

The Importance Of Submitting Supplemental Authorities

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Appeals can be won or lost based on new case law that emerges long after the appellate briefing is complete. Yet, often a practitioner may think that the vast majority of the appellate work is done when the last appellate brief is filed in a case. This article discusses the importance of submitting supplemental case authorities to the appellate court in a timely manner.

California State Appellate Courts

In California state appellate courts, there is no specific rule directed at submitting supplemental authorities while an appeal is pending, but the submission of such authorities is clearly permitted. Several of the California appellate courts invite the submission of supplemental case authorities in the letter from the court that provides notice of oral argument.

For example, included in the Third Appellate District's notice of oral argument is a statement that parties may submit additional authorities not cited within their briefs. The Third Appellate District even allows the list of supplemental authorities to be presented as late as at the time of oral argument. The letter from the court advises that counsel may submit citations for any decisions that were rendered after preparation of the briefs and which will be cited by counsel at oral argument.

In the Third Appellate District, the notice of oral argument is usually sent out at least one month in advance of the oral argument date. Although the tendency might be to wait until a couple of days before oral argument to prepare the list of supplemental citations, that is a bad idea. The court and its staff need time to read and digest the citations prior to oral argument. Waiting until the last minute to submit the supplemental citations means that the court may not have had time to consider these new citations prior to oral argument. As in a federal appeal, the best practice is to update the authorities in the appellate briefs immediately upon receiving the notice of oral argument and then to again update the research a day or two before oral argument.

It is also important to continue to track the issues in the appeal after oral argument. In the California appellate courts, the appellate court must render its decision within 90 days from the date of submission of the case to the appellate court. A case is submitted for decision when the court has heard oral argument or approved its waiver and the time has expired to file all briefs and papers, including any supplemental brief permitted by the court. Thus, if new case law is issued in that 90 day period that could influence the outcome of the case, appellate counsel should bring those new cases to the appellate court's attention.

Conclusion

An appeal should not be considered to just have two components – briefing and oral argument. Rather, an appeal should be viewed as a process that may span several months or even years. During the time the appeal is pending the law can change. The need to update research and inform the court of changes in the law relevant to the appeal is of critical importance and can be the key to winning on appeal.

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