occurred in your case; do not simply state the rule of law and leave it to the court to determine how what happened below deviated from that rule.

5. Prejudice. It is not enough to show that an error occurred; your argument must show how your client was harmed. Even on the rare occasion that your issue does not require a showing of prejudice, at a minimum you must note that and cite the relevant authority.

6. Remedy. What do you want the court to do? Reverse the conviction? Remand for resentencing? Grant a new trial? Be specific.

7. Federalize. Where appropriate, federalize your issue to preserve the appellant's right to federal habeas review. This means expressly discussing the federal constitutional rights at issue,

preferably with citation to United States Supreme Court authority. (The federal error should be included in the point heading.)

8. Procedural bars. Has the issue been waived? Was it preserved by an objection? Does your client have standing to raise the issue? Is the issue moot? Not yet ripe?

Handling Authority Effectively

Use Your Facts

A common way to handle case authority in an appellate argument is to individually summarize a list of cases, and at the end of the list, insert a brief comparison of the foregoing law to the facts of the instant case. This is not necessarily a bad way to use case law -- certainly it is better than a list of boilerplate and string cites followed by a cursory application of the general law to the specific facts -- but an even better approach is to weave your supporting authority in with a discussion of the facts. Like so:

> In *People v. Doe*, the court held that [principle of law.] In that case, [summary of relevant facts]. In holding that [principle of law], the court emphasized [pithy quotation that helps your case]. *Doe* is factually indistinguishable from the case at bar, in which [summary of similar facts]. Of particular note is [particular fact that really drives the comparison home].

Another way to use your facts in conjunction with case law is to begin with the error in your own case:

> When a defendant makes a timely and specific objection to [legal error that occurred in your case], the court should [do whatever you think the court should have done]. [Citation to case on point.] In [case on point], the court held that [whatever the court held, followed by discussion of relevant and similar facts].

A mixture of approaches provides for the most engaging analysis, and that of course is your goal: to engage the court's attention long enough to make your case.

Distinguishing Bad Law

Obviously you must deal with relevant case law that is contrary to your position. There is a right way and a wrong way to do this. The wrong way looks something like this:

> Courts have long held that [your argument is wrong]. [Citation.] The majority of federal courts to consider the issue have likewise concluded that [your argument is wrong]. [Citations.] Furthermore, California appellate courts have followed the federal courts and determined that, under the state constitution, [your argument loses]. *However, those cases are distinguishable.*

Don't argue from a negative. Structuring your argument this way predisposes the reader to view your issue as windmill tilting, at best. A much better approach is to start with a strong statement of your issue, and then deal with contrary authority:

> [Your argument is right]. [Citation to the only authority on your side.] [Analogy to similar favorable case law that keeps this issue from being frivolous.] [Appeal to due process and fundamental fairness if you've got nothing else.] [Your argument is right.] *Cases to the contrary may be distinguished*.

Boilerplate and String Citations

We have already discussed the fact that long stretches of boilerplate are boring to read and encourage the reader to skim. String citations are even worse and should be avoided. So, for instance, avoid long statements of boilerplate like the following:

> A warrantless search is per se unreasonable under the Fourth Amendment to the United States Constitution, subject only to a few specifically established and well-delineated exceptions. (*California v. Acevedo* (1991) 500 U.S. 565 [111 S.Ct. 1982, 1996, 114 L.Ed.2d 619, 634]; *Katz v. United States* (1967) 389 U.S. 347, 357 [88 S.Ct. 507; 19 L.Ed.2d 576, 585]; *People v. Laiwa* (1983) 34 Cal.3d 711, 725.) It is settled that when the question of the legality of a search is raised, a showing that the search was undertaken without a warrant constitutes a prima facie case that the search was illegal. The People have the burden of proving a justification under one of the carefully circumscribed exceptions to the warrant requirement. (*Vale v. Louisiana* (1970) 339 U.S. 30, 34 [90 S.Ct. 1969, 26 L.Ed.2d 409, 413]; *People v. Laiwa, supra*, 34 Cal.3d at p. 725; *People v. Carney* (1983) 34 Cal.3d 99, 106.)
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> The Fourth Amendment prohibition against unreasonable search and seizure protects those who have "a legitimate expectation of privacy in the invaded place." (*Rakas v. Illinois* (1978) 439 U.S. 128, 143 [99 S.Ct. 421; 58 L.Ed.2d 387]; *Katz v. United States, supra*.) "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." (See *Brown v. United States* (1973) 411 U.S. 223, 230; *Simmons v. United States* (1968) 390 U.S. 377, 389; *Wong Sun v. United States* (1963) 371 U.S. 471, 492; *cf. Silverman v. United States* (1961) 365 U.S. 505, 511; *Gouled v. United States* (1921) 255 U.S. 298, 304.)
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> On appeal following the denial of a motion to suppress evidence, the trial court's factual findings, whether express or implied, must be upheld if they are supported by substantial evidence. (*People v. Lawler* (1973) 9 Cal.3d 156, 160.) "However, since the reasonableness of the search is an issue of law, an appellate court conducts an independent review of the trial court's conclusion." (*People v. Gallant* (1990) 225 Cal.App.3d 200, 206.) Accordingly, on appeal, "'it becomes the ultimate responsibility of the appellate court to measure the facts, as found by the trier, against the constitutional standard of reasonableness.' [Citation.]" (*Ibid*.)

While some or all of those points may be important to your argument, piling them all up into one litany of boilerplate and string citations simply signals to the reader that this page of the brief can be skimmed over. It is a better idea to focus on the narrow area of law you plan to discuss, and pull your general statements from the same cases you will use to develop your argument; go through the basic law as quickly as possible, keeping the statements as relevant and specific to your issue as you can.

The only time string citations should be used is if you are pointing out a split of authority, or trying to argue against a minority view and you wish to show the extent of the opposition to that view. In other words, when the sheer number of cases and diversity of jurisdictions that endorse your position is relevant and helpful to your case, string citations may be useful. Otherwise, you should avoid them.

Long Quotations

Lengthy inset quotations wind up being skimmed just as much as boilerplate is skimmed. In this case, however, the skimming is more serious, since the writer has often intended the long quote to emphasize an important point.

A better approach is to paraphrase legal points or use shorter quotations, and keep inset quotes to a moderate length. It is a good idea to summarize the gist of a long quote immediately following the quote, just in case the reader has skimmed and missed your point altogether.

Lengthy quotations from a reporter's transcript are almost always a bad idea. Instead, only quote the lines that are truly necessary to your argument, summarize what does not need to be quoted, and weave such quotations into the argument to remind the reader of why they are rereading portions of a transcript that they have already read.

History and Background

Always remember that you are writing a persuasive argument, not a legal treatise or a law review article. Unless you are arguing for a change in the law or a particular interpretation that is dependent on some background information or legislative history, the court does not require a detailed examination of what the law used to be.

Effective Advocacy and Argumentation

Have a Point

Some commentators call this "having a theme." The concept of a "theme" can be a little too amorphous to plot an argument around, but always check yourself against your blueprint -- what happened, why it was error, how it harmed your client, and what the court should do about it. You are not writing a law review article; you are writing an appellate argument designed to incur specific relief for a specific wrong.

Use Strong Verbs

If you are not familiar with the difference between passive and active voice, find yourself a good usage manual and brush up. Legal writing demands some use of the passive voice, particularly for criminal defense attorneys: no good advocate will choose to say "the defendant attacked the victim at 10:52" when "the victim was attacked at 10:52" will serve just as well. But too much passive voice makes for a very wordy brief, and moreover, passive voice is boring and leads to lazy writing. Compare:

> The traffic stop in this case was undertaken without reasonable suspicion of criminal wrongdoing, and may be challenged on appeal by Mr. Smith. The holding below should be affirmed.

That is not a terrible paragraph, but the following paragraph has something that the first example does not, i.e, subject nouns:

> The officer stopped the car with no reasonable suspicion of criminal wrongdoing and thereby detained all passengers in the vehicle, including Mr. Smith. Mr. Smith may therefore challenge the search on appeal. This court should affirm the holding of the Court of Appeal.

Not only is the second paragraph livelier, but also it contains information that would be very awkward to include in the first paragraph. By choosing active verbs -- "stopped," "detained" -- and both a subject and an object noun, the argument involves people rather than abstractions -- officer, passengers, Mr. Smith.

Strong verbs are useful for curbing the impulse to use font styles and punctuation for emphasis. It is far better to choose language that makes your point strongly than to use your word processor to make your text appear more emphatic. Strong verbs also reduce the need to punch up your writing with excessive adverbs and adjectives. A brief that is written primarily in passive voice and filled with terms like "clearly" and "obviously" is less persuasive than a brief that uses active verbs and keeps the sentences strong, simple, and uncluttered.

Don’t Waffle

If appellate advocacy were to have only one rule, this should be it: *never use the words "appellant contends" unless you are representing the respondent.* "Appellant contends" makes you sound like a liar. "Appellant contends" sounds as if you are presenting only one side of an issue upon which reasonable minds could differ. This may well be true, but the court can figure that out for itself. Don’t preface your contentions with "appellant contends;" just contend it.

Compare:

> Appellant contends that the motion was improperly denied. Appellant further contends that this denial unfairly deprived him of due process under the Fourteenth Amendment.

To:

> In denying appellant's motion, the court deprived him of due process of law under the Fourteenth Amendment.

Other phrases to avoid: "it is appellant's contention that ..." and "appellant's position is ..." Use these phrases when discussing the respondent's argument, not your own.

Judgment and Professionalism

The trend away from formulaic legalese has left many lawyers confused about the line between plain English that is appropriate for a legal document, and inappropriately informal language. A conversational style can be very effective, but is tricky to pull off for all but the best writers. When in doubt, keep your language formal and focus on simplifying your language rather than making your style more casual.

The following guidelines should help you in this area.

Hyperbole

Hyperbolic language in a legal brief looks unprofessional and tends to weaken your argument. Not every legal error violates all civilized notions of decency and fair play; not all due process violations shock the conscience. Even words like "clearly" and "obviously" can make it sound like you are trying too hard. If the law is clear and obvious, you should use case law rather than superfluous adverbs to point that out.

Along these same lines, try to avoid excessive italics, bold, and odd font choices. None of these choices makes an argument more compelling; they merely make the lawyer look a tiny bit desperate.

Vulgarity

It is a fact of life for a criminal defense attorney that sometimes our work involves foul language and unpleasant concepts. Sometimes our briefs will include vulgarities and coarse language, but those inclusions should always be in the form of direct quotations, and there should probably be a point to the vulgarity. If the specific term is important, quote the witness directly. If you are just summarizing a witness's account and the precise terminology is not important, you should paraphrase and use the less colorful terms.

Condescension and Insult

Finally, do not insult the court. In fact, do not insult *any* court. No matter how egregious the error below, your argument will be more persuasive if you point it out clearly and decisively without impugning the professionalism of the trial court. Other jurisdictions that disagree with your position are not "misguided" or "specious;" they are just wrong.

The same goes for your opponent. Think back to the times when an opponent has veered close to personal insult in a responsive brief, and then think of how many times you wound up winning those cases. The personal insult is the last refuge of the lawyer who knows they are about to lose.