# An Advocate Persuades

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Dedication

*To our son, Sam, who we welcomed to our family as we wrote this book, and to Sol Rocklin, to whom we said goodbye.*

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*To my family, and especially my mother and father, for their unconditional love and unfailing support.*

CNC

*To my mom, Linda Copous, who taught me to love books, and to my life-long mentor, Amy Blake Hearn, who inspired me to write one.*

SCP

# Contents

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# Introduction

Lawyers, in representing their clients, often ask a court to act. A lawyer might ask the court to set bail, exclude certain evidence at trial, order that one party compensate another party, or review a legal decision from a lower court. When asking the court to do something, the underlying question is this: How do you persuade a court to act in a way that benefits your client?

This book answers that question. It explains how to marshal law and facts in the way that will most likely persuade a court that the outcome you seek is justified. In other words, it teaches you how to advocate for your client, in writing and orally.

Before reading on, always remember this: Persuasive writing is not so very different from objective writing. Objective writing seeks to persuade a colleague that your legal analysis is correct. To achieve that end, your arguments must be well organized, make a clear point, and be supported by the law and facts. In addition, your colleague will be more receptive to your arguments if your arguments are presented in a polished, professional-looking document. So, too, with persuasive writing. When writing to a court, your arguments must also be well organized, make a clear point, and be supported by the law and facts. Moreover, a judge, like any other lawyer, will be more receptive to your arguments if they are polished and comply with the court's rules. Thus, when writing as an advocate, you will rely on all the skills you learned when writing objectively.

Accordingly, this book builds on your existing ability to objectively analyze a client's legal question. Here, you will learn about the subtle shift from objective analysis to persuasive argument. For example, persuasive writing usually takes the form of a brief or motion, rather than an objective memorandum of law. The briefs and motions are also directed at a different audience—judges and their law clerks. Writing for this different audience will require you to present both facts and law in a slightly different way, highlighting your strong points and explaining why weaknesses, ultimately, do not undermine your argument.

To help you make the shift from objective analysis to persuasive argument, this book begins by providing some background. In the initial chapters, this book explains what makes an argument persuasive, describes the ethical and professional responsibilities of an advocate, pro-

vides an overview of the litigation process, and introduces you to trial motions and appellate briefs.

The book then walks you through the steps necessary to build a trial motion or appellate brief and to expertly revise and polish your work. The last chapter explains how to prepare for and present oral arguments before trial and appellate courts.

Finally, the appendices provide advice if you are competing in a moot court competition and additional examples of trial motions and appellate briefs. Through these chapters, *An Advocate Persuades* provides a step-by-step guide to producing arguments that can persuade a court to act in your client's favor.

# An Advocate Persuades

Chapter 1

# The Nature of Persuasion



Persuasion has been defined in various ways, but for our purposes, to persuade is to prevail on a person or persons to do something or to believe something.[1] For example, a lawyer may persuade a judge to issue a discovery order—that is, to prevail on the judge to do something. Similarly, as part of a brief, a lawyer might persuade an appellate court that the law should be interpreted or applied in a certain way. A lawyer might, for example, argue that the First Amendment does not prohibit states from restricting judges' ability to solicit campaign funds. The lawyer might then argue that the appellate court should affirm the lower court's ruling. In that case, the lawyer has convinced the judges to believe something and then argued that a course of action should follow from that belief. Oral persuasion, too, aims to prevail on the court to believe something or to do something.

To persuade a judge or a panel of judges, the advocate must transfer the view of the universe in the advocate's head into the head of the judge or judges before whom the advocate is appearing. Only then—when the court perceives the universe as the advocate does—will the court be moved to act in the advocate's favor.

## I. Principles of Persuasion

To bring the court around to your view of the universe, your argument must take into account the three parts of persuasion: the source of

1. *See, e.g.*, Ken Kister, *The American Heritage Dictionary of the English Language* 1352 (Anne H. Soukhanov ed., 3d ed. 1992) (defining "persuade" as the ability to induce someone "to undertake a course of action or embrace a point of view by means of argument, reasoning, or entreaty").

the message, the content of the message, and the audience that receives the message. By understanding those three components of persuasion, and by putting each to use, you can determine how best to persuade a court. This chapter explains how the source of a message, the content of a message, and the audience hearing the message each play a part in whether a message—such as your legal argument—will be persuasive.

Source, content, and audience are not, however, the only ways to think about persuasion. The field of classical rhetoric recognizes three modes of persuasion: *ethos*, *logos*, and *pathos*. *Logos* is the appeal to the logic and reasoning of the listener. *Ethos* is an appeal based on the credibility and trustworthiness of the material and the author. *Pathos* is an appeal to the emotion or passion of the listener. To effectively persuade, you will use all three principles in varying degrees depending upon your audience and the purpose of the communication.

This chapter explains the relationship between the ideas of source, content, and audience on the one hand and *ethos*, *logos*, and *pathos* on the other. It concludes by examining how those different modes of persuasion can be used in combination to persuade judges.

**What Is Classical Rhetoric?**

> Originating in Greece around 450 B.C., classical rhetoric involved the comprehensive and systematic study of the art of persuading through written and verbal expression. In fact, Aristotle—one of the first and best known of the classical rhetoricians—defined rhetoric as the power "of discovering in the particular case what are the available means of persuasion."

Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 11 (3d ed. 2012) (footnotes omitted).

## A. Source and *Ethos*

As mentioned above, the source of a message plays an important role in persuasion. In persuasive legal writing and oral argument, *you* are the source of the message. Thus, you must ask yourself, what about you will enhance, or detract from, the persuasive force of your message? The short answer is this: your credibility.

Credibility is the "quality, capability, or power to elicit belief."[2] That is to say, whether the source of a message persuades depends on whether

2. Kister, *supra* note 1, at 438.

that source is credible to the audience. You enhance your credibility as a source by using the persuasive method of *ethos* from classical rhetoric.

A number of factors influence the audience's perception of the source's credibility. In some instances, you may be able to immediately influence your audience's perception of your credibility, perhaps based on the professional look of your work or by your status as a lawyer in the community. In other instances, you must wait and allow the acquisition of time and experience to develop your credibility before your audience. Whether or not you can take immediate action to increase your credibility, you should be aware of all the factors that will affect it.

The first factor that influences the audience's perception of the source is the source's status or position. Imagine, for example, that you are a judge. You read a brief stating that no court anywhere in the country has held that distinctions based on sexual orientation are subject to strict scrutiny for purposes of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. On the cover of the brief, you note the name of the attorney who wrote the brief, and you note the attorney's bar number. The bar number shows that he is newly admitted to the bar. You then turn to an opposing brief stating that a number of intermediate state appellate courts have held the opposite—that sexual orientation classifications are subject to strict scrutiny. That brief, you observe, was written by a noted constitutional scholar.

Without doing any research, which source are you likely to find more credible? The constitutional scholar, you might agree, will have greater initial credibility and his brief will, at the outset, be more persuasive. Has the constitutional scholar done anything to enhance his credibility by what he wrote? No—he is highly credible simply because of his status.

Although you may not be able to change your status or position overnight, you can do other things as you interact with the court that will enhance your credibility. In classical rhetoric, the three components of *ethos* are character, intelligence, and good will. By demonstrating each of those three components, a source uses *ethos* to create credibility.[3]

For example, you can employ *ethos* by demonstrating your good character. As an advocate, you establish your good character when you are consistently honest, candid, and trustworthy in all professional interactions. You must always explain the law accurately, which requires you to acknowledge any weaknesses in the facts or law that may support the other party's argument. You should also pay attention to details. Submit documents that are grammatically correct, are properly cited, and conform to

3. Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 127 (3d ed. 2013). Smith's book gives an excellent in-depth discussion of these three components with examples, and this chapter draws heavily from his excellent work.

***Ethos*—Establishing Credibility**

*Amicus curiae* (friend of the court) briefs in the United States Supreme Court must include a statement of the *amicus*'s interest in the case. In that section, most *amici* use *ethos* to establish their credibility. Consider, for example, this excerpt from a brief filed by the American Bar Association (ABA). In it, the ABA uses the breadth of its membership to establish its credibility:

> The ABA is the leading association of legal professionals and one of the largest voluntary professional membership organizations in the United States. Its membership comprises nearly 400,000 attorneys in all fifty states, the District of Columbia, and the U.S. territories, and includes attorneys in private firms, corporations, non-profit organizations, and government agencies. Membership also includes judges, legislators, law professors, law students, and non-lawyer associates in related fields.
>
> Since its founding in 1878, . . .

Brief of Amicus Curiae American Bar Association In Support of Petitioners in *Obergefell v. Hodges* (No. 14-556).

As a judge, aren't you likely to say to yourself, "Gee, these folks must know what they're talking about"?

court rules. Those details establish your reliability in small things and will lead the court to assume that you are also reliable in the larger issues of explaining the law and why that law supports the outcome you seek.

Portraying good character is vital for an audience to accept your argument:

> If a reader believes that a writer is, to use Aristotle's word, a rascal, that is, if a reader believes that a writer is not above lying, cheating, deceiving, or misleading, then the reader will view the writer's arguments with skepticism and doubt. Conversely, if a reader believes that a writer possesses good character—or at least if the reader has no reason to question the writer's character—then the reader will be more receptive to the writer's arguments and assertions.[4]

Thus, to persuade, begin by establishing and maintaining your good character.

In addition to developing a reputation as a trustworthy lawyer, you can also influence the court's perception of your credibility by demonstrating your intelligence. You can demonstrate your intelligence to the court by showing a comprehensive knowledge of the governing law and

4. *Id.*

**The Pitfalls of Being Perceived as a "Rascal"**

An advocate's inaccurate statements in a brief can cause judges to become skeptical of the source of the message:

> JUSTICE SOTOMAYOR: I — I have a real problem with whatever you're reading, because I'm going to have to go back to that article. I am substantially disturbed that in your brief you made factual statements that were not supported by the cited . . . sources and in fact directly contradicted.
>
> I'm going to give you just three small examples among many I found. So nothing you say or read to me am I going to believe, frankly, until I see . . . with my own eyes the context, okay?

Oral Argument in *Gross v. Glossip*, 135 S. Ct. 2726 (2015).

the facts of your case.[5] Such comprehensive knowledge will lead the court to believe you and to have confidence in your work product.

Finally, you can establish your credibility by showing "good will" toward others.[6] Attorneys show good will toward others in how they refer to parties, opposing counsel, the judges, or the jury. A respectful tone toward all players when writing or speaking to a court establishes your good will toward others involved in the litigation. A condescending, insensitive, or overly passionate tone can negate good will and leave the judge less favorably disposed toward you and your arguments.

To maximize your credibility through the use of *ethos*, you will want to ask yourself the following questions:

- Am I consistently professional, honest, and ethical in all my professional dealings?
- Do the arguments and authorities I assert accurately present the law and facts, while still representing the interests of my client?
- Does this document or oral argument reflect my competence and professionalism as a lawyer?
- Is the argument that I am presenting respectful of all parties involved in the litigation?

## B. Content and *Logos*

Not surprisingly, *what* the source says to the audience strongly influences whether the audience will be persuaded. The content of the mes-

5. *Id.* at 155.
6. *Id.* at 144.

sage obviously matters. In written advocacy before a court, the content of the message is delivered through a brief, a motion, or a memorandum in support of a motion. In oral advocacy, the oral argument delivers the content. No matter the vehicle, the content of your message should be crafted to persuade.

In crafting your message, you may try this approach: (1) Decide where you want the court to go, that is, what result you seek; (2) give the court a reason to want to go there; and (3) provide the court with a valid means of getting there.[7] For example, when arguing in favor of a motion to dismiss an indictment, you first must know the relief you seek (dismissal of the indictment). You must then make the court *want* to dismiss the indictment. Finally—using the law and the facts—you must give the court a legally valid basis to grant the relief you seek.

To be persuasive, that content—the result you want, the desire to get there, and the means to go there—must be structured logically. The court must be able to see the relationship between the result you seek and the law and facts that support that result—and the court must want to reach the result you seek because it believes that result is the correct one.[8]

This idea brings us to the idea of *logos*. *Logos* is an appeal to logic. And logic, it has been said, is "the lifeblood of American law."[9] At its core, *logos* provides the substance of your legal argument in a clear, organized structure. In a sense, *logos* is the message's content, exclusive of the audience or the source.[10] Thus, regardless of the source and her credibility, regardless of the audience, a message must always be rationally and logically presented to be persuasive.

As a lawyer, you will invoke *logos*—that is, you will appeal to the court's logic—if you use an expected organizational structure. You likely already know the particular structures that lawyers use to present their arguments. Lawyers begin an argument by stating the issue the argument addresses or the conclusion the argument will reach. Lawyers then explain the relevant law, apply that law to the facts of the client's case, and

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7. Bradley G. Clary, Sharon Reich Paulsen, & Michael J. Vanselow, *Advocacy on Appeal* 4 (3d ed. 2008); *see also* Bradley G. Clary, *Primer on the Analysis and Presentation of Legal Argument* 45 (1992) ("You have to know where you are going before you can persuade someone else to go there with you.").

8. Making the court want to reach a certain result includes appealing to the court's emotions through the use of *pathos*, discussed below.

9. Ruggero Aldisert, Stephen Clowney, & Jeremy D. Peterson, *Logic for Law Students: How to Think Like a Lawyer*, 69 U. Pitt. L. Rev. 1, 1 (2007). This article is both informative and witty—a great read for law students and attorneys.

10. Carole C. Berry, *Effective Appellate Advocacy: Brief Writing and Oral Argument* 53 (4th ed. 2009).

conclude. "IRAC," "CREAC," "CRRPAP," and other organizational structures you may have learned are the mechanisms by which attorneys create rational, organized argument—using *logos* to persuade. Because these structures play such an important role in persuading, Chapter 7, *Organizing Persuasive Arguments*, is devoted to reminding you of the logical structures attorneys use in their written work, and it provides examples so that you can see how logical, organized structures can be used for persuasive effect.

In addition to structuring your arguments in a logical way, you can also enhance the persuasiveness of your message by emphasizing those aspects of your argument that are strongest and explaining why any weaknesses ultimately should not dissuade the court from reaching the result you seek. Chapters 8 and 9, *Developing Persuasive Arguments* and *Refining Persuasive Arguments*, explain how to craft such a message. Chapter 6, *Themes for Persuasive Arguments*, addresses how to use themes to tie the content of your message together.

Thus, when assessing the persuasiveness of your message content, ask yourself the following questions:

- Did I organize each argument in a logical manner?
- Is each argument rational and logical?
- Is each argument supported by relevant law and facts?
- Did I eliminate extraneous arguments and include only those arguments that are strong and directly relevant for the judge to decide the case?
- Did I clearly set out and deal with any weaknesses in my client's facts or relevant law?

## C. Audience and *Pathos*

The final consideration in any attempt to persuade is the audience. Who is your target audience? What use will that person or those people make of your argument? What kinds of messages might the audience be predisposed to accept? How should you craft your argument in light of your responses to those questions? To be sure, many messages are directed at diverse audiences with different goals. Most advertising, for example, is directed at a diverse audience whose members will make different uses of the message. So, while you might pay attention to that slick car commercial because you are in the market for a car, your classmate may pay attention because he wants to know what band is on the soundtrack. Advertisers have to consider a diverse audience with myriad interests when they craft their persuasive messages.

Your job as a legal advocate is, in a sense, easier. Your goal is to persuade a judge or a panel of judges; that's a fairly narrow audience. That audience will use the information you convey for only one purpose: to

decide. Knowing that you have a judge audience whose goal is to decide a legal question will help you craft a more persuasive document or oral argument. At bottom, your message should be aimed at helping that audience do its job: issue a decision.

Moreover, because judges have the same goal, they share several predispositions. One predisposition that all judges are likely to share is the predisposition, discussed above, for a logically structured argument. Judges are educated, intelligent, law-trained decision makers. They have gone through the same educational system as the advocates and will thus be predisposed to "think like a lawyer." Use of *logos*—logical argument—will resonate with them.

Another predisposition that judges are likely to share is for an advocate to get to his or her point quickly. Judges are busy people. Federal appellate court judges read approximately 13,000 pages of briefs each year—and that staggering number does not include the pages of records, trial transcripts, and background materials for each case.[11] Because your reader is busy, write efficiently. Tell the court what decision you seek and provide the necessary law and facts to support that decision. Include only the most important arguments rather than presenting every possible argument. Do not include extraneous information, incorrect information, or incomplete information—all of which will slow the court down and make your argument less persuasive.

Other preferences are likely to be more specific to the court in which you are appearing or the particular judge who will be hearing the case. As an advocate, you should learn as much about your audience as possible. Although you know that your audience is law-trained, intelligent, and tasked with making a decision, there is more you can learn about the court. Is this a court that handles only Social Security matters, or is it a court that handles everything from dog bite disputes to intellectual property issues? Put differently, knowing whether your audience is composed of specialists or generalists may help you decide the depth or breadth of the content you provide. For example, if you are arguing to a specialized court or to a particular judge who you know has experience in the area, you may be able to omit background information about the law that governs the case. Conversely, if you are appearing before a generalist or a panel of generalists, you will need to begin your complex corporate income tax argument with some fundamental tax concepts.

On a more individual level, think about whether anything about the particular judge or judges before whom you are appearing will make that judge or panel of judges more or less receptive to your legal argument. If, for example, the judge before whom you are appearing has rejected

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11. Mark P. Painter, *Appellate Practice—Including Legal Writing from a Judge's Perspective* 2 (May 1, 2000), http://www.plainlanguage.gov/examples/legal (last visited June 26, 2015).

your position in the past based on a certain argument, you should consider a different argument. If you are presenting a statutory construction argument, evaluate whether the judge will be more likely to rely on legislative history to interpret the statute or simply to stick with the plain language.

Personal characteristics of the judge who will be hearing your case may also be relevant to how you go about persuading. Is the judge before whom you are appearing particularly conservative or liberal politically, "tough on crime" or pro-defendant, sympathetic to corporate interests or sympathetic to interests of the individual person or community? Has the judge had life experiences that are relevant to this case? Knowing that kind of information, like more general information about the court and about the court's legal preferences, will increase your ability to persuade.

Finally, remember that judges are human. That fact brings us to the third classical rhetorical device, *pathos*. *Pathos* involves persuading by appealing to the audience's emotions. Although subtle, *pathos* exerts its influence by appealing to your legal reader's emotion.

> The effective use of emotion involves creating a response in the audience that makes the audience want to do things your way. It means the audience not only believes at an intellectual level that you are right, but feels it at a gut level and wants to do something about it.[12]

*Pathos* is a powerful mode of persuasion because most people, especially legally-trained people who are taught to focus on *logos*, underestimate it. Watch, for example, any political or product advertisement. Which emotion was the advertisement designed to evoke? The political advertisement was probably designed to produce fear if the opposing party is elected and a sense of well-being based on the election of the proposed candidate. The product advertisement probably focused on happiness, love, and success based on the preferred product choice. All of these emotional appeals can be powerful and sometimes unconscious influences on your decision-making process.

With respect to your legal argument, you can use *pathos* to create a "commanding narrative"[13] that can move a judge in a variety of ways. You can use emotion to help the judge understand what motivated the parties to act or react in a particular way; emotion can help the judge understand why the outcome you seek is just or fair; and it can help the judge sympathize with your client's position.

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12. Louis J. Sirico, Jr., & Nancy L. Schultz, *Persuasive Legal Writing* 12 (4th ed. 2015).

13. *See* Steven D. Stark, *Writing to Win: The Legal Writer* 110 (2d ed. 2012).

**The Use of *Pathos* in a Judicial Opinion**

In *DeShaney v. Winnebago County Department of Social Services,* the Court held that a state agency that failed to adequately investigate reports of child abuse could not be held liable under the Due Process Clause for resulting injuries to the child, Joshua DeShaney. In his dissent, Justice Blackman employed *pathos* to make his point:

> Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, . . . "dutifully recorded these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles — so full of late of patriotic fervor and proud proclamations about "liberty and justice for all" — that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.

489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

Although most judges are trained to check their emotions — law is, after all, a *logos*-based discipline — judges are still human. They too feel anger, fear of loss, guilt, sadness, and happiness. Importantly, they want to do the right thing. Subtly invoking emotions can powerfully influence rational judgment and a judge's decision. Reminding the court, for example, that your seemingly unsympathetic client is not just a criminal "defendant," but is also a human with typical human frailties invokes *pathos*. As mentioned above, your message's content should, among other things, make a judge *want* to reach the conclusion you seek. *Pathos* is the means to do that.

Emotional appeals can be tricky, however, and should be done in an understated manner. The best way to make an emotional appeal without sounding emotional is to allow the facts to speak for themselves and to provide little to no commentary. For example, when Chief Justice John Roberts (then, attorney John Roberts) wanted to show the vital role a mine played in a remote Alaskan community, he did not say, "The Red Dog Mine is vital to the economy." Rather, he said this:

> Operating 365 days a year, 24 hours a day, the Red Dog Mine is the largest private employer in the Northwest Arctic Borough, an area roughly the size of the State of Indiana with a population of about 7,000. The vast majority of the area's residents are Inupiat Eskimos whose ancestors have inhabited the region for thousands of years. The region offers only limited year-round employment opportunities, particularly in the private sector . . . .

> Prior to the mine's opening, the average wage in the borough was well below the state average; a year after its opening, the borough's average exceeded that of the State.[14]

In other words, Justice Roberts allowed the facts to speak for themselves so that the Justices who read his brief could feel the importance of the mine to the community. Without making any overtly emotional appeal, his phrasing creates a commanding narrative that helps the legal reader connect to that litigant's side of the story.

As you consider your audience, ask yourself the following questions:

- Did I structure my arguments in a way that makes the judge feel good about ruling in my client's favor?
- Did I create and explain rules, and acknowledge unfavorable rules, from my client's perspective in a manner that advances my client's argument?
- Have I effectively addressed any weaknesses in my client's facts or authority?
- Have I made my client come across as likable?
- Does my brief or document (or my oral argument) evoke the intended emotion from my audience?

## II. Using the Principles Together

When writing to a court and in oral argument, you will use all of the above principles in varying degrees depending on your audience and the purpose of the legal document or argument. *Logos*—the structure of your message—is the most basic mode of persuasion attorneys use, but *logos* is intertwined with other aspects of persuasion: the substantive content of your message; your credibility as the source of the message; and the judge's predisposition to agreeing with your message. Understanding these different aspects of persuasion and how you will use them in your arguments will enhance the persuasiveness of your document or oral argument.

Different sections of your document may rely more heavily on one mode of persuasion than another. For example, you are more likely to employ *pathos* in your statement of facts (see Chapter 12, *Statement of Facts and of the Case*), where *how* you present the facts can have a significant impact on how the court feels about your client. Your argument section likely will be more *logos*-intensive, but you should nonetheless consider how *pathos* may play into your argument. Finally, *ethos* should perme-

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14. From Brief for Petitioner, *Alaska, Dept. of Envtl. Conservation v. U.S. E.P.A*, 540 U.S. 461 (2004), available at 2003 WL 2010655 (citations omitted); *see also* Ross Guberman, *Five Ways to Write Like John Roberts*, http://www.legalwritingpro.com/articles/john-roberts.pdf (last visited October 9, 2015).

ate every part of every document you prepare, from the cover to the last page; you always want the court to perceive you as a reliable, believable, and credible source.

Different types of cases and the court in which you are appearing also will affect how you use the rhetorical devices introduced above and how considerations of source, content, and audience play out. For example, there may be less room for the use of *pathos* in a technical statutory construction problem before a supreme court. But skillful use of *pathos* is indispensable if you represent a parent in a termination of parental rights case, a defendant in a criminal case, or an injured plaintiff in a tort case—especially when you are addressing a trial court.

Consciously considering how the audience will perceive you, the message you want to convey, and the needs of your audience is vital to producing a persuasive document or oral argument. Similarly, crafting your message by creating just the right mix of *ethos*, *logos*, and *pathos* will allow you to transfer your view of the case and your desired outcome into the head of the judge to whom you are presenting your argument.

As you read the rest of this book, keep in mind considerations of source, message content, and audience. Think about how the rhetorical devices of *ethos*, *logos*, and *pathos* can be used together to persuade your judge audience. Finally, always be mindful of the purpose of your argument: to make the court want to rule in your client's favor and to give the court everything it needs to do so.

## Practice Points

- In any attempt to persuade, you should consider the source, the message content, and the audience. Then, craft your message accordingly.
- Always use *ethos* to enhance your credibility and make your message more persuasive.
- Use *logos* to present a well-organized, logical, and coherent argument.
- Use *pathos* to involve your audience emotionally in your message.
- Use the three rhetorical devices together to best persuade your audience.

Chapter 2

# The Ethical, Professional Advocate



The majority of this book focuses on *how* to present arguments to a court; this chapter, by contrast, focuses on *who* you present to the court. In other words, this chapter focuses on you—the source of the message. Every interaction you have as an attorney, whether that interaction is with the court, opposing counsel, or a client, gives you the opportunity to demonstrate—and others the opportunity to observe—what kind of lawyer you have chosen to be. Have you chosen to be fair? Truthful? Respectful? Aggressive? Evasive? Sloppy? Your goal should be to always act as—and to be perceived as—an ethical, professional, and credible lawyer.

In an adversarial setting, it is easy to get caught up in the fight and to become lax about acting ethically and professionally. This chapter serves as a gentle reminder not to leave your ethics and professionalism at the door when you transition to situations that require persuasive, rather than objective, writing.

## I. Why Act Ethically and Professionally?

As you learned in the last chapter, *The Nature of Persuasion*, one reason to act ethically and professionally is because your credibility as an advocate affects the persuasiveness of your argument. A court will be more receptive to your argument if it perceives you, the source of that message, as credible. For example, if you tell the court, "Your Honor, the evidence will show that the police officers continued to question my client even after my client unequivocally invoked her right to counsel," the court

**"Ethics" and "Professionalism"**

The two terms we use throughout this chapter are broad. "Ethics" at its broadest means "[a] set of principles of right conduct." *The American Heritage Dictionary of the English Language* 630 (3d ed. 1992). "Professionalism" often refers to the standards of people practicing an occupation when that occupation requires significant training and study. *See id.* at 1446 (defining "professionalism" and "professional").

Those terms can be narrowed to "professional ethics," "legal ethics," or "rules of professional conduct." Generally, those more narrow terms refer to required standards that govern a lawyer's conduct. An attorney who fails to follow those governing standards risks a disciplinary action or disbarment.

This chapter uses the broader terms — ethics and professionalism — to encourage you to think broadly about the set of principles or standards you will adhere to in your practice.

must be able to assume that you have diligently investigated the facts and that you are representing those facts accurately. Although you might prevail the first, or even the second, time that you inaccurately represent the facts or the law to the court, your luck will eventually run out. When it does, you will have tarnished your credibility. Moreover, in the extreme case, it will become impossible to persuade a court of anything because you will have been suspended from practice or disbarred for unethical conduct. Thus, if your goal is to persuade courts on behalf of your clients, become an unfailingly credible resource for the court.

You should, however, keep in mind one other important reason for acting ethically and professionally: It is the right thing to do. Members of the public who seek out an attorney are vulnerable. They have an important matter they are unable to resolve. To resolve that matter, they need to enter the legal system — a system whose procedures can seem confusing and inaccessible. Ethical and professional rules protect those members of the public and the integrity of the court system. The rules ensure fairness amongst the parties before the court. Acting in an ethical and professional way — even when doing so is not required by a rule — protects us and our profession. We must face ourselves in the mirror every day, and we must interact with other lawyers nearly every day. Those everyday interactions are more satisfying and vastly easier when we act ethically and professionally.

## II. Some Guiding Principles

Although specific rules govern the conduct of an advocate, a few general principles will make those specific rules much easier to follow. Here,

we present a few general principles before we turn to the specific rules that govern a lawyer's conduct.

## A. A "Zealous Advocate" Is Not a "Zealot"

First, understand what it means to be a "zealous" advocate. You will hear the word "zealous" bandied about a lot in the context of representing clients. Lawyers sometimes use the obligation to represent clients zealously as a justification for unethical, unprofessional, aggressive, or inappropriate behavior. Those lawyers, however, misunderstand the term.

The concept of "zeal" as a professional ethic was first introduced in 1908 when the Canons of Professional Ethics explained that a lawyer owes his client "warm zeal in the maintenance and defense of [the client's] rights."[1] But even then, the Canons took care to remind lawyers that "[t]he office of attorney does not permit, much less does it demand … violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client."[2] By 1980, the professional code emphasized that being a zealous advocate does not change a lawyer's duty to "treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."[3]

Nevertheless, concerns arose that attorneys misunderstood what it means to "represent a client zealously." Thus, in the most recent revision, the concept of "zeal" has been replaced by the requirements of diligence and promptness.[4] The commentary to today's rules discusses the idea of "zeal in advocacy." That commentary explains that, "[a] lawyer is not bound … to press for every advantage that might be realized for a client" and "the lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons in the legal process with courtesy and respect."[5] As one court put it, "[t]o be vigorous … does not mean to be disruptively argumentative; to be aggressive is not a license to ignore the rules of evidence and decorum; and to be zealous is not to be uncivil."[6]

Thus, "zeal" does not mean you should become a "zealot."[7] The first term means "enthusiastic diligence"; the second means "fanatic." Do not

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1. ABA Canons of Prof'l Ethics Canon 15 (1908).
2. *Id.*
3. Model Code of Prof'l Responsibility EC 7-10 (1980).
4. Annotated Rules of Prof'l Conduct 43 (1992) ("Rule 1.3 substitutes reasonable diligence and promptness for zeal; the comment [explaining Rule 1.3 does], however, … requir[e] zeal in advocacy upon the client's behalf.").
5. Annotated Model Rules of Prof'l Conduct R. 1.3 cmt. (2007).
6. *In re Williams*, 414 N.W.2d 394, 397 (Minn. 1987).
7. *See* G.C. Hazard, Jr., & W.W. Holdes, *The Law of Lawyering* 70 (2d ed. 1990); *see also* Michael D. Murray & Christy H. DeSanctis, *Advanced Legal Writing and Oral Advocacy: Trials, Appeals, and Moot Courts* 3 (2009) (commenting that attorneys misunderstood the term "zeal" to mean "fanatically" or "cravenly").

**Who's in Charge Here?**

As you can see from the discussion about the word "zealous," the rules governing professional conduct have changed over time. Those changes can sometimes be confusing, in particular, because those changes involve a variety of "rules," "codes," and "canons." In an effort to help you sort through the different "rules," "codes," and "canons," here is a brief explanation of the rules governing the professional conduct of lawyers.

To begin, individual states adopt the rules that govern the conduct of lawyers practicing within that state. Thus, every state has its own unique set of rules governing the professional conduct of its practicing lawyers.

The American Bar Association (ABA) has, however, exerted enormous influence on the rules that each state has adopted. Since 1908, the ABA has published a set of model rules of professional conduct. As "model" rules, the ABA's rules are merely a recommended set of rules and have no binding authority. However, because most states have, to one degree or another, adopted the ABA's model rules, the ABA's rules provide a fairly good gauge for the rules that states have adopted. Over time, the ABA's model rules have changed. So that the change in names does not confuse you, here's a short history of the model rules of professional conduct.

**1908** ABA adopts the Canons of Professional Ethics.

**1969** ABA adopts the Model Code of Professional Conduct.

**1983** ABA adopts the Model Rules of Professional Conduct.

Each new set of rules replaced the preceding set of rules. Thus, today, the ABA's recommended rules are the Model Rules of Professional Conduct. However, as mentioned above, each state is free to adopt the ABA's revisions or not.

confuse the two. Although others will cry "zealous advocacy" to justify boorish behavior, you know better.

## B. "It Is What It Is"

Next, practice saying, "It is what it is." In your life as a lawyer, you will undoubtedly encounter facts that are inconvenient and law that is unfavorable. When you encounter an inconvenient fact or unfavorable law, you should say to yourself, "It is what it is." Face the facts. Acknowledge the law. And then explain why, despite the one or the other, your client should still prevail. If the particular facts or relevant law preclude you from arguing that your client still wins, then you must admit that conclusion. Talk to your client about the available options and, if necessary, settle or withdraw your complaint or appeal.

The alternative—ignoring inconvenient facts or unfavorable law—will ultimately do more harm than good. For example, if you avoid the

undesirable facts or law, you will lose the opportunity to present them in the light that will best serve your client. Worse, if the problematic facts or law prevent you from arguing that your client should still prevail, then you will have pursued a frivolous argument, wasting your client's money and exposing yourself to sanctions. Either way, when those bad facts or contrary law come to light—and they will—your credibility will be tarnished and possibly damaged beyond repair. Thus, although skirting some facts or a part of the law may seem like a good idea in the short term, the damage to you and to your client is simply not worth it. Instead, accept "it is what it is," and take the opportunity to couch the problematic facts and law in a way that minimizes their impact.

## C. "Winning" Is a Relative Term

Finally, as an advocate, you should think carefully about what it means to "win." In adversarial settings, people talk a lot about winning and losing. Trials often are conceived as battles or, if really long and drawn-out, as wars. On appeal, people win or lose, as if appeals are sporting events in which one team is a winner and the other a loser. Lawyers refer to counsel representing other parties as their opponents, and they often revel in beating them.

Although that kind of shorthand for adversarial proceedings is common and sometimes useful, try to view proceedings as something other than a to-the-death battle. Doing so helps to avoid some of the ethical and professional pitfalls that befall those who become too caught up in the battle. Avoid seeing adversarial settings as wars in which all opponents are to be mercilessly crushed, and you may also avoid the temptations to take unethical or unprofessional shortcuts.

What does it mean to win? Winning in an adversarial setting may be defined as achieving the best possible outcome for your client in light of the existing facts and law and consistent with acting professionally and ethically.

An example involving an inmate's appeal and an assistant attorney general will illustrate the point. Along the way, you will also see how an attorney can accept that "it is what it is" and still act as a zealous advocate. In that case, an inmate brought a tort action against the prison. The inmate lost and—acting *pro se*—appealed the decision arguing that the trial court judge had erroneously granted summary judgment in favor of the state. An assistant attorney general was assigned to the case to represent the state government. Upon reviewing the facts and the law, the assistant attorney general determined that the inmate was correct: The trial court had, in fact, erroneously granted judgment in favor of the state. Although a non-frivolous argument could have been made that the appellate court should uphold the trial court's judgment, it had little chance of succeeding. Worse, if the appellate court rejected the inmate's

argument, there was a chance that the appellate court would announce a rule that would be detrimental to the state in the many other tort actions filed by prison inmates.

The assistant attorney general decided that the best outcome would be achieved by conceding that the trial court had erred but suggesting a rule that would benefit the state in the long run.[8] The court adopted the state's proposed rule. Although the appellate court held in favor of the inmate, the state "won" the appeal in the sense that it achieved the best possible outcome given the facts and the law.

Winning is not always about winning the case. If you carefully and objectively assess the facts and law, and make the best of what you have, you are less likely to push the boundaries of professionalism to achieve an illusory victory.

## III. Specific Rules an Advocate Should Know

Although the general principles above will point you in the right direction most of the time, you can also turn to the rules of professional conduct. Each state's bar adopts rules of professional conduct that apply to members of that bar, which you can find by going to your state bar's website.[9] In most states, though, the rules of professional conduct generally follow the American Bar Association's Model Rules of Professional Conduct. Based on those model rules, here are some guidelines about how to conduct yourself as an ethical, professional advocate.

| RULE | DO | DON'T |
|---|---|---|
| 1.1 | **Be competent**, which includes<br>• Investigating the law and facts sufficiently to determine whether your client has grounds for a claim.<br>• Submitting briefs that are organized, thoroughly researched, and supported by legal authority. | **Demonstrate incompetence by**<br>• Failing to educate yourself about claims or arguments that your client might assert or about facts that might support those claims or arguments.<br>• Submitting briefs that are so disorganized or unsupported by legal authority that the court is "called upon to supply the legal research and organization to flesh out a party's arguments." *Smith v. Eaton*, 910 F.2d 1469, 1471 (7th Cir. 1990) |

8. *See Canell v. Oregon*, 58 P.3d 847 (Or. Ct. App. 2002) (adopting state's proposed rule).

9. You can find a link to the various states' rules on the American Bar Association's website: http://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest.html#States.

| RULE | DO | DON'T |
|---|---|---|
| 1.3 | **Be diligent**. "Diligence" is an earnest, persistent effort to accomplish the task at hand, in this case, representing your client. | Allow an ever-expanding workload (or other personal events in your life) to cause you to **neglect** a client's case. |
| 1.3 | **Be prompt** in communicating with your client and attending to your client's matter. | **Procrastinate** such that you needlessly raise your client's anxiety; undermine your client's confidence in you; or, worst of all, adversely affect your client's legal position. |
| 1.4 | **Communicate regularly with your client**, both to consult about the means of achieving your client's objectives and to keep the client informed about the status of the case. | Avoid returning phone calls, letters, or e-mails. |
| 1.6 | **Maintain confidences**. Except under limited circumstances designated in the model rules or under the law, you cannot reveal any information relating to the representation of your client. | Gossip, tell tales, or post information about your clients, especially in a manner that would allow someone to identify your client. |
| 3.1 | **Assert an argument only if it can be supported by both the law and facts.** If winning your argument would require the court to overturn existing case law or a statute, your argument must recognize that. | **Assert a frivolous argument**. A lawyer makes a frivolous argument when it is wholly unsupported by either the law or the facts of the case. Although an attorney can argue that the law should be extended to new areas or that a previous decision should be overruled, such an argument should acknowledge that it is attempting to extend or overrule current law. |
| 3.3 | **Acknowledge contrary authority from the governing jurisdiction.** Doing so is not only ethical, but is good advocacy. | **Ignore contrary authority in the governing jurisdiction**. If you find yourself thinking, "maybe the court and opposing counsel won't find this case," you're asking for trouble. |
| 3.3 | **Correct a false statement of law or fact.** You may, at some time, inadvertently state the law or a fact incorrectly, or the law may change while your client's case is being considered. In either situation, you must alert the court. | **Knowingly make a false statement of law or fact** to the court. Never stretch your reading of the law or the facts such that you are misrepresenting one or the other. |
| 3.4 | **Follow court rules.** | Fail to research and, thereby, fail to become familiar with a court's rules. |
| 3.4 | **Be fair to the opposing party and counsel.** | **Be unreasonable by**<br>• Making frivolous discovery requests.<br>• Failing to respond to, or delaying a response to, a reasonable discovery request.<br>• Raising a fact or issue at trial when you believe that the fact or issue is irrelevant or inadmissible. |

| RULE | DO | DON'T |
|---|---|---|
| 3.5 | **Avoid improper communications** with the court, counsel, or others. | **Communicate ex parte** with the judge or jury, unless permitted or required to do so by law. "Ex parte" means the communication occurs without the other party (or counsel for the other party) being present. |

If the above basic principles and specific guidelines prove insufficient, and you find yourself confronting a decision about which you are uncertain, imagine that whatever you are about to do will end up on the front page of the *New York Times*. Or, imagine that your decision "goes viral." In other words, imagine that anyone with an Internet connection—that is, everyone—knows about the decision you just made. Do you still feel comfortable? If you have to spend much time and effort deciding whether a proposed course of action is ethical or professionally appropriate, you probably shouldn't do it.

Finally, remember that being a decent person will go a long way toward being an ethical lawyer. As one professor of legal ethics explained, "Being an ethical lawyer is not much different from being an ethical doctor or mail carrier or gas station attendant. You should treat others as you want them to treat you. Be honest and fair. Show respect and compassion. Keep your promises."[10] A good lawyer can competently and vigorously represent her client and, at the same time, be a decent person.

## Practice Points

- An effective advocate is one whom the court can rely on. Adhering to the rules of professional conduct will enhance your credibility before the court and, therefore, your effectiveness as an advocate.
- Accept the limits of the law and the facts. Advocate for your client, but do so within the limits of the law and facts.
- Be familiar with the rules of professional conduct that govern in your jurisdiction.
- At all times, "[b]e honest and fair. Show respect and compassion. Keep your promises."[11]

10. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 Vand. L. Rev. 871, 909 (1999).
11. *Id.*

Chapter 3

# A Litigation Overview



Before you draft documents for your client, you must understand the litigation that has generated the need for your document. Lawyers submit different documents depending on whether litigation is "civil" or "criminal" litigation. Lawyers also submit different documents depending on whether litigation has just begun or is nearing its conclusion. These variables—whether a case is a civil case or a criminal case and whether the motion or brief is submitted earlier or later in the litigation—affect which facts are available, what law applies, and the arguments you may make. Thus, you must be aware of the litigation process and where your case is located within that process before you draft.

To that end, this chapter briefly describes the difference between civil and criminal litigation and then explains the different documents that are produced along each of those litigation tracks. As you read, you should note the different purposes for the different documents. Some documents present persuasive arguments and ask the court to take action or to refrain from taking an action. Those documents are usually called a "motion" or "brief." A motion is often accompanied by a "memorandum of law," which explains the arguments in detail.

Other documents merely inform. For example, "pleadings," such as a complaint or an answer, inform the court and opposing party of alle-

**Oral vs. Written Motions**

Not all motions are in writing. During a hearing or trial, motions are usually made orally and ruled upon by the judge. Other motions, especially those before and after a trial, are usually in writing. This book focuses on written motions.

gations, denials, or defenses in a lawsuit, but make no arguments about those allegations, denials, or defenses. Similarly, lawyers will notify opposing counsel of depositions they intend to take, documents the other side must produce, and witnesses they plan to call at trial.

In providing an overview of the civil and criminal litigation processes, this chapter describes both kinds of documents—those that seek to persuade and those that inform. In that way, you can see the different roles that different documents play. After this overview, however, this book focuses more specifically on how to develop those documents that will persuade a court to take action on your client's behalf.

## I. Civil vs. Criminal Litigation

Table 3-A sets out some of the more significant differences between a civil case and a criminal case.

**Table 3-A • Differences between a civil case and a criminal case**

| | Civil Litigation | Criminal Prosecution |
|---|---|---|
| **Definition** | Civil litigation addresses disputes between two or more parties, whether those parties are individuals, organizations, or a government. | Criminal litigation addresses crimes against society. Criminal litigation is often called criminal "prosecution" because the government prosecutes an individual or other entity for alleged crimes. |
| **Case filed by** | A private party or the government | The government |
| **Burden of proof** | The plaintiff has the burden of proof. The plaintiff must prove each claim by a preponderance of the evidence. | The burden of proof is on the government. The government must prove its case beyond a reasonable doubt. |
| **Examples** | Landlord/tenant disputes, divorce proceedings, personal injuries, and medical malpractice | Theft, assault, robbery, trafficking in controlled substances, and murder |
| **Redress** | The plaintiff seeks monetary damages or an injunction. An injunction requires a person to act or refrain from acting. | The prosecutor seeks jail time, probation, fines, or in exceptional cases and in some states, a death sentence |
| **Appeal** | The losing party appeals | Usually only the defendant appeals |
| **Effect of judgment** | Liability | Guilt |

Civil and criminal cases are governed by different rules of procedure, which permit different kinds of motions and appeals.[1] The rules of civil and criminal procedure differ from jurisdiction to jurisdiction. Moreover, local custom may affect how a particular procedural step is performed. For those reasons, cases within different jurisdictions will always look a little bit different. Nevertheless, regardless of whether a case is a civil or criminal case and no matter the jurisdiction, the litigation will have four distinct stages: pre-trial, trial, post-trial, and appeals.

The two sections that follow provide a tabular overview of a civil matter and, then, a criminal matter. The tables are by no means exhaustive. The tables do, however, describe the major stages of litigation and the motions or briefs that are produced along the way. To give you a sense of the pace of litigation, the tables provide the time frames within which documents must be filed. The time frames are from the federal rules of civil, criminal, and appellate procedure. State procedural rules will govern the time frames in state court, and those rules may result in slightly different time frames.

As you read, remember that, although you may be permitted to file a motion or brief at a particular stage, whether you actually file a particular motion or brief always depends on the facts and law available to you.

## II. Civil Litigation

Every civil case begins with a dispute between two or more parties. For example, one neighbor builds an addition to his house that blocks the view that another neighbor had previously enjoyed; a business owner receives a delivery of goods that do not look or perform as expected; a bicyclist runs into you while you're on your skateboard. Although the kinds of disputes are limitless, the general process of litigation is the same.

### A. Pre-Trial

As an attorney, you begin by listening to the client's problem and investigating the relevant facts and law. After your preliminary investigation, you will likely contact the other party or that party's attorney. You may send a "demand letter" that asks the other party to stop certain conduct or pay damages. If a dispute cannot be settled informally, then one of the parties may decide to initiate a claim in court. The typical pre-trial path is set forth in Table 3-B.

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1. Specialized courts—such as tax courts, bankruptcy courts, or specialized business courts—have their own, somewhat different, procedural steps; however, because the majority of cases follow either the civil or criminal procedural tracks, this chapter focuses on those two paths.

**Table 3-B • Typical civil pre-trial stages**

| Pre-trial stage | Explanation |
|---|---|
| **Complaint** | The first formal step in civil litigation is to file a complaint. A complaint notifies the opposing party that some individual (or entity) has initiated a legal action in court. The complaint outlines the plaintiff's legal claims and the factual basis for those claims. |
| **Motion to dismiss** | After the complaint is filed, the defendant's attorney has an initial opportunity to ask the court to take action to dismiss all or part of the complaint. A defendant can ask the court to dismiss a complaint for a variety of reasons. Some common reasons for asking the court to dismiss the complaint are because the complaint fails to state a claim upon which relief can be granted, the court lacks jurisdiction, the complaint was not properly served on the defendant, or because the plaintiff waited too long to initiate the litigation (i.e., "the statute of limitations" has run).<br>If the judge grants the motion to dismiss, the dismissal may be granted "with prejudice" or "without prejudice." If the motion is granted with prejudice the case is dismissed, the litigation in the trial court ends, and the plaintiff's only recourse is to appeal.<br>If the motion is granted without prejudice, the plaintiff can still amend and re-file the complaint to continue the litigation. |
| **Answer** | If the case is not dismissed, the defendant must file an answer to the plaintiff's complaint. In the answer, the defendant must admit or deny each of the allegations in the complaint. Failure to do so results in the defendant admitting to the complaint's allegations.<br>In the answer, the defendant can set out affirmative defenses and counterclaims. An affirmative defense asserts claims that, if true, will defeat one or more plaintiff's claims. An example of an affirmative defense might be a claim that the statute of limitations has run.<br>A counter-claim is a claim brought by the defendant that, if later proved true, would entitle defendant to some relief. |
| **Reply** | If the defendant's answer included counter-claims, the plaintiff may be able to file a "reply," similar to the defendant's answer. In a reply, the plaintiff admits or denies the allegations that support the counter-claim. |
| **Discovery** | After the lawsuit is filed, a great deal of activity occurs in the form of discovery. Discovery provides relevant information to both parties in terms of facts, expected testimony, and exhibits. Common types of discovery include: (1) interrogatories, which are a list of questions that one party is asking the other party to answer; (2) requests to produce documents; (3) requests that the opposing party admit to certain facts; and (4) depositions, during which an attorney questions a witness who is under oath.<br>The majority of discovery is handled without judicial involvement. Sometimes, however, if the parties cannot agree, one party will file a motion asking the court to take action related to the discovery process. Typical discovery-related motions include a motion to compel discovery, a motion for a protective order to prevent discovery, or a motion to limit discovery.<br>A court may also order parties to engage in a mediated settlement conference. Mediation is an informal settlement conference led by a trained mediator who seeks to find a resolution to the case that is acceptable to all parties. |

*Chart continues on the next page*

**Table 3-B • Typical civil pre-trial stages,** *continued*

| Pre-trial stage | Explanation |
|---|---|
| **Motion for summary judgment** | A motion for summary judgment asks the court to dismiss the case based on the known facts. In a motion for summary judgment, the moving party argues that, based on the undisputed facts, that party is entitled to judgment as a matter of law. The well-known standard is that a party is entitled to summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).<br>If the court grants summary judgment in either party's favor, judgment is entered in the prevailing party's favor and litigation at the trial level ends. The case will continue only if the losing party appeals. |
| **Motion in limine** | Motions in limine are requests that certain materials be excluded from the trial or be deemed admissible. Usually, a party will request that material be excluded from the trial because the material was improperly obtained, would be overly prejudicial, or irrelevant to the proceedings. |
| **Pre-trial order** | Before trial begins, the parties will draft a proposed pre-trial order outlining the case as it will be presented at trial. If the proposed order is acceptable to the judge, the judge signs the pre-trial order and it governs the events at trial. The pre-trial order addresses the issues that remain in dispute, the witnesses that will appear at trial, and the need for further decisions by the court. |

## B. Trial

Most civil cases settle before the trial begins. In fact, in most jurisdictions, and depending on the type of case, less than five percent of all complaints filed proceed to trial.[2] Those cases that proceed to trial usually unfold as shown in Table 3-C.

**Table 3-C • Typical stages of a civil trial**

| Stage | Explanation |
|---|---|
| **Jury selection** | In a civil case, a plaintiff or defendant must request a jury for the case to be heard by a jury. If a party does not request a jury trial, the case will be heard and decided by a judge. See Fed. R. Civ. P. 38, 39.<br>When a case is to be heard by a jury, the trial begins by selecting the jury from a pool of potential jurors. This process is called "voir dire." During voir dire, attorneys or the judge, depending on the court's procedures, will talk with potential jurors about any pre-existing beliefs or experiences that may affect the juror's perception of the case. A juror can be dismissed "for cause" when the voir dire establishes that the juror cannot be impartial or will be unable to attend the trial. An attorney can also use one of several "peremptory" challenges or strikes to exclude a person from the panel without providing a reason for the exclusion. |

*Chart continues on the next page*

2. *See, e.g.*, U.S. Dept. of Justice, Civil Justice Survey of State Courts, 2005, at 1 (Oct. 2008) (available at http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf).

**Table 3-C • Typical stages of a civil trial,** *continued*

| Stage | Explanation |
|---|---|
| **Opening statement** | The plaintiff's lawyer opens the trial by making an "opening statement." In the opening statement, counsel describes what will be proved during the trial. The defendant's attorney then follows with an opening statement describing, from the defendant's perspective, what the trial will show. |
| **Plaintiff's case-in-chief** | Because the plaintiff has the burden of proof, the plaintiff's case is presented first. Plaintiff's counsel provides evidence witness-by-witness. Each witness's testimony is recorded. Witnesses also can identify and present documentary or other physical evidence, which is then entered into the record. After plaintiff's attorney examines each witness, defendant's attorney has the opportunity to cross-examine that witness. |
| **Motion for judgment as a matter of law** | After plaintiff's case-in-chief, the defendant will often move that the case be dismissed because the evidence presented was insufficient to prove the plaintiff's case. Such a motion is usually made orally and is often ruled upon quickly. In federal courts, such a motion is called a "motion for judgment as a matter of law." However, in state courts, the same motion is often called a "motion for directed verdict" in jury trials, or a "motion to dismiss" in bench trials. |
| **Defendant's case-in-chief** | Next, the defendant puts on his case-in-chief by producing witnesses and evidence to respond to the plaintiff's case and to establish any affirmative defenses or counterclaims. Like the process in the plaintiff's case-in-chief, each witness is questioned by the defense attorney and may be cross-examined by plaintiff's counsel. |
| **Rebuttal and sur-rebuttal** | At the end of the defendant's evidence, the plaintiff may put on rebuttal witnesses or evidence to refute the evidence presented by the defendant. The defendant then has the opportunity for a sur-rebuttal, essentially a rebuttal to the rebuttal. |
| **Motion for judgment as a matter of law** | After defendant's case has been presented, the plaintiff has the opportunity to move for judgment on the ground that plaintiff's case has been proved and the defendant has failed to undermine that case or prove a defense. This motion must be made before the case goes to the jury. |
| **Closing arguments** | During closing arguments, also called summation, each attorney recaps the evidence and organizes it for the jury, explaining why the evidence supports a verdict favorable to that attorney's client. Counsel's closing argument must be consistent with the jury instructions that the court will give (see below). Usually, the plaintiff's counsel will present closing argument first, and the defendant will follow. The plaintiff may follow with a short rebuttal. |
| **Jury instructions** | After closing arguments, and if the case is being heard by a jury, the judge will instruct the jury regarding the law that the jury will follow to reach a decision. The instructions that will be read to the jury are often the subject of argument, and counsel may have previously submitted arguments to the court about the precise language that should be read to the jury. |

*Chart continues on the next page*

**Table 3-C • Typical stages of a civil trial,** *continued*

| Stage | Explanation |
|---|---|
| **Verdict** | After instructions are read, the jury will deliberate and return a verdict. A jury may return a "general" or "special" verdict. A general verdict simply states which side wins. A special verdict lists the jury's findings with respect to each factual issue or with respect to selected issues.<br>In a bench trial, instead of a verdict, the judge will prepare an order with findings of fact and conclusions of law. Usually, attorneys from each side will submit proposed findings of fact and conclusions of law, and the judge will draft a final order based on those submissions. |
| **Entry of judgment** | To conclude a trial, the court must enter a judgment into the court's records. The judgment is a document that is separate from either the jury's verdict or the judge's findings of fact and conclusions of law. |

## C. Post-Trial

After the trial, verdict, and entry of judgment, the losing party may seek relief from the decision by filing one of the motions described in Table 3-D.

**Table 3-D • Typical civil post-trial motions**

| Type of Motion | Explanation |
|---|---|
| **Motion for judgment as a matter of law** | Within 28 days after a judgment has been entered, a party can move for a judgment as a matter of law. Such a motion is permitted only if the party has also made a motion for a judgment as a matter of law at the close of all of the evidence. Fed. R. Civ. P. 50(b). |
| **Motion for a new trial** | Within 28 days after a judgment has been entered, a party may move for a new trial. Fed. R. Civ. P. 59. |
| **Motion to alter or amend judgment** | If an attorney believes that the court's judgment needs to be corrected in some way, the attorney can, within 28 days of the entry of judgment, file a motion explaining why that correction is warranted. Fed. R. Civ. P. 59(e). |
| **Motion to set aside judgment** | A motion to set aside the judgment asks the court to relieve a party from a final judgment on the ground that it would be unjust or unnecessary for the court to carry out its judgment. A party might argue that fraud, mistake, or newly discovered evidence would make it unjust for the court to exercise its authority. Fed. R. Civ. P. 60(b). |
| **Motion for attorneys' fees** | While parties typically pay their own litigation costs, sometimes the winning party may move to recoup attorneys' fees. Attorneys' fees can be awarded by statute, contract, or as a matter of public policy, depending upon the jurisdiction. |

## D. Appeals

After judgment is entered at the trial level, the losing party has the opportunity to appeal. The appellate process is described briefly in Table 3-E.[3] Chapter 5, *Appellate Practice*, describes the world of appeals in more detail.

**Table 3-E • Appellate process**

| Terminology | Explanation |
|---|---|
| **Appeal as of right** | After a final judgment is entered, the losing party is generally entitled "as of right" to have an intermediate appellate court review the decision of the lower court. In an appeal as of right, the intermediate court cannot refuse to hear the case. |
| **Notice of appeal** | A notice of appeal must be filed within 30 days of entry of judgment. Fed. R. App. P. 4(a)(1)(A). As its name suggests, a notice of appeal notifies the parties and the courts of the party's intention to appeal. |
| **Forwarding the record** | After filing a notice of appeal, the party appealing the decision must order from the court reporter a copy of those portions of the trial transcript that will be relevant to the appeal. That record will then be forwarded to the appellate court. Fed. R. App. P. 10(b), 11(b). |
| **Submission of briefs** | The party filing the appeal must file his opening brief within 40 days after the record is filed. The party responding to the appeal has an additional 30 days to file its brief in response. The party appealing then has another 14 days to file a reply brief. Fed. R. App. P. 31. |
| **Oral argument** | In many cases, the appellate court allows the attorneys to present oral arguments related to the issues on appeal. During the arguments, the judges may interrupt and ask questions about various points of law or fact. |
| **Opinion** | A court issues an opinion to announce its decision in the case and to explain its reasoning regarding the legal issues raised on appeal. When an opinion is published, it both resolves that particular controversy and gives guidance to other potential litigants who have similar issues. |

*Chart continues on the next page*

3. Table 3-E assumes an intermediate appellate court. Although most jurisdictions in the United States have an intermediate appellate court, the following states either lack an intermediate court or have an atypical structure for their intermediate courts: Delaware, Maine, Montana, New Hampshire, Rhode Island, North Dakota, South Dakota, Vermont, West Virginia, and Wyoming.

**Table 3-E • Appellate process**, *continued*

| Terminology | Explanation |
|---|---|
| **Disposition** | A "disposition" is the appellate court's final determination of the matter. Typical dispositions are listed below. Sometimes an appellate court will have different dispositions for the different legal issues raised on appeal, or will combine dispositions, for example, by reversing and remanding the decision of the lower court. |
| **Affirm** | The appellate court agrees with the trial court's decision. |
| **Reverse** | The appellate court disagrees with the trial court's decision and overturns it. |
| **Remand** | The appellate court sends the case back to the trial court with instructions for further action. |
| **Vacate** | The appellate court makes the trial court's decision legally void. |
| **Writ of certiorari** | To have a decision heard by the highest appellate court, the parties must, in most cases, file a petition for a writ of certiorari to provide reasons why the court should exercise its discretion and review the case. |

## III. Criminal Litigation

Whereas a civil case begins with a dispute between two private parties, a criminal case begins when the government suspects an individual or organization has engaged or is about to engage in some criminal activity. A police officer may actually see a crime take place, or the police may learn about possible criminal activity. Two steps then follow: an investigation and an arrest. Depending on the circumstances, the investigation may precede the arrest; however, under some circumstances, a person is first arrested and then police investigate the alleged crime to support the prosecution of the arrestee.

During an investigation, officers may question witnesses, ask a witness to identify the suspect in a line-up, or obtain a search warrant to search a particular location for evidence. Prosecutors may also be involved in an investigation by, for example, issuing a subpoena for documents.

An officer will arrest a suspect when the officer or a prosecutor believes the evidence provides "probable cause" to believe that the suspect has committed a crime.[4]

### A. Pre-Trial

After the arrest, the state begins its formal prosecution. Table 3-F describes the typical pre-trial proceedings in a criminal case.

4. The tables below draw heavily from the work of Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Olin S. Kerr, *Criminal Procedure* (5th ed. 2009), and from

**Table 3-F • Typical criminal pre-trial stages**

| Stage | Explanation |
|---|---|
| **Complaint** | After the defendant is arrested, the prosecutor reviews the case to decide whether to file charges and, if so, what charges to file. If the prosecutor decides to prosecute the case, he will prepare a complaint.<br>The complaint describes the crime allegedly committed and the basic facts that, if proved, would establish the crime. The complaint must be filed with the court within 24 to 48 hours after the arrest. Once the complaint is filed, the arrestee becomes a criminal defendant. |
| **Initial appearance** | After the complaint is filed, the defendant is brought before a judge for an initial appearance. This appearance must also occur within 24 to 48 hours after the defendant is arrested.<br>During the initial appearance, the defendant is formally notified of the charges contained in the complaint.<br>If the suspect was arrested without an arrest warrant, the court will also determine whether the officer had probable cause to arrest the suspect. If the officer did not have probable cause to arrest the defendant, the complaint is dismissed.<br>If probable cause did exist, the judge will determine whether the defendant will continue to be held in custody. The judge may temporarily release the defendant based on the defendant's promise to return for future proceedings — that is, released "on her own recognizance." Alternatively, the judge may set bail or other conditions of release, such as a curfew, travel restrictions, or wearing a monitoring device, or the defendant may be held in jail until the next proceeding. |
| **Information or indictment** | The next step in the criminal process takes place within two or three weeks after the initial appearance; however, this step differs depending on whether the jurisdiction is an "information jurisdiction" or an "indictment jurisdiction."<br>The majority of jurisdictions are information jurisdictions. In an information jurisdiction, the next step in a criminal case is a "preliminary hearing." The purpose of this preliminary hearing is to review whether probable cause exists to proceed with the case. If a judge determines that probable cause supports each of the allegations in the complaint, the prosecutor files the "information" with the trial court that states the charges against the defendant and the essential facts establishing those charges.<br>A minority of jurisdictions are indictment jurisdictions. In an indictment jurisdiction the grand jury determines whether sufficient probable cause exists for the case to continue. When the grand jury hears the evidence, the grand jury will hear only from the prosecutor. Neither the defendant nor defendant's counsel will be present. If the grand jury determines sufficient evidence exists, the grand jury (through the prosecutor) will issue an indictment, which sets forth the charges against the defendant and the related facts. Each charge and the related facts are listed as one "count."<br>At this point, the information or the indictment replaces the complaint as the official "charging" or "accusatory" instrument in the case. |

*Chart continues on the next page*

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Harry I. Subin, Chester L Mirsky & Ian S. Weinstein, *Federal Criminal Practice: Prosecution and Defense* (1992).

**Table 3-F • Typical criminal pre-trial stages**, *continued*

| Stage | Explanation |
|---|---|
| **Arraignment** | After an information or indictment is filed, the defendant is arraigned. At an arraignment, the defendant is informed of the charges against her. The defendant can plead "guilty," "not guilty," or if permitted in the jurisdiction, "*nolo contendere*," which means "no contest." The judge then sets a date for trial or for sentencing, depending on the plea. |
| **Motions to dismiss** | Like the defendant in a civil case, the criminal defendant may move to dismiss the case. A criminal defendant may move to dismiss a case because the information or indictment fails to allege an essential element; because critical evidence should be suppressed, Fed. R. Crim. P. 8, 14; because the prosecution is constitutionally barred, for example, because of double jeopardy or violation of speedy trial requirements, *id*.; or because of some other affirmative defenses such as self-defense, insanity, or a statute of limitations. |
| **Discovery** | The discovery rules in most jurisdictions require more disclosure by the government than by the defense. In those jurisdictions that require the government to disclose certain information, the government usually must disclose defendant's oral statements; defendant's written or recorded statements; defendant's prior record; documents and objects that the government plans to rely on at trial or that would be material to a defense; reports of examinations or tests that would be material to the defense; and any summary of expert testimony the government intends to introduce. Fed. R. Crim. P. 16(a).<br>The defendant, however, need only disclose documents, objects, reports, and expert testimony that the defendant intends to use at trial. Fed. R. Crim. P. 16(b).<br>In some states, however, the government is not required to disclose any documents. Rather, the defense must show why requested materials should be made available. |
| **Motions to suppress** | Motions to suppress are requests that certain materials be excluded from the trial.<br>If a motion to suppress is granted, counsel and witnesses are prohibited from referring to that material during the trial. |

## B. Trial

The time span from arrest to the start of a felony trial usually falls within five to eight months.[5] However, just as most civil cases settle before making it to court, most criminal cases end in settlement—that is, a plea agreement. "Most defendants—more than 90%—plead guilty

5. LaFave, *supra* note 4, at 15.

rather than go to trial."[6] If a criminal case does go to trial, that case will most likely conclude in two to three days[7] and result in a conviction.[8] The stages of that trial are described in Table 3-G.

**Table 3-G • Typical stages of a criminal trial**

| Stage | Explanation |
|---|---|
| **Jury selection** | A defendant facing more than six months of incarceration always has a right to a jury trial; however, a criminal defendant may waive that right and have the case tried by a judge instead of a jury. Fed. R. Crim. P. 23(a).<br>When a criminal case is to be heard by a jury, the trial begins (as it does in a civil case) by selecting the jury from a pool of potential jurors. This process is called "voir dire." During voir dire, the judge or the attorneys talk with potential jurors about any pre-existing beliefs or experiences that may affect the juror's perception of the case. A juror can be dismissed "for cause" when the voir dire establishes the juror cannot be impartial or will be unable to attend the trial. There is no limit to the number of jurors who can be dismissed for cause. An attorney can also use one of a limited number of "peremptory" challenges or strikes to exclude a person from the panel without providing a reason for the exclusion. |
| **Opening statement** | The prosecutor opens the trial by making an opening statement. In the opening statement, the prosecutor will identify the charges being brought against the defendant and describe the evidence the government will introduce to prove the charges. The defendant's attorney may present an opening statement or not. In addition, the defense is often given the choice as to whether to follow the prosecutor's opening statement with its own or whether to wait until the beginning of its case. |
| **Government's case-in-chief** | Like the plaintiff in a civil action, the government has the burden of proof so the government's case is presented first. The prosecutor presents evidence witness-by-witness. Each witness's testimony is recorded. Witnesses also can identify and present documentary or other physical evidence, which is then entered into the record. Each witness is examined by the prosecutor and, usually, cross-examined by the defendant's attorney. The government may then conduct a redirect examination of the same witness. The government may never call the defendant to the witness stand in its case-in-chief. |

*Chart continues on the next page*

6. *How the Federal Courts Work: Criminal Cases*, U.S. Courts, http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/CriminalCases.aspx; *see also* LaFave, *supra* note 4, at 15 ("The ratio of guilty pleas to trials quite often will be 12 to 1 or higher.").

7. LaFave, *supra* note 4, at 16.

8. There are approximately three convictions for every one acquittal. *Id.*

**Table 3-G • Typical stages of a criminal trial**, *continued*

| Stage | Explanation |
|---|---|
| **Motion for judgment of acquittal** | After the government's case-in-chief, the defendant will often move for the case to be dismissed because the evidence presented was insufficient to prove the government's case beyond a reasonable doubt. Such a motion is usually made orally and is often ruled upon quickly. |
| **Defendant's case-in-chief** | In a criminal trial, a defendant need not present any evidence on the theory that the government has failed to meet its burden of proof. If a defendant chooses to present a case-in-chief, the defendant will also produce witnesses and evidence to establish an alternative narrative or present an affirmative defense. The defense attorney will examine each witness. The government will have the opportunity to cross-examine the witness. Then, finally, the defense attorney may choose to conduct a redirect examination. |
| **Rebuttal** | If the defendant has presented evidence, the government may put on rebuttal witnesses or evidence to refute the evidence presented by the defendant. |
| **Closing arguments** | During closing arguments, the attorneys recap their version of events and organize the evidence for the jury, explaining why the evidence supports a particular verdict. The arguments must be consistent with the jury instructions that the court gives (see below). The government will present its closing argument first, and the defendant will follow. The government may follow with a short rebuttal. |
| **Jury instructions** | The judge will instruct the jury regarding the law that the jury will follow to reach a decision. Usually, instructions are given after closing arguments. The instructions that will be read to the jury are often the subject of argument, and counsel may have previously submitted to the court the precise language that should be read to the jury. |
| **Verdict** | After instructions are read, the jury will deliberate and return a verdict. A jury may return a "general" or "special" verdict. A general verdict simply states which side wins. A special verdict lists the jury's findings with respect to selected issues. In federal courts, and in every state except Louisiana and Oregon, a jury verdict in a criminal case must be unanimous. |

## C. Post-Trial

If a jury finds a defendant guilty, that verdict is often followed by post-trial motions. If, after those motions, the guilty verdict stands, the court will sentence the defendant and enter judgment.

### 1. Motions

Common post-trial motions in a criminal case include those set forth in Table 3-H.

**Table 3-H • Common post-trial motions in criminal cases**

| Post-verdict proceeding | Explanation |
|---|---|
| **Motion for judgment of acquittal** | A defendant may move for a judgment of acquittal (or renew such a motion) within 14 days after a guilty verdict or after the jury has been discharged. Fed. R. Crim. P. 29. |
| **Motion to stay sentence** | A defendant may ask the court to stay a sentence while the defendant appeals the judgment. Fed. R. Crim. P. 38. |
| **Motion for a new trial** | A motion for a new trial is usually filed when new evidence is discovered that may exonerate the client, or the attorney has discovered some procedural error or misconduct that casts doubt on the verdict. Fed. R. Crim. P. 33. In some states, before filing an appeal, the party that lost must make a motion for a new trial. |

### 2. Sentencing

After a guilty plea, a plea of no contest, or a guilty verdict has been entered, the defendant will be sentenced. Sentencing procedures vary at the state and federal levels. However, in most states and at the federal level, the judge determines the sentence for a convicted defendant.[9]

Before sentencing the defendant, judges will often consider facts that did not or were not allowed to come to light at trial, such as a defendant's prior criminal record, family relationships, health, and work record.[10]

Some states and the federal courts have sentencing guidelines that guide judges when they impose a sentence. The guidelines are intended to help judges impose proportionate sentences and to foster uniform sentencing.[11]

---

9. *See* LaFave, *supra* note 4, at 16. The major exception is death penalty cases. In death penalty cases, a jury determines whether to give the death penalty sentence to a convicted defendant.

10. So that a judge can determine an appropriate sentence, a probation officer usually submits a presentencing report that includes biographical information about the defendant, major information about his or her living situation, and relevant legal information about the crimes he or she is accused of committing. After addressing any objections, the report is then submitted to the court for consideration as a part of the sentencing. *See* Fed. R. Crim. P. 32(e)-(f); Fed. R. Crim. P. 32(d); *see also* LaFave, *supra* note 15, at 16 (describing the role of a presentence report and the parties' ability to present additional information or challenge information in a report).

11. LaFave, *supra* note 4, at 16.

In jurisdictions where the sentencing judge's discretion is limited by sentencing guidelines, a judge is also usually required to make findings of fact regarding those factors that led to the sentence.[12]

### 3. Entry of judgment

Finally, the court must enter judgment. The judgment must state the plea or jury verdict and, if the defendant is found guilty, the final sentence imposed.[13] Once the judgment has been entered, the trial concludes.

## D. Appeals and Other Post-Conviction Remedies

In criminal cases, usually only the defendant has a right to appeal.[14] The government's ability to appeal is limited by double-jeopardy, the constitutional prohibition against a defendant being tried twice for the same crime. When a defendant does appeal, the conviction will usually be affirmed. Convictions are affirmed 90 to 95 percent of the time.[15]

Criminal appeals generally proceed in the same way that civil appeals proceed. That is, the defendant appeals to an appellate court and asks the appellate court to review the record below for some error. Because a criminal appeal generally follows the same process as a civil appeal, you can review Table 3-E, Appellate Process, for an overview of the criminal appellate process. The one difference between a criminal appeal and a civil appeal is that, in a criminal appeal, the defendant must file a notice of appeal within 14 days of entry of judgment.[16] By contrast, the civil appellant has 30 days to file a notice of appeal.[17]

In addition to filing a traditional appeal, sometimes called a "direct appeal," defendants can challenge the legality of their conviction or sentence in ways that are unavailable to the civil litigant. Defendants convicted in state courts can seek review of their conviction or sentence under that state's post-conviction review proceedings. If that fails, the defendant may then file a petition for a writ of habeas corpus in federal court. Defendants convicted in a federal court can seek review of their conviction by filing a petition for a writ of habeas corpus in federal court.

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12. *See id.*

13. Fed. R. Crim. P. 32(k). In the case of a bench trial, the judgment will state the court's finding of facts and its adjudication. *Id.*

14. *Id.* Some states do allow the state to appeal in limited circumstances, most frequently to clarify aspects of the law. Because of double jeopardy (the federal constitutional prohibition against being tried twice for the same crime), if the state can appeal, it usually must appeal before the trial and not after the verdict.

15. LaFave, *supra* note 4, at 17.

16. Fed. R. App. P. 4(b)(1)(A).

17. Fed. R. App. P. 4(a)(1)(A).

These procedures are called "collateral remedies." "Collateral" means "[b]y the side" or "[n]ot lineal,"[18] and these attacks on the conviction are all by means other than direct appeals. These processes are briefly explained in Table 3-I.

**Table 3-I • Additional post-conviction (collateral) remedies**

| Terminology | Explanation |
|---|---|
| **State post-conviction review** | A defendant convicted in state court may challenge his conviction or sentence (or both) in state court on the ground that it violates the state or federal constitutions.<br>How a defendant seeks post-conviction review in state court varies from state to state. In some states, the defendant files a motion or application in the court in which he was convicted. In other states, the defendant files a separate petition for post-conviction review, initiating a new civil action.<br>If a defendant loses a post-conviction review at the trial level, the defendant may then appeal the trial court's decision through the normal appeals process. |
| **Federal writ of habeas corpus** | A defendant convicted in federal court who has exhausted his appeals has a collateral remedy in federal court. The defendant can file a petition for a writ of habeas corpus in a federal district court, asserting that his conviction or sentence violates the United States Constitution. 22 U.S.C. §§ 2241-2255 (2012). Again, if a defendant loses at the district court level, the defendant may appeal the decision through the normal appeals process.<br>In addition, a state court defendant who has exhausted all his state court remedies can then file a petition for a writ of habeas corpus in federal court. In essence, state-court defendants get two chances (in addition to direct appeal) to challenge their convictions and sentences; federal court defendants get only one. |

Now that you have an overview of the litigation process, you can turn to your client's case and consider the document that needs to be drafted. The next two chapters, Chapter 4, *Motion Practice*, and Chapter 5, *Appellate Practice*, explain the documents that lawyers use to persuade a court to act—the motion and the appellate brief.

18. Black's Law Dictionary 317-18 (10th ed. 2014).

Chapter 4

# Motion Practice



The last chapters have provided background information about the nature of persuasion, the ethics and professional responsibilities of a litigator, and the litigation process. The purpose of this chapter is, first, to introduce the trial motion. Whenever you begin a writing project, you should have a clear idea of what you will be producing. Thus, this chapter begins by showing you a typical motion and its parts. It also explains the rules that will govern your motion so that you can determine what a motion in your jurisdiction should look like. In addition, this chapter provides you with background about what happens after a motion is drafted, that is, how it is served, how it is filed, and how it is responded to. Although this book focuses on developing the written product, understanding what happens to that written product after it is written often provides useful context for the writing project. This chapter provides that background.

# I. A Trial Motion and Its Parts

To begin, we must clarify what lawyers mean when they use the word "motion." Lawyers use the word "motion" in two very different ways. Technically, the word "motion" refers to a short document (often, only one to two pages) in which the lawyer requests the court to take some action. The one or two page document that makes the request is the motion, and it provides little explanation for why the court should act.

Lawyers also use the word "motion" in a more colloquial way. In this more colloquial usage, the word "motion" refers to not just the request, but all the documents that are submitted along with the request. Those additional documents include, most typically, a supporting memorandum of law and supporting evidence.[1]

Because lawyers use the word "motion" in two different ways—to refer to the motion itself and to refer to the motion and all the accompanying documents—be attentive to the word "motion." If you are ever uncertain about the way in which the lawyer is using the word, just ask.

## A. The Motion

As explained above, a motion is a request that a court act. The request can be anything that the court has in its power to order. For example, a motion can request the mundane, such as an order to reschedule a hearing or an order to permit additional pages. Other motions go to the heart of a dispute. For example, a motion can request that a complaint be dismissed, that certain evidence be suppressed, or that a jury's decision be overruled.

Most motions are written. Sometimes, however, events during a trial may prompt a lawyer to make a motion orally. This chapter addresses written motions only.

Written motions have typical parts: (1) a caption, (2) a statement of the relief the party seeks, (3) a brief statement of the grounds for that request, and (4) the attorney's signature. Examples 4-A and 4-B show two different motions and their constituent parts.

**"Motion" is not a verb**

A party *never* "motions" for summary judgment. A party "moves" for summary judgment. Similarly, a party does not "motion" the court to dismiss plaintiff's complaint; a party "moves" the court to dismiss the complaint.

1. When a lawyer files a motion with a court, the motion may also include a notice of motion, a draft order, and proof of service. To keep things simple, we have focused on the primary parts of an ordinary motion: the motion, the supporting memorandum of law, and supporting evidence.

## Example 4-A • A motion to suppress

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY

THE STATE OF OREGON, )
)
Plaintiff, )
)
vs. )
)
TRAVIS Z. TREATSKY, )
)
Defendant. )
_____ )

Case No. 21-15-18156

DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

Caption

The defendant, through his attorney, Jordan R. Silk, moves this Court for the following orders:

This paragraph is a typical lead-in to a motion's actual request.

1. An order suppressing any and all evidence of the field sobriety tests performed by the defendant on May 21, 2015, and

2. An order suppressing all evidence of the breath test performed by the defendant on May 22, 2015.

The statement of the relief defendant seeks.

This motion is based on the attached memorandum of law and is, in the opinion of counsel, well-founded in law and not made or filed for the purpose of delay.

The motion cross-references the memorandum of law, which explains the grounds for relief. That memorandum is provided at Example 4-C.

DATED this _____ day of November, 2015.

_____
Jordan R. Silk
OSB # 105031
Lane County Public Defender's Office
555 Willamette Street
Eugene, OR 97401
Appearing for Defendant

The lawyer's signature

## Example 4-B • A motion to dismiss

**United States District Court**
**For the District of Utah**

| | | |
|---|---|---|
| KATELYN MASON and JENNIFER WELCH, individually and on behalf of those similarly situated, | : | Civil Action No. 14 CV 921 |
| | : | DEFENDANT'S MOTION TO DISMISS PLAINTIFF WELCH'S COMPLAINT |
| Plaintiffs, | : | |
| v. | : | |
| CENTRAL STATE UNIVERSITY OF UTAH, | : | |
| Defendant. | : | MAY 5, 2015 |

The first paragraph of the motion states both the relief it seeks (dismissal of portions of the complaint) and the grounds for that relief (Rule 12(b)(6)).

Pursuant to Federal Rule of Civil Procedure 12(b)(6), defendant Central State University of Utah hereby moves to dismiss that portion of the Complaint that relates to plaintiff Jennifer Welch because plaintiff Welch lacks standing.

The next paragraph briefly elaborates on the grounds, but cross-references a memorandum of law for further explanation.

Specifically, all claims asserted by plaintiff Welch must be dismissed because plaintiff Welch, by her own allegations, did not suffer any present or past injury, and she cannot establish future injury because she is graduating this year. For these reasons, and as explained more fully in the attached memorandum of law, she lacks standing to bring her Title IX claim.

Therefore, defendant Central State University of Utah respectfully requests that this Court grant its Motion to Dismiss Plaintiff Welch's Complaint.

Hepworth & Peterson LLP

The lawyer's signature

By: _____
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350 Lake Street
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Phone: (203) 363-7512
Fax: (203) 262-7676
*Attorney for Defendant*

## B. The Supporting Memorandum of Law

Motions are often, but not always, accompanied by a supporting memorandum of law. The supporting memorandum of law explains why the motion should be granted. It explains the relevant law and applies that law to the facts of the case.[2]

Different jurisdictions have different names for the supporting memorandum of law. It may be called a "memorandum of law" in support of the motion, or it may be called a "brief," "a memorandum of points and authorities," or something else entirely. Whatever the name, the supporting memorandum of law is where the court will find all your persuasive arguments.

Although many motions are accompanied by a supporting memorandum, other motions are not. Some requests to a court are so straightforward that no accompanying memorandum is necessary. For example, a motion asking the court to reschedule a hearing would likely not need to be supported by a memorandum because the motion itself would simply explain the conflict and request the change. There would be no need to provide the court with a legal analysis justifying the scheduling change. Other requests are less straightforward and require further explanation. For example, a motion that asks the court to dismiss a case or suppress evidence needs an explanatory memorandum to explain why the requested relief should be granted.

When a memorandum of law accompanies a motion, the memorandum usually has these parts: (1) a caption, (2) an introduction or preliminary statement, (3) the statement of facts, (4) the argument, (5) the conclusion, and (6) the lawyer's signature. Example 4-C provides an example of a full memorandum of law and identifies each of those parts.

---

2. In some jurisdictions, the legal argument explaining why the motion should be granted is presented in the same document as the motion. For simplicity, this book assumes that the request asking the court to act is one document called a "motion" and the legal argument supporting that request is in a separate document called a "memorandum of law."

## Example 4-C • A memorandum of law in support of a motion to suppress

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY

The caption identifies the court to which the motion is submitted, the parties to the litigation, the docket number, and the title of the document.

| | | |
|---|---|---|
| THE STATE OF OREGON, | ) | |
| | ) | Case No. 21-16-18156 |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | MEMORANDUM OF LAW IN |
| | ) | SUPPORT OF DEFENDANT'S |
| TRAVIS Z. TREATSKY, | ) | MOTION |
| | ) | |
| Defendant. | ) | |
| | ) | |

### INTRODUCTION

The introduction to a supporting memorandum provides context for the arguments that follow by explaining the nature of the case and its procedural history. It may also provide a short summary of the arguments that follow.

On May 21-22, 2015, the state violated Article I, Section 9 of the Oregon Constitution when Trooper Evan Sether administered field sobriety tests and then a breath test to defendant Travis Treatsky. Trooper Evan Sether did not obtain warrants to administer those tests. With respect to the field sobriety test, Trooper Sether lacked probable cause to administer the test, and Mr. Treatsky did not voluntarily consent to field sobriety tests. Because the state obtained evidence from the tests in violation of Article I, Section 9 of the Oregon Constitution, all evidence resulting from the field sobriety tests — including results from the breath test — should be suppressed.

### FACTUAL BACKGROUND

The statement of facts explains all the facts relevant to the motion and the arguments supporting the motion.

On the evening of May 21, 2015, Mr. Travis Treatsky was driving westbound on Highway 126 after a long day of travel and visiting with family. Earlier that day, Mr. Treatsky had driven from northern California where he attends the College of the Siskiyous to his home in Springfield, Oregon. After the long drive home, Mr. Treatsky visited with his mother and sister, and then drove to visit his stepfather. (Aff. Jordan Silk ¶ 3, Nov. 11, 2015.) Returning home from his stepfather's house, Trooper Sether stopped Mr. Treatsky because the lens on one of Mr. Treatsky's taillights was broken. Trooper Sether observed Mr. Treatsky's fatigued demeanor and concluded that Mr. Treatsky was under the influence of an intoxicant. (Police Rep. of Trooper Sether 1-2, May 22, 2015.)

Trooper Sether asked Mr. Treatsky to perform two separate field sobriety tests. Trooper Sether read to Mr. Treatsky his rights with respect to taking a field sobriety test, and Trooper Sether explained the consequences if Mr. Treatsky failed to take the field sobriety. Those consequences included immediate seizure and then a likely suspension of his driver's license. Mr. Treatsky then took the field sobriety tests. According to Trooper Sether, Mr. Treatsky failed both field sobriety tests. (Police Rep. Sether 2.)

Trooper Sether then placed Mr. Treatsky under arrest, took him to the police station, and administered a breath test yielding a result of 0.08% BAC. (Police Rep. Sether 2).

## ARGUMENT

The argument section is the heart of the supporting memorandum. It explains all the reasons the court should order the relief you seek.

The evidence in this case was illegally seized and must, therefore, be suppressed. Article I, Section 9 protects individuals from unreasonable searches and seizures by the state. Under that section, when the state searches an individual without a warrant, such "searches and seizures are *per se* unreasonable unless the state proves an exception to the warrant requirement." *State v. Bridewell*, 759 P.2d 1054, 1057 (Or. 1988). To show an exception to the warrant requirement, the state generally must show either that probable cause and exigent circumstances justified the search or that the individual voluntarily consented to the search. *See id.*; *State v. Nagel*, 880 P.2d 451, 456 (Or. 1994). In this case, Trooper Sether did not obtain a warrant to administer any of the tests. Thus, for each test, the state must show either that probable cause and exigent circumstances justified the search or that the defendant consented to the search. The State cannot meet that test. Thus, the field sobriety tests and the evidence from them were unlawfully seized, and that evidence must be suppressed.

### A. Trooper Sether administered field sobriety tests in violation of Article I, Section 9 of the Oregon Constitution.

Because the field sobriety tests were administered in violation of Article 1, Section 9 of the Oregon Constitution, evidence from those tests should be suppressed.

#### 1. Trooper Sether lacked probable cause to administer field sobriety tests.

The defendant's attorney uses an analogical argument to support his argument that the officer lacked probable cause to support the administration of a field sobriety test.

First, Trooper Sether lacked probable cause to administer the two field sobriety tests. A field sobriety test is a search and seizure within the scope of Article I, Section 9. *Nagel*, 880 P.2d at 456. To lawfully administer such a test without a warrant, the officer must have probable cause to believe that the person is under the influence of an intoxicant. *Id.*; *State v. Stroup*, 935 P.2d 438, 440 (Or. App. 1997). An officer has probable cause when the "officer subjectively believes that a crime has been committed and evidence of the crime can be procured by the seizure of the person or the thing"; however, "the officer's belief must be objectively reasonable under the circumstances." *Stroup*, 935 P.2d at 456 (citing *State v. Owens*, 729 P.2d 524, 529 (Or. 1986)). In *Stroup*, the court held the officer did not have probable cause to administer field sobriety tests because the only evidence was "a slight odor of alcohol, bloodshot eyes, and an admission of drinking alcoholic beverages." *Id.* at 441-42. In ruling that the officer lacked probable cause to administer the field sobriety test, the court emphasized that the defendant was initially stopped for an equipment violation, not for unsafe driving. *Id*. at 440.

Here, Trooper Sether had even less evidence supporting probable cause than did the officer in *Stroup.* In *Stroup,* the officer pointed to an alcoholic odor

and bloodshot eyes to establish probable cause. Trooper Sether's only evidence was the defendant's general weariness. (Sether's Report, p 1). And, in both cases, the defendants were stopped for an equipment violation, not for unsafe driving. Thus, Trooper Sether believed he had probable cause based on far less evidence than was present in *Stroup*, where the Court of Appeals found no probable cause to administer field sobriety tests. Accordingly, Trooper Sether's belief was not objectively reasonable, and absent consent from Mr. Treatsky, the State obtained Mr. Treatsky's field sobriety tests in violation of Article I, Section 9 of the Oregon Constitution.

**2. Mr. Treatsky did not voluntarily consent to perform field sobriety tests.**

In addition to not having probable cause to administer the field sobriety tests, Trooper Sether also never obtained Mr. Treatsky's voluntary consent. In determining the voluntariness of consent to a warrantless search "the test is whether, under the totality of the circumstances, the defendant's consent was an act of free will *or, instead, resulted from police coercion, either express or implied*." *State v. Hall*, 115 P.3d 908, 918 (Or. 2005) (emphasis added).

Police coercion includes informing a person of economic harm and loss of privileges that will result if the person refuses a request to take a test. In *State v. Machuca*, a police officer suspected the defendant of drunk driving and requested the defendant take a blood test. 218 P.3d 145, 147 (Or. App. 2009), *overruled on other grounds*, 227 P.3d 729 (Or. 2010). Before the defendant gave his consent, the police officer read to the defendant the "rights and consequences" of refusing consent. *Id.* The consequences included seizing defendant's driver's license and likely suspension of the defendant's right to drive. *Id.* The defendant then consented to the blood test. *Id.*; Or. Rev. Stat. § 813.130(2). Before trial, the defendant moved to suppress the evidence from his blood test. *Machuca*, 218 P.3d at 148. Upon review, the Oregon Court of Appeals held that consent to the blood test was not effective because the consent was obtained "through a threat of economic harm and loss of privileges." *Id.* at 150. Such consent, the court held, "is coerced by the fear of adverse consequences and is ineffective to excuse the requirement to obtain a search warrant." *Id.*

The defendant's attorney uses another analogical argument, this time to support his argument that the defendant did not consent to field sobriety tests.

Here, too, Mr. Treatsky's consent was not voluntary. Just like the officer in *Machuca*, the officer in this case read to the defendant the "rights and consequences" of refusing consent. In this case, as in the *Machuca* case, those rights and consequences included the seizure of his driver's license and the likely suspension of his right to drive. Thus, Mr. Treatsky's consent, like the defendant's consent in *Machuca*, was "coerced by the fear of adverse consequences and is ineffective to excuse the requirement to obtain a search warrant."

Because Trooper Sether lacked probable cause to administer field sobriety tests and Mr. Treatsky did not voluntarily consent to the tests, evidence of the tests should be suppressed.

**B. If the Court concludes Trooper Sether lacked probable cause, all evidence obtained as a result of the illegal search must be suppressed.**

The results of the breath test must also be suppressed. Oregon employs an exclusionary rule that prevents the state from offering evidence obtained as a result of illegal police conduct. *Hall*, 115 P.3d at 920. "[T]he critical inquiry is whether the state obtained the evidence sought to be suppressed as a result of a violation of the defendant's rights under Article I, section 9." *Id.* If so, evidence from the illegal search and seizure must be suppressed. *See id.*

Here, the illegal search produced evidence that resulted in unconstitutionally obtained evidence. Had Trooper Sether not administered illegal field sobriety tests, he would not have arrested Mr. Treatsky and taken him to the police station, and the breath test would not have taken place. Because Trooper Sether lacked probable cause and voluntary consent to perform field sobriety tests, the breath test and its results were obtained in violation of Article I, Section 9. The Court should therefore suppress all evidence that was obtained as a result of any search conducted in violation of Article I, Section 9.

**CONCLUSION**

Because evidence of Mr. Treatsky's performance of field sobriety tests and from the breath test were obtained in violation of Article I, Section 9 of the Oregon Constitution, this Court should suppress all such evidence.

The conclusion is a short statement of the relief you seek.

DATED this _____ day of November, 2015.

_____

Jordan R. Silk
OSB # 105031
Appearing for Defendant

The lawyer's signature

## C. Factual Support

Sometimes an argument in the memorandum of law needs to be supported by evidence. For example, if the court must interpret a contract, you will need to attach a copy of the contract to the supporting memorandum. If the court is considering a motion for summary judgment, you may need to attach excerpts from depositions to prove that no material issues of fact exist. Sometimes a party or the lawyer submitting the motion will submit an affidavit as evidence of the facts provided to the court, as in Example 4-D. An affidavit is a sworn statement and, in that way, is treated the same as testimony presented in court. Example 4-D shows an affidavit that supports the argument in Example 4-C.

If you are submitting your motion in hard copy, you will likely staple the supporting evidence to the memorandum of law. You may be able to include a tabbed divider or label it as an appendix to make it easier for the court to find. If you are submitting your document electron-

ically, you should look for instructions about whether the supporting evidence and the memorandum should be combined and uploaded as a single document or whether they should be uploaded separately. Always consult the procedural or local court rules to determine the court's particular requirements regarding how to file supporting documents.

**Example 4-D • Affidavit in support of a motion**

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY

| | | |
|---|---|---|
| THE STATE OF OREGON, | ) | |
| | ) | Case No. 21-15-18156 |
| Plaintiff, | ) | |
| | ) | AFFIDAVIT IN SUPPORT OF |
| vs. | ) | DEFENDANT'S MOTION TO |
| | ) | SUPPRESS EVIDENCE |
| TRAVIS Z. TREATSKY, | ) | |
| | ) | |
| Defendant. | ) | |
| _____ | ) | |

STATE OF OREGON )
)
County of Lane )

I, Jordan Silk, being first duly sworn on oath, do depose and say the following:

I am the attorney for the above-named defendant.

I have reviewed Trooper Sether's police report and the DVD recording of the investigation regarding the facts and circumstances relevant to Trooper Sether's DUI investigation of the defendant on May 21-22, 2015. A true and accurate copy of Trooper Sether's police report is attached as Exhibit 101.

Mr. Treatsky confirms that on the evening of May 21, 2015, he was driving westbound on Highway 126 after a long day of travel and visiting with family. Earlier that day, Mr. Treatsky had driven from northern California where he attends the College of the Siskiyous to his home in Springfield, Oregon. After the long drive home, Mr. Treatsky visited with his mother and sister, and then drove to visit his stepfather. Returning from his stepfather's house, Trooper Sether stopped Mr. Treatsky because one of his rear taillight lenses was broken. Trooper Sether subsequently arrested Mr. Treatsky.

DATED this ___ day of November, 2015.

_____
Jordan R. Silk

SUBSCRIBED AND SWORN before me this __ day of November, 2015.

_____
Notary Public for Oregon

## II. The Rules That Govern Trial Motions

Above, we have described what a typical motion looks like in a typical jurisdiction. The truth is that motions (and their supporting documents) vary from jurisdiction to jurisdiction. Some local rules require that a separate memorandum of law be submitted with every motion.[3] If that is the rule, then submit a motion that is separate from the memorandum of law. By contrast, in some jurisdictions a separate memorandum of law is not required; rather, the custom or the rule is to combine the motion and supporting memorandum into one document.

Thus, before drafting a motion familiarize yourself with all the rules and customs that govern the motion you are planning to submit. You will usually look for three different kinds of rules: the jurisdiction's procedural rules, "local" court rules, and "standing orders" of the judge before whom you will be appearing.

### A. Procedural Rules

The first set of rules to become familiar with are the jurisdiction's procedural rules that govern trial practice. The federal courts and all state courts have their own rules of procedure. Those rules—the rules of civil procedure and the rules of criminal procedure—govern practices in those jurisdictions.

The procedural rules at the federal and state level provide only the most general guidance with respect to motion drafting. For example, the Federal Rules of Civil and Criminal Procedure require that motions be in writing, unless made during trial; state the grounds for seeking an order; and state the specific relief or order sought.[4]

For a limited number of motions, however, the jurisdiction's procedural rules will provide more detailed guidance. For example, the Federal Rules of Civil Procedure require that, when filing a motion for summary judgment, the motion must prove that no fact is in dispute "by citing to particular parts of the record," such as depositions, answers to interrogatories, affidavits, or other materials in the record.[5] Similarly, if a party seeks an order protecting it from discovery, a motion filed in federal court must also include a statement that the parties attempted, in good faith to resolve the dispute.[6]

---

3. For example, the trial court rules in Oregon state that a motion to suppress evidence in a criminal case must be accompanied by "the moving party's brief, which must sufficiently apprise the court and the adverse party of the arguments and authorities relied upon." Unif. Tr. Ct. R. 4.060(1)(b).

4. Fed. R. Civ. P. 7(b) (requiring that the grounds for the order be stated "with particularity").

5. Fed. R. Civ. P. 56(c)(1).

6. Fed. R. Civ. P. 26(c).

Thus, although the jurisdiction's rules may not ultimately provide significant guidance for the particular motion you are writing, you should always start your research there, just in case they do.

## B. Local Rules

Next, you will want to become familiar with the court's local rules. For management purposes, federal and state trial court systems are further divided. For example, the federal trial court system is divided into ninety-four districts, and state trial courts are often divided by county. Each subdivision usually has its own set of rules. These rules are often called "local rules."

Local rules are rules adopted by courts and apply regardless of the particular judge hearing the case.[7] These local rules tend to provide more specific guidance than the procedural rules. Local rules will often dictate details about the content and format of a motion and its accompanying memorandum of law, including the sections that must be included in a memorandum of law, page limits, margin sizes, fonts, and whether a cover sheet must be attached.[8]

## C. Standing Orders

In addition to the local rules that are adopted court-wide, individual judges may issue standing orders—ongoing orders that apply to all lawyers who appear before that particular judge. Standing orders can include the same kinds of information that local rules include. In the case of a standing order, however, the rule applies only to those cases before a particular judge. Not all judges have standing orders, and at the time you are submitting a motion, your case may not have been assigned to a particular judge. Thus, a set of standing orders may not govern your motion. If, however, your case has been assigned to a particular judge, you should determine whether that judge has any standing orders relevant to your case.

---

7. The Federal Rules of Civil Procedure explain that, in federal courts, "a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with—but not duplicate—federal statutes and rules . . . ." Fed. R. Civ. P. 83.

8. Local rules also often provide a wealth of practical information helpful to an attorney, including the hours that a court is open, where documents are received, how cases are assigned, when motions will be heard, what methods of delivery constitute service, appropriate attire for court, whether cell phones and other electronic devices will be permitted, who must provide playback equipment if a video or other recording is entered into evidence, and much more.

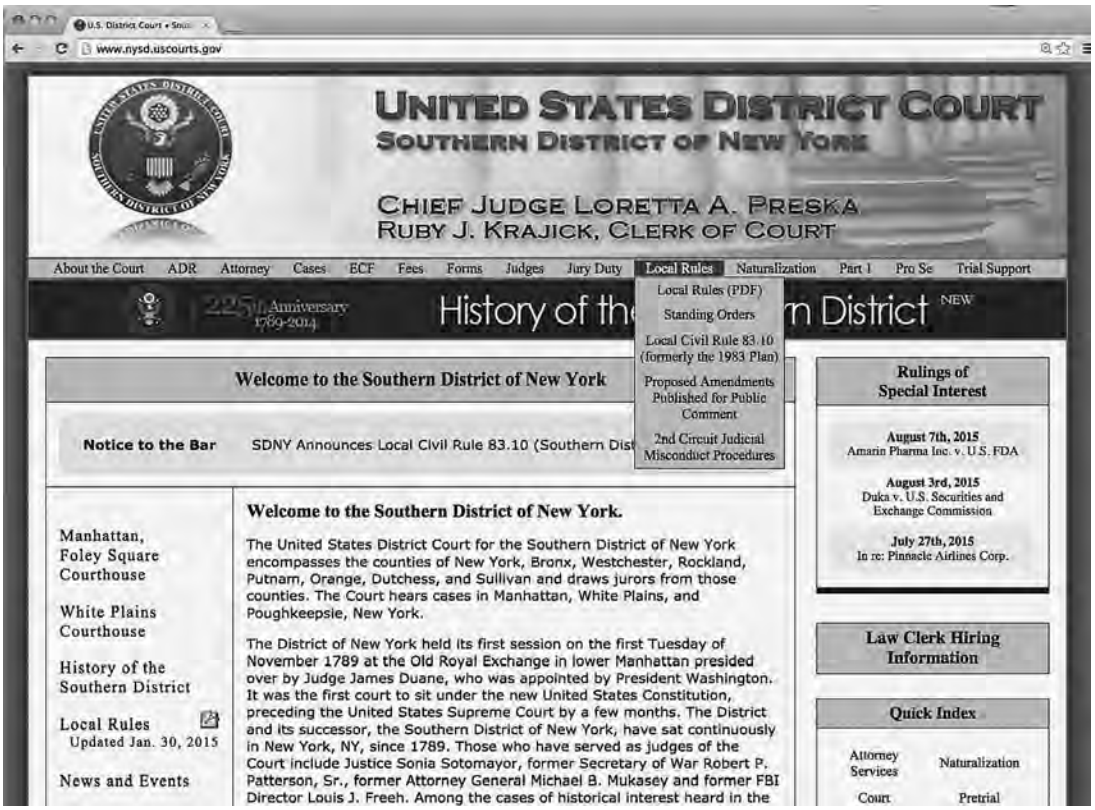
## D. Finding the Rules

All of the rules mentioned above are usually available on the website of the court to which you will be submitting your motion. So, go to the court's website first to determine the relevant rules. If you cannot find the rules on the court's website, you can check with the Clerk of Court to determine how to get a copy of the local rules. If your case has been assigned to a particular judge, you can also ask the Clerk of Court if the judge has any standing orders, or you can call the judge's chambers to determine whether the judge has issued any standing orders.

All of these rules—and especially the local rules and standing orders—are subject to change. Whenever submitting a motion, always check to make sure you are relying on the most up-to-date set of rules.

You might want to take a minute right now to find your local court's website to see what they look like. For example, if you searched the Internet for "local rules Southern District of New York," your search will lead you to the home page for the United States District Court for the Southern District of New York, shown in Figure 4-E. To find an example of a standing order, as in Example 4-F, you might search the Internet for "judge standing order."

**Figure 4-E • Local rules**



**Example 4-F • A standing order**[9]

**Motion Practice Standing Order**
Courtroom 303
Judge Christopher C. Starck

**Motion practice**

All motions shall be set on Tuesday or Wednesday morning. Uncontested or agreed motions shall be set at 9:00 a.m. Contested motions shall be set at 9:15 a.m.

All motions for default judgment shall be set at 9:15 a.m. with copies of the proof of service attached to the motion.

Prior to noticing a motion for hearing, counsel must contact the courtroom clerk and have the matter placed on the call for the desired date. No motions may be noticed for hearing unless counsel personally contacts the courtroom clerk prior to sending out the notice of motion. Failure to follow this rule will cause the Court to strike the motion from the call.

Contested motions shall not be placed on the call for hearing during the first week of the Court's jury trial call, other than by approval of the Court or due to emergency circumstances. Agreed and routine motions are allowed during the first week of the Court's jury trial call.

Complete copies of all contested motions, including motions, briefs, relevant pleadings, and exhibits must be delivered to the Court at least 7 days before the hearing date. Failure to deliver the motion packet in advance of the hearing date may cause the Court to refuse to hear the motion when presented. Multiple copies of the same pleading or motion should not be tendered to the Court. The parties are encouraged to confer and to send a single packet of the motions and exhibits to the Court in an effort to conserve natural resources.

At times, the Court may require electronic copies of the motions and briefs. Counsel shall produce electronic copies of pleading when requested by the Court.

Court reporters are not provided by the Court for oral arguments at motions, other than motions presented during trial.

Entered:_____
Christopher C. Starck

Dated: May 1, 2015

9. Nineteenth Judicial Circuit Court of Lake Cnty. Ill., *Standing Orders of the Nineteenth Judicial Circuit*, http://19thcircuitcourt.state.il.us/resources/Pages/StandingOrders.aspx (last visited Feb. 1, 2015).

## E. Following the Rules

Following all the relevant rules is important. In some instances, failing to follow the rules could result in your motion being rejected. If you are filing on a deadline, you may not have time to resubmit. On that basis alone, you could have your motion denied and possibly even lose the case.

While other consequences are less dire, you should still scrupulously follow the rules. First, following the rules will make your arguments easier to absorb. Judges are very busy, and they read many motions and their accompanying legal arguments. They expect the motion and the accompanying argument to look a certain way, to have the sections in a certain order, and to contain all the information required by the rules. To the extent that a motion or memorandum of law does not do those things, the judge has to work harder to follow it and will have less mental energy to devote to the legal argument.

Carefully following the rules also enhances your credibility—that is, your *ethos*—with the court. Following the rules shows the court that you know how to, and make the effort to, find and follow rules. A judge will assume that someone who can find and follow the rules of practice can also find and follow the substantive law. By contrast, if a judge sees that you cannot find and follow the rules of practice, the judge may begin to wonder whether you can find and follow the substantive law. You want the judge to read your motion and memorandum of law with complete confidence that what follows was written by a smart, careful, trustworthy lawyer. Thus, find and follow all relevant rules of practice.

## F. Unwritten Rules

In addition to all the formal rules that you must follow, it is worth your while to find out about local customs. Often local jurisdictions have common ways of presenting a motion. Sometimes particular judges have preferences about how information is presented. So, ask around. Ask a trusted colleague for a sample motion or memorandum of law. If you know which judge has been assigned to hear your motion, ask if that judge has preferences about how information is presented. Although you are not bound by these customs or preferences, you and your client will be well-served if you know of them in advance.

# III. After the Motion Is Drafted

After you have drafted the motion and gathered any supporting documents, you will serve a copy of those documents on opposing counsel and provide a copy to the court.

## A. Service and Its Proof

Each jurisdiction's rules of civil and criminal procedure provide detailed instructions about how to properly serve opposing counsel. The purpose of this book is not to provide those detailed rules, but to give you a picture of that process and of any documents you might have to draft. Thus, we skip over the exact ways in which you will serve opposing counsel and address the document you will have to draft to prove you have served opposing counsel.

"Proof of service" is a document that shows you have served opposing counsel the same documents that you have filed with the court. Failure to provide such proof can be grounds for dismissing the motion. That proof is usually provided in a sworn statement by the person who served the opposing party, as in Example 4-G. That statement is then appended to the documents provided to the court.

**Example 4-G • Proof of service when opposing party served by mail**

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 28

Index No. 15-SC-52975

Randall Runco,
Plaintiff,

AFFIDAVIT OF SERVICE
BY MAIL

-against-

HammerTime Construction, Inc.,
Defendant.

Glenna Gilbert, being duly sworn, states as follows:

I am over 18 years of age and not a party to this action.

On September 16, 2015, I served Plaintiff's Motion to Compel Evidence on HammerTime Construction, Inc., the defendant in this proceeding. I enclosed a true copy of the attached papers in a properly sealed postpaid envelope. I deposited that sealed envelope in an official depository of the United States Postal Services within the State of New York. The envelope was addressed to HammerTime Construction, Inc., the defendant, at 5555 Broadway, New York, NY, 10036.

Signature:_____

Sworn to me this ___ day of _____ 20__

_____
Notary Public or Court Employee

Alternatively, and as discussed further below, most courts now accept (or even require) electronic filing. If papers are filed electronically, proof of service might be provided as in Example 4-H.

**Example 4-H • Proof of service when filing electronically**

**CERTIFICATE OF SERVICE**

I certify that on May 5, 2015, the above defendant's Motion to Dismiss Plaintiff Overdevest's Complaint was filed electronically, and notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing.

_____

Jonathan Bardavid, Esq.

## B. Filing with the Court

You will then file your notice of motion, motion, memorandum of law in support of the motion, supporting documents (if any), draft order (if any), and proof of service with the court. Again, you should first consult the local rules to determine how to file with the court.

Traditionally, to file your documents with the court, you or someone you work with goes to the courthouse. Once at the courthouse, you go to the clerk of court and submit two or three copies of your motion and all accompanying documents. The clerk of court examines the motion and the accompanying documents to ensure compliance with the court rules. Once approved, you pay a filing fee. Then, the clerk of court stamps the documents as filed. The stamp shows the date on which the documents were filed. One stamped copy is returned to you so that you have proof that your motion was properly filed.

More recently, many courts have adopted electronic filing systems. In some courts, parties are permitted, but not required, to file electronically. In other court systems, parties must file electronically. In such electronic filing systems, counsel can submit documents to the court electronically. Often, counsel can also serve opposing counsel electronically. Courts with electronic filing systems have detailed explanations about how to use the electronic filing systems on their websites, as in Figure 4-I on the next page.

**Figure 4-I • An electronic filing system**


## C. The Opposing Party's Response

In some instances, you may be the one who drafts, serves, and files a motion and its accompanying documents. In other cases, you will represent the party who is being served. If you represent the party being served, you will have to respond to the motion. You can do so in one of several ways.[10]

### 1. Statement of non-opposition

If you do not oppose the motion, you can notify opposing counsel of your lack of opposition. At the hearing, opposing counsel can inform the judge of the lack of opposition, and you will not need to attend the hearing. A good practice, however, is to submit a statement of non-opposition. Doing so creates a record of your position and ensures that your position is not misrepresented.

You are most likely to take this route when the matter is a ministerial one, as in Example 4-J.

10. The discussion of opposing party's possible responses was drawn from Thomas A. Mauet, *Pretrial* 336 (7th ed. 2008).

**Example 4-J • A statement of non-opposition**[11]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF INYO

| | |
|---|---|
| CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER,<br><br>Plaintiff,<br><br>vs.<br><br>GREAT BASIN UNIFIED AIR POLLUTION CONTROL DISTRICT,<br><br>Defendant. | Case No. SJCVPT-15-41092<br>Assigned for all purposes to the Honorable Dean T. Stout<br><br>**PLAINTIFF CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER'S NOTICE OF NON-OPPOSITION TO DEFENDANT GREAT BASIN UNIFIED AIR POLLUTION CONTROL DISTRICT'S MOTION FOR MANDATORY TRANSFER OF VENUE**<br><br>Date: July 10, 2015<br>Time: 1:00 P.M. |

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE THAT Plaintiff City of Los Angeles Department of Water and Power has received and reviewed Defendant Great Basin Unified Air Pollution Control District's Notice of Motion and Motion for Mandatory Transfer of Venue and does not oppose the motion. In fact, the Department of Water and Power supports the motion and joins in the request to transfer this action to the Kern County Superior Court pursuant to Code of Civil Procedure § 394(a).

**Dated:** June 23, 2015

MANATT, PHELPS & PHILLIPS, LLP
Mark D. Johnson

By:_____
Mark D. Johnson
Attorney for the City of Los Angeles Department of Water and Power

### 2. Consent order

Another possibility is to consult with counsel to determine whether the parties might be able to craft a consent order. This approach, common in state courts but not in federal courts, allows the parties to negotiate a proposed order and then submit it to the court for its approval. Al-

11. Example drawn from a motion of non-opposition filed in *City of Los Angeles Department of Water & Power v. Great Basin Unified Air Pollution District*, No. SICVPT-06-41092 (Cal. Sup. Ct. June 26, 2006).

though a judge is not required to grant an order simply because the parties agree on it, a judge usually will.

### 3. Memorandum of law in opposition

Finally, you might oppose the motion. When you oppose a motion, you ordinarily do not submit a motion in opposition. Instead, you submit a memorandum of law in opposition to the motion. That memorandum of law explains why the motion should not be granted. A memorandum of law in opposition to a motion has all the same parts as the moving party's memorandum of law in support of the motion.

## D. The Moving Party's Reply Memorandum

If the rules permit, the moving party may file a final reply. A reply memorandum, when it is allowed, may have all the same parts as an opening memorandum of law; often, however, it does not. A reply memorandum responds to new issues raised in the opposing memorandum of law; it should not repeat arguments already presented in the opening memorandum of law. Because the reply memorandum addresses only those issues not already addressed in the opening memorandum, the reply is often limited to a short argument section and a conclusion.

### Practice Points

- A motion has these typical parts:
  - A caption.
  - A statement of the relief requested.
  - A brief statement of the legal grounds upon which the relief is requested.
  - An attorney's signature.
- When the legal grounds for granting a motion need to be explained in any detail, the motion is accompanied by a "memorandum of law" or "brief." A memorandum of law has these parts:
  - A caption.
  - An introduction.
  - A statement of facts.
  - An argument explaining the legal grounds that support the motion.
  - A conclusion.
  - An attorney's signature.

- Before drafting your own motion
  - Review the governing procedural rules.
  - Review the local rules.
  - If a particular judge will be hearing your motion, determine whether that judge has standing orders or preferences that will affect the motion.
- After drafting your motion, make sure it is properly filed with the court and served on opposing counsel.
- If you are served with a motion, carefully consider whether you, in fact, oppose the motion.
  - If you do oppose the motion, you must submit a reply.
  - If, however, you do not oppose the motion, you can submit a statement of non-opposition.
  - If you can work out a settlement with opposing counsel, you can submit a motion asking the judge to approve a consent order.

Chapter 5

# Appellate Practice



This chapter introduces you to the world of appeals. An appeal, as you likely know, is the way in which a lawyer asks an appellate court to review the decisions of a lower court.

The chapter begins by introducing you to the appellate brief. As we explained with respect to trial motions, before you begin any writing project, you should have a clear idea of how the end product should look. This chapter will help you envision that end product.

In addition, to write an effective appellate brief, you will need to know more about your audience and the rules that govern your appeal. The chapter thus describes the appellate process—from the initial decision to appeal to requesting review from the highest appellate court. That discussion is followed by a whirlwind tour of some uniquely appellate concepts that play into appellate brief writing.

## I. Appellate Briefs

After a trial, a party dissatisfied with the results can ask an appellate court to review the trial court's legal decisions. That party would file an appeal. In that party's appellate brief, the party would explain the error the lower court made and why one or more errors should result in the lower court's decision being reversed. Although the components and their order vary by jurisdiction, the typical appellate brief includes the following components:

- Cover
- Table of contents
- Table of authorities
- Statement of jurisdiction
- Statement of the issues (or questions) presented
- Statement of the case
- Summary of the argument
- Argument
- Conclusion and relief sought
- Lawyer's signature

Each of those parts is identified in Example 5-A.[1]

1. Example 5-A shows a typical appellate brief. Although this brief was filed with the Oregon courts, the format has been changed to show what a typical brief looks like. This example does not follow the format required by Oregon's local rules governing appellate briefs.

## Example 5-A • An appellate brief

IN THE COURT OF APPEALS OF THE STATE OF OREGON

| | |
|---|---|
| STATE OF OREGON<br><br>Plaintiff-Respondent,<br><br>v.<br><br>RUBEN E. RODRIGUEZ,<br><br>Defendant-Appellant. | Malheur County Circuit Court<br>No. 04065087C<br><br><br><br><br>CA A126339 |

**RESPONDENT'S BRIEF**

———————

Appeal from the Judgment of the Circuit Court
For Malheur County
Honorable PATRICIA A. SULLIVAN, Judge

The cover identifies the parties, their lawyers, the court from which the case is being appealed, the court in which the appeal is being heard, and the docket numbers for the trial and the appellate cases.

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## TABLE OF CONTENTS

The table of contents provides an overview of the argument to come. It also tells the judge where to find the different parts of the argument within the brief.

## TABLE OF AUTHORITIES

### Cases Cited

**Statutory Provisions**



**Other Authorities**

## RESPONDENT'S BRIEF

### JURISDICTION

This court has jurisdiction pursuant to Oregon Revised Statute § 138.050.

This statement of jurisdiction establishes that the court has jurisdiction to hear this case.

### QUESTION PRESENTED

Should the language of *former* Oregon Revised Statute § 809.235(1)(b), providing that a person's driver's license shall be permanently revoked if the person is convicted of a misdemeanor DUI "for a third time," be construed to preclude revoking a person's driver's license after a fourth, fifth, or other succeeding misdemeanor DUI?

The question presented states the legal question that needs to be resolved on appeal.

### STATEMENT OF THE CASE

Defendant has been convicted of driving under the influence (DUI) on four separate occasions. In Oregon, he was convicted of a DUI in 1976 and 1980. While in California in 1989, he was also convicted of a DUI. Finally, last year, defendant pleaded guilty and was then convicted of a DUI when he drove with a blood alcohol content of .27 percent. At sentencing, the trial court permanently revoked defendant's driving privileges. Defendant now appeals that sentence.

The statement of the case states the facts relevant to the appeal. In some jurisdictions, this section is called the statement of facts. Other jurisdictions require both a statement of facts and a statement of the case.

### SUMMARY OF ARGUMENT

After defendant pleaded guilty to a misdemeanor DUI, the trial court permanently revoked his driver's license pursuant to *former* Oregon Revised Statute § 809.235(1)(b) (amended 2005) because defendant had been previously convicted of a DUI at least two times. *Former* Oregon Revised Statute § 809.235(1)(b) requires a court to permanently revoke a person's driver's license if the person "is convicted of misdemeanor [DUI] . . . *for a third time*."

On appeal, defendant argues that the trial court was not permitted to permanently revoke his license because he had three previous DUI convictions, and the statute allowed permanent revocation only upon a third conviction, not upon a fourth. This court should affirm the permanent revocation.

First, revocation was mandatory under *former* Oregon Revised Statute § 809.235(1)(b). That statute is ambiguous because it can plausibly be read to mean that permanent revocation is mandatory in cases where either (1) a person had *only* two prior convictions for DUI, or, as the state argues, (2) a person had *at least* two prior convictions for DUI.

Because the statute is ambiguous, this court should look to the legislative history of *former* Oregon Revised Statute § 809.235(1)(b) to discern the legislature's intent. That history shows that the legislature recognized that repeat drunk drivers pose a significant danger to the public, and revocation of driving privileges is one means for protecting the public from habitual drunk drivers. Given the legislature's intention to protect the public and sanction repeat DUI offenders, construing the statute as defendant proposes, to revoke third-time offenders, but not revoke fourth-, fifth-, or more-time offenders, would be contrary to the legislature's intent as evidenced by the legislative history.

The summary of the argument, not surprisingly, gives a summary of the argument to come. Judges will return to this section if they need a quick overview of the argument.

## ARGUMENT

The argument explains why the desired outcome is supported by the law and facts.

### I. The trial court's permanent revocation of the defendant's driver's license was proper.

This argument provides an example of a statutory construction analysis.

At sentencing, the trial court correctly revoked defendant's driving privileges pursuant to *former* Oregon Revised Statute § 809.235(1)(b).[1] That statute provided as follows:

> The court shall order that a person's driving privileges be permanently revoked if the person is convicted of felony driving while under the influence of intoxicants under Oregon Revised Statute § 813.010 or *if the person is convicted of misdemeanor driving while under the influence of intoxicants under Oregon Revised Statute § 813.010 for a third time.*

Or. Rev. Stat. § 809.235(1)(b) (amended 2005) (emphasis added).

#### A. Oregon's method of statutory construction

A trial court's construction of a statute is reviewed for errors of law. *State v. Thompson*, 971 P.2d 879, 885 (Or. 1999); *Chaffee v. Shaffer Trucking, Inc.*, 948 P.2d 760, 761 (Or. Ct. App. 1997). That construction is governed by Oregon statutes pertaining to statutory construction, Or. Rev. Stat. §§ 174.010-.090, and the methodology set out in *Portland General Electric Co. v. Bureau of Labor & Industries*, 859 P.2d 1143, 1145-47 (Or. 1993).

The aim of statutory construction — both under Oregon statute and case law — is to discern what the legislature intended when it enacted the particular statute: "In the construction of a statute, a court shall pursue the intention of the legislature if possible." Or. Rev. Stat. § 174.020(1)(a); *Portland Gen. Elec. Co.*, 859 P.2d at 1146-47.

To ascertain the legislature's intent, the text and context of the relevant statutes must be analyzed first because the text and context together represent the best evidence of the legislature's intent. *Portland Gen. Elec. Co.*, 859 P.2d at 1145-46. In examining the text of a statute, the construing court generally assumes that the legislature intended the words of the statute to carry their ordinary meanings unless the phrasing of the statute suggests that the legislature intended different meanings to apply. *Id.* at 1146; *see also State v. Ausmus,* 85 P.3d 864, 869 (Or. 2003) (stating that a court usually "gives words of

---

1. Oregon Revised Statute § 809.235(1)(b) (amended 2005) was amended by Oregon Laws 2005, chapter 436, section 1, and now reads as follows:

> (b) The court shall order that a person's driving privileges be permanently revoked if the person is convicted of felony driving while under the influence of intoxicants in violation of Oregon Revised Statute § 813.010 or if the person is convicted of misdemeanor driving while under the influence of intoxicants in violation of Oregon Revised Statute § 813.010 or its statutory counterpart in any other jurisdiction for a third or subsequent time.

common usage their plain, natural and ordinary meaning"); *State v. Stamper,* 106 P.3d 172, 174 (Or. Ct. App. 2005) (phrasing of statute may indicate legislature intended different meaning to apply).

The text, however, should not be considered in isolation, but in its context. *Vsetecka v. Safeway Stores, Inc.*, 98 P.3d 1116, 1119 (Or. 2004). The context of a statute includes other parts of the same statute, along with other related statutes, prior versions of the statute, prior judicial interpretations of the relevant statutory language, and pre-existing common law. *See In re Marriage of Denton*, 951 P.2d 693, 697 (Or. 1998); *Krieger v. Just*, 876 P.2d 754, 758 (Or. 1994); *Portland Gen. Elec. Co.*, 859 P.2d at 1146; *Stephens v. Bohlman,* 838 P.2d 600, 603 n.6 (Or. 1992). At this first step in the analysis, rules of construction, both statutory and judicial, may be applied to assist in discerning the meaning of the language at issue. *Portland Gen. Elec. Co.*, 859 P.2d at 1146.

If, after examining the text in context, the court concludes that the statute is ambiguous, that is, capable of multiple constructions that are not "wholly implausible," the court may resort to legislative history and, if necessary, other aids to assist in its construction. *Owens v. Motor Vehicle Div.*, 875 P.2d 463, 468 (Or. 1994) (explaining that resort to legislative history is necessary unless alternative interpretations are "wholly implausible").

If the intent of the legislature still remains unclear even after considering the text, context, and legislative history, then this court may resort to general maxims of statutory construction to resolve the remaining uncertainty. *Portland Gen. Elec. Co.*, 859 P.2d at 1146. Among these general maxims is the principle that the court will not adopt a statutory meaning that is inconsistent with the apparent policy of the legislation as a whole and that leads to an incongruous result. *See State v. Vasquez-Rubio*, 917 P.2d 494, 497 (Or. 1996) (explaining that absurd-result maxim best suited for helping court determine which of a number of plausible meanings legislature intended).

### B. Oregon Revised Statute § 809.235(1)(b) is ambiguous because the phrase "for a third time" is capable of multiple constructions that are "not wholly implausible."

The subject phrase, "for a third time," is ambiguous because it has more than one plausible meaning. It could mean, as defendant argues, that (1) a person had *only* two prior convictions for DUI, or, as the state argues, that (2) a defendant had *at least* two prior convictions for DUI, and the present conviction for which revocation is mandatory constitutes the "third." The latter construction is plausible for several reasons.

First, the legislature created an indefinite reference. The indefinite article "a" is an indefinite determiner with an indefinite reference. *See* Sidney Greenbaum, *Oxford English Grammar* 165 (1996) ("The definite article is used when the speaker (or writer) assumes that the hearer (or reader) can identify the reference of a noun phrase[.] . . . The indefinite article is used when that assumption cannot be made[.]"); *see also* Ronald Carter & Michael McCarthy, *Cambridge Grammar of English* 907 (2006) ("Indefinite article refers to the determiner *a/an* that is used to express an indefinite meaning."). It is "used as a function word before . . . mass

nouns when the individual in question is undetermined, unidentified, or unspecified . . . ." *Webster's Third New Int'l Dictionary* 1 (unabridged ed. 1993); *see also Galfano v. KTVL-TV,* 102 P.3d 766, 772 (Or. Ct. App. 2004) (relying on *Webster's* definition of the article "a" in ruling that the phrase *"a* judgment pursuant to Rule 67" in ORCP 68 C(5)(b) authorizes a trial court to render a supplemental judgment after *any* ORCP 67 judgment has been entered). *Compare Anderson v. Jensen Racing, Inc.*, 931 P.2d 763, 767 (Or. 1997) (explaining that the definite article "the" functions as an adjective that denotes a particular, specified thing).

The indefinite article "a" used with the ordinal determiner "third" suggests that the legislature intended an indefinite third. The word "third" is an ordinal number; ordinals refer to positions in a sequence. *See* Greenbaum, *supra*, 199. Thus, the combination of the indefinite "a" with the ordinal "third," creates an indefinite third. Because the statute refers to an indefinite third position in a sequence, the ordinary meaning of the statutory text mandates license revocation upon any conviction, following two prior convictions.

Reading the text of *former* Oregon Revised Statute § 809.235(1)(b) in its context also leads to the conclusion that the statute mandates revocation of a person's driver's license upon any conviction after two prior convictions. The stated policies of the legislature are context within which the text of each statute should be read. *State v. McBroom*, 39 P.3d 226, 228 n.2 (Or. Ct. App. 2002) (explaining that statutory statement of general policy in vehicle code is context for interpretation of specific provision pertaining to offense of failure to drive within a lane). With respect to Oregon's vehicle code, the legislature's stated polices are to protect the public, Or. Rev. Stat. § 801.020(11)(a), to "deny the privilege of operating motor vehicles on the public highways to persons who by their conduct and record have demonstrated their indifference for the safety and welfare of others," Or. Rev. Stat. § 801.020(11)(b), and to "discourage repetition of criminal acts," Or. Rev. Stat. § 801.020(11)(c). Thus, understanding *former* Oregon Revised Statute § 809.235(1)(b) to require the revocation of a driver's license upon any conviction, following two prior convictions, is also consistent with the statute's context.

The alternate construction advanced by defendant is not consistent with the statutory context. If defendant's argument prevails, a person with a *greater* number of DUI convictions (i.e., more than three convictions) prior to the enactment of the statute would lose his or her license for a substantially *lesser* period of time than a person who has been convicted of only two DUIs before the effective date of the statute. *See* Or. Rev. Stat. §§ 809.400(1), .428(2). Not only is such a construction patently inequitable, such an eventuality would be contrary to the stated policies of the legislature to protect the public and to deny driving privileges in relation to driving offenses.

Moreover, the fact that the legislature has in other instances used the phrase "at least three times," does not mean the absence of that language here requires the court to adopt the defendant's interpretation. Previously, this court has explained that, when the legislature uses a particular phrase in one statute but not another, it permits an inference that the omission was intentional, but this court "c[ould] not say that the text speaks conclusively in that regard." *State v. Robison*, 120 P.3d 1285, 1287 (Or. App. 2005). Thus, the absence of the "at

least three time language" merely creates an ambiguity, which allows this court to consider the statute's legislative history when interpreting the statute.

### C. The legislative history demonstrates that the legislature intended to mandate license revocation any time after two prior convictions.

The legislative history for House Bill 2885, which eventually became Oregon Revised Statute § 809.235, reflects an intent that sanctions for DUI increase as the number of DUI convictions increases.

For example, Representative Barker, a chief sponsor of the bill, testified before the House Judiciary Committee in support of the bill. He expressed frustration with current law, which allowed courts to revoke driving privileges only upon a fourth conviction. He wanted revocation to occur sooner:

> I introduced this bill, brought this bill forward, that would revoke driving privileges after a third conviction of driving under the influence. At the present time, it's four convictions. And * * * to keep it really brief the only objections I've heard about this so far at town halls and so on in meetings with citizens in my district is they can't imagine why we're waiting for the third time, why it isn't done sooner.

House Judiciary Committee, April 3, 2003, Tape 123 Side A at 50, Internet RealOne Player at 1:51:52.

When Representative Barker carried the bill on the House floor, he explained waiting until a fourth DUI conviction to revoke a driver's license was "unacceptably tolerant towards reckless behavior":

> HB 2885 comes to you from your Judiciary Committee where it passed with a unanimous vote. Currently someone convicted of driving under the influence of intoxicants does not permanently lose their driving privileges until after their fourth conviction. This means that after the initial DUI arrest which often results in a diversion program someone has to be convicted four more times to lose their privileges. As an Oregonian and the father of two daughters I find this to be unacceptably tolerant towards such reckless behavior. As a retired police lieutenant I could tell you that someone who gets convicted of drunk driving four times has a substance abuse problem[,] and colleagues[,] they need to be off the road.
>
> This bill revokes rather than suspends the driver's license of a person convicted for the third DUI. This revocation can be appealed after ten years. I don't feel it's necessary to give you a long speech about the dangers of driving while intoxicated. Most of us know someone who's been victimized by an intoxicated driver.

House Floor Debate on HB 2885, April 10, 2003, Tape 49 Side A at 314 to 356, Internet RealOne Player at 3 6:27 to 3 9:56.

On the Senate floor, prior to passage of the bill, other senators expressed their frustration with drivers who, despite prior convictions and other sanctions, continued to drink and drive:

> Senator Stan: HB 2885 is a DUI bill that changes the penalty for conviction for DUI from suspension to revocation of a driver's license after three convictions. We understand on the first conviction an individual may go through a diversion program and have the conviction removed so it's very likely a person convicted of three DUI has also offended one other time. It's very clear that people who continue to offend in this way have a very serious addiction problem and we believe that it's important to revoke their privilege to drive and so members I urge your support of HB 2885.
>
> Senator Dukes: This is a good bill because it makes a very small incremental improvement. But I stand today in utter frustration, if you listen to the carrier when to get around to a Class A misdemeanor — which by the way folks we're not even prosecuting at the moment because we don't have enough court time to do all of that. We're going to do that after the fifth DUI, We're going to finally — it's just the penalty really small for turning someone lethal loose on the roads in Oregon. And I think that one of the failures that the legislature has made over the years is an inability to be able to deal with that. I mean after you've gone out and driven and then convicted, and driven and then convicted, and driven and then convicted — we're going to give you a Class A misdemeanor. And then if you go drive and get convicted again we'll finally get to a felony. And we'll get serious about it maybe and I just think in that process we have given people far too many opportunities to kill and maim people. And that is a mistake. However, as I said this bill is an improvement, but at this rate we're going to have a lot more deaths from drunk drivers that we could have stopped if we would simply have the guts to strengthen these laws.
>
> Senator Minnis: Mr. President I just wanted to stand and say that I agree one hundred percent with the senator from Astoria [Senator Dukes]. There were over 25,000 DUI arrests in Oregon in 2001. That is simply not acceptable. Thank you.

Senate Floor Debate on H.B. 2285, May 21, 2003, Tape 165 Side B at 16 to 74, Internet RealOne Player at 59:18 to 1:00:52.

Nowhere does the legislative history suggest that the legislature was enacting a bill that would allow revocation of driving privileges at the third conviction but not upon a fourth. Such an interpretation would lead to the incongruous result that a person with a greater number of DUI convictions would be subject to a lesser penalty.

Accordingly, this court should construe *former* Oregon Revised Statute §809.235(1)(b) to mandate permanent driver's license revocation in cases in which a person is convicted of a misdemeanor DUI and has previously been convicted at *least twice* for DUI.

In this case, Mr. Rodriguez had three times been convicted for DUI when, on September 13, 2004, he pleaded guilty to a fourth misdemeanor charge of driving under the influence of intoxicants. Because he had been convicted for DUI at least twice before, pursuant to *former* Oregon Revised Statute §809.235(1)(b), the court properly imposed a permanent revocation of Mr. Rodriguez's driving privileges.

## CONCLUSION

Final conclusions to a brief are often short and formulaic, such as this one. The final conclusion will always ask for the relief sought.

The trial court's judgment wherein defendant's driver's license is permanently revoked should be affirmed.

Respectfully submitted,

The lawyer's signature

_____
LAURA S. ANDERSON
Senior Assistant Attorney General

Attorneys for Plaintiff-Respondent
State of Oregon

The party who files the appeal is called the appellant (or petitioner). The party responding to the appeal is called the respondent. After an appellant files an opening brief, the party who won below can file a brief explaining why the trial court's decision was in fact correct and should be upheld. As a general matter, a respondent's brief includes all the same parts as an appellant's brief. Many courts, however, allow a respondent to accept parts of the appellant's brief and not repeat those parts in the respondent's brief. The federal rules, for example, state that, unless the respondent is dissatisfied with the appellant's statement, a respondent's answering brief need not include the jurisdictional statement, the statement of the issues, the statement of the case, or the statement of the standard of review.[3] Whether to accept any of appellant's statements is a strategic decision that Chapter 11, *Constructing an Appellate Brief*, discusses at more length. For now, you should know that respondent's brief usually includes all the same parts as the appellant's opening brief, but the respondent has the option of omitting a section and accepting one or more of the appellant's statements.

Finally, in some instances, the appellant or petitioner can file a response to the respondent's brief. Reply briefs are not always allowed as a matter of right.[4] If a reply brief is permitted and the respondent decides to file one, then the reply brief will look very much like the opening or responding brief. However, you will include only those parts of the brief that are necessary to respond to the opposing arguments. Usually, after a cover, table of contents, and table of authorities, the reply brief jumps straight into the argument.

**Appellee vs. Respondent**

"Appellee" and "respondent" refer to the same party: the party who is responding to the appeal.

The Federal Rules of Appellate Procedure use the word "appellee." "Respondent," however, is the more intuitively meaningful word. When using the word "respondent," the reader does not have to sort out the difference between "appellant" and "appellee," two very similar sounding words. For these reasons, this chapter uses the word "respondent" throughout.

3. Fed. R. App. P. 28(b).

4. For example, under the Oregon Rules of Appellate Procedure, the appellant in a criminal case is not allowed to file a reply brief without leave of court. Or. R. App. P. 5.70(3). Other jurisdictions may have similar rules.

## II. The Rules that Govern Appeals

The above section describes how an appellate brief typically looks. Appellate briefs do, however, vary from jurisdiction to jurisdiction. To determine what your brief should include, you will have to consult the rules that govern appeals in your jurisdiction. These same rules will also provide other important information such as the time frame in which you must file your brief.

Keep in mind that some jurisdictions have more than one set of rules governing their appeals. For example, appeals in the federal courts of appeal are governed first by the Federal Rules of Appellate Procedure. Then, the various federal circuit courts have their own local rules that supplement the Federal Rules of Appellate Procedure. Similarly, in state courts, the state's highest court usually adopts a set of rules that govern its proceedings, while the intermediate appellate court adopts different rules for its proceedings.

Two resources can help you find and understand the governing appellate rules. First, most courts have valuable information on their websites. In addition to appellate rules of procedure, you will often find sample documents and how-to advice on courts' websites. Second, a number of good treatises on appellate practice are available, some of which address practice in certain courts (such as the United States Supreme Court or the Ninth Circuit Court of Appeals) and others that are more general. A law librarian will be able to direct you to the most suitable treatise. The bottom line for your practice: Long before you even think about writing a brief, make sure you have consulted the rules that govern the appeal.

## III. The Court and Its Players: Judges, Law Clerks, and Staff Attorneys

Understanding the institution that you are addressing and the players in the appellate process will help you craft your brief to be more persuasive. A concise overview follows.

Of course, appellate courts have judges or justices. Normally, courts have an odd number of judges; however, if there are vacancies or recusals, your appeal may be heard by an even number of judges. Courts may sit in panels (usually of three judges), or the entire court may sit together (en banc).

In addition to the judges or justices, most appellate courts have two other categories of lawyers who may be involved in your appeal: law clerks and staff attorneys. Although the terminology and functions vary from court to court, law clerks are often recent law school graduates who work

**Be Precise!**
**Know Your Judges from Your Justices**

In most jurisdictions, a judge who is appointed or elected to the highest appellate court is called a "justice." A judge who sits on an intermediate appellate court is called a "judge." Exceptions do exist. In California, for example, the Court of Appeal jurists are called justices. Be sure to know the correct title for the person who will be deciding your case. It can only help.

for an individual judge for one to two years.[5] Staff attorneys are permanent lawyer-employees who may work for the court as a whole or for individual judges. Some staff attorneys have many years of experience and may have expertise in a given area of law. In most appellate courts, law clerks and staff attorneys assist the judges by conducting legal research, preparing bench memoranda (a memorandum that summarizes a case for a judge, usually prepared before oral arguments), preparing initial drafts of opinions, and editing and finalizing opinions.

When drafting an appellate brief, keep those various audiences in mind. Specifically, keep in mind that, in most cases, the judges and most of the legal staff working with the judges are generalists. That is, they are educated attorneys, but they are likely not experts in the subject matter central to your client's case. You should always assume that you know your case better than the appellate judges who will hear your appeal. Thus, in most instances, to persuade the court of your client's desired outcome, you must first educate the court about the facts of your case and the underlying law that applies to the case.

## IV. The Appellate Process

Before you begin writing an appellate brief, you should also understand the overall process by which an appeal is filed, argued, and decided. This part of the chapter provides that overview.

### A. The Decision to Appeal

A lower tribunal—a trial court, administrative agency, or other tribunal—has just disposed of a matter in a way that is contrary to your client's position. Do you appeal the decision?

---

5. Increasingly, judges are hiring permanent law clerks. When a law clerk is hired on a permanent basis, the most significant difference between a "law clerk" and a "staff attorney" is the title. Otherwise, both are experienced lawyers assisting a judge or group of judges with research, drafting opinions, and preparing for oral arguments.

### 1. Whether to appeal

Lawyers should put a lot of thought in deciding whether to appeal. The first question in deciding whether to file an appeal is whether the tribunal's ruling is appealable. As a general matter, a losing party has no inherent right to appeal; rather, the right to appeal typically is conferred by statute. Usually, statutes permit litigants to appeal decisions that end the litigation but not those decisions that occur during the litigation process. For example, you may appeal after a decision granting a motion to dismiss or for summary judgment if the decision ends the litigation by disposing of all the claims before the court. By contrast, you typically may not appeal a decision denying summary judgment because that decision does not end the litigation but rather permits the case to proceed to trial.

Some exceptions do exist. Statutes permit some "interlocutory" appeals—that is, appeals before the litigation is concluded—if continuing the litigation would be particularly prejudicial to a party. For example, many jurisdictions permit a litigant to appeal a decision when a court concludes that a defendant does not have immunity from suit or when the court concludes that it has personal jurisdiction over the defendant, despite the defendant's arguments to the contrary. In both cases, proceeding to the trial would effectively deny the defendant the right to be protected from trial, and that right could not be re-gained after trial. Thus, when an interlocutory appeal is taken, the appellate court will review the specific issue permitted by the interlocutory appeal, and after the appellate court's decision, the case will either be dismissed or returned to the trial court to continue with the litigation.

Assuming that you have an appealable decision in hand, you must still decide whether you should appeal. In reaching that decision, consider whether an appeal will be worthwhile to your client:

- What is the projected cost of the appeal?
- What is the likelihood of obtaining a better outcome on appeal?
- How will the delay inherent in pursuing the appeal affect your client?
- Is another route—such as seeking a settlement or asking the trial court or other tribunal to modify its ruling—a better approach?

In short, before filing an appeal, you must carefully consider whether an appeal is the best way to serve your client's needs. Producing a persuasive brief in an otherwise ill-advised appeal may not be to your client's advantage.

### 2. Which issues to raise on appeal

Once you have decided that it makes sense to appeal, another decision that you will have to make before filing an appellate brief is which

issues you will raise on appeal. Many appellate briefs raise only one issue, such as whether the evidence was sufficient to support a criminal conviction, while other briefs may raise dozens of issues.

In choosing which issue or issues to raise on appeal, remember that you are not required to challenge every ruling made by the trial court or agency. Experienced appellate practitioners will choose their strongest arguments and forgo those arguments that have only a small chance of succeeding for three reasons: First, a good argument buried in a host of weak arguments may be overlooked. Second, appellate judges have a lot of reading to do; if you force them to read several arguments that have little merit, they are less likely to react favorably to the one strong argument that you present. Finally, appellate courts impose length limits on briefs. If you waste words on six weak arguments, you may not have space to make that incredible winning argument on the one meritorious issue.

Notwithstanding the general advice to limit the number of issues raised on appeal, you must sometimes raise issues that you think have lit-

**Review of Agency Decisions**

As you read this chapter understand that appellate courts review decisions not just from trial courts. Appellate courts also review agency decisions, and sometimes the review of agency decisions constitutes a significant part of an appellate court's docket. Although there are some differences when an appellate court reviews an agency decision, many of the same principles discussed below apply to review of agency decisions.

So that you will have a feel for how an appeal arises from an agency decision, here is a brief description of the process.

Federal and state agencies are part of their respective executive branches. After the legislature passes a statute, often the legislature will delegate to an agency within the executive branch the authority to implement that statute. For example, Congress has delegated to the Internal Revenue Service the responsibility for implementing the tax code, and the Environmental Protection Agency implements environmental laws. States often have analogous agencies, which implement state laws. Agencies implement statutes by promulgating rules or regulations.

To enforce those regulations, agencies have authority to issue orders. Disputes often arise from those orders. For example, the Environmental Protection Agency has authority to issue permits that allow parties to discharge some material into wetlands. If the permit is denied, the party seeking the permit can challenge the EPA's decision.

The process for challenging an agency decision varies greatly from agency to agency. Some agencies have an internal process for reviewing an initial agency decision. In some agencies, that review may be before an administrative law judge and be nearly as formal as a trial. In other agencies, that review is much less formal. Still other agencies provide no review after the initial decision is made. In those cases, the initial decision is also the agency's final order.

Whatever the process may be in a given agency, once the agency issues its final order, a dissatisfied party can seek review in a state or federal appellate court, depending on whether a state or federal agency issued the order. Review of an agency's final order normally skips over the trial court and proceeds directly to an appellate court.

tle chance of success. For example, when pursuing an appeal in state court, you might identify a federal constitutional claim that has been rejected by the state intermediate appellate court in previous cases. You may, though, have reason to believe that the state supreme court or the United States Supreme Court will agree with your position. In that case, you must raise the issue in the intermediate appellate court so that it is preserved for later courts to consider. In doing so, however, the savvy practitioner will acknowledge in the intermediate court that the argument has previously been rejected by that court.

## B. The Notice of Appeal

The appellate process typically begins with a notice of appeal, which in federal court must be filed within 30 days after the decision being appealed is entered in the trial court's docket.[6] The exact format of a notice of appeal will vary from jurisdiction to jurisdiction. To determine the required format in your jurisdiction, consult the appendix to the appellate rules of procedure, the court's website, or a relevant treatise. Example 5-B shows you a typical notice of appeal.

The notice of appeal is filed with either the trial court or the appellate court, depending on the rules in that jurisdiction. In addition, the notice of appeal is served on the other parties to the case. With these steps, both the court and the other parties to the case are notified that the dispute has not been finally resolved and that jurisdiction now lies with the appellate court.

After that document is filed, certain timelines begin to run and certain actions must be taken before the briefs are filed. For example, in federal court the appellant must order a transcript of the court proceedings within 14 days after the notice of appeal is filed.[7]

**The Petition for Judicial Review of a Final Agency Order**

When seeking judicial review of a final agency order, you would file a "petition for judicial review," which is the administrative law counterpart to a notice of appeal from a trial court decision. As with the notice of appeal, the petition for judicial review of the agency order triggers certain timelines and triggers the agency's duty to transmit relevant parts of the administrative record to the appellate court.

6. Fed. R. App. P. 4(a)(1)(A).
7. Fed. R. App. P. 10(b)(1).

**Example 5-B • A typical notice of appeal**

United States District Court for the
Southern District of Texas

| | | |
|---|---|---|
| Jonathan B. Wilson,<br>Plaintiff, | } | No. 16-10664 |
| v. | } | Notice of Appeal |
| Zal Medical Group, Inc.,<br>Defendant. | } | |

Notice is hereby given that Zal Medical Group, Inc., defendant, in the above named case, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 7th day of March, 2016.

*Gail Izaguirre*
Gail Izaguirre
Attorney for Zal Medical Group
1100 Louisiana Street
Suite 410
Houston, TX 77002

## C. The Record

At trial or during a hearing, the parties determine what evidence to submit to the decision maker, and the decision maker bases a decision on that evidence. That evidence, which usually consists of documents, exhibits, and a transcript of any oral testimony or argument, comprises the "record" in the case. On appeal, lawyers compile excerpts of the trial record (sometimes called an appendix) and submit it to the appellate court so that the appellate court can review the proceedings below.

The importance of the record on appeal cannot be overstated. With few exceptions, appellate courts may not consider evidence that was not before the trial court. Thus, when trying to persuade appellate courts, remember that if something is not in the record, it does not exist. References to matters that are not in the record may draw the ire of appellate judges and will detract from the persuasiveness of your argument.

Court rules differ regarding who has the responsibility for preparing the appendix or excerpt, and rules also vary regarding the contents of

the appendix or excerpt. Typically, the appendix or excerpt contains only those parts of the trial record that are necessary to support the arguments made on appeal; however, some appellate courts require the full record to be transmitted.

Compiling the excerpt of record requires a little bit of thought. Lawyers tend to throw everything into the excerpt, perhaps figuring, "Better too much than too little." Although that sentiment is hard to argue with, an excerpt of record that includes virtually the entire trial court file, when the only issue on appeal is an isolated legal issue, does not inspire confidence that the lawyer is taking the necessary care in the appeal. Put that extra ounce of thought and effort into the excerpt or appendix.

**Do Appellate Courts Really Care About the Record?**

Yes. Here's what one California court had to say about the record:

> When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two. In this case, the parties totally missed the appellate mark by failing to provide an adequate record for review.

*Protect Our Water v. Cty. of Merced*, 1 Cal. Rptr. 3d 726, 726 (Cal. Ct. App. 2003).

## D. The Briefs

After the notice of appeal has been filed and the relevant parts of the record have been transmitted, the parties then submit their briefs. The different kinds of briefs that the parties file are described earlier in this chapter.

The rules of appellate procedure in each jurisdiction establish the amount of time parties have to file their briefs. In federal courts, and if no extension of time is granted, the appellant must file the opening brief (also called the "appellant's brief") 40 days after the record is filed. The respondent then has 30 days to submit a brief. In federal court, the appellant then has 14 days to file a reply brief to the respondent's brief.[8]

## E. Oral Argument

After briefs are filed—often many months after briefs are filed—the parties may have an opportunity to present oral arguments to the court.

8. Fed. R. App. P. 31(a)(1).

Judging from movies and television, one would think that appeals are really all about oral argument. It turns out—no surprise here—that television and movies do not always depict the court system accurately. As an initial matter, many appeals are decided without oral argument; the briefs are the only opportunity the parties have to persuade the court. In addition, even for those cases in which the court hears oral argument, the briefs are almost always considered to be more important in persuading the court. Oral argument is discussed in detail in Chapter 14, *Oral Arguments*.

## F. The Opinion

Finally, after briefs are submitted and after oral argument (if oral argument is permitted and if the parties elect to present oral arguments), the court will issue its opinion. The opinion is the court's explanation of its decision in an appeal.

The form of opinions varies enormously from court to court and even from case to case. The United States Supreme Court often issues opinions that run dozens or hundreds of pages in length. At the other extreme, some appellate courts issue short opinions or one-page orders that do little more than affirm or reverse a lower court's decision. Many courts also issue unpublished opinions that have little or no precedential value.

When writing an appellate brief, you should think about how you want to influence the court's opinion. For example, if you won below, you may not want the appellate court to write an opinion at all; rather, you might prefer that the appellate court summarily affirm the decision below. When writing the brief in that type of case, you would want to show that existing precedent squarely addresses all the issues raised and an analysis of those cases shows the trial court got it right. In other cases, your goal may be to convince the court to write a published opinion that will not only allow you to prevail in this case, but will also provide guidance to lower courts and litigants. Finally, there may be times when you know that you are likely to lose the appeal, but you want your brief to guide the court's analysis. In those cases, you will want your brief to help shape the court's opinion so that the opinion announces a rule that is favorable to your client's future interests, despite the loss in this particular case.[9]

## G. Petitions for Reconsideration or Rehearing

If you lose an appeal in an intermediate appellate court, you might appeal to a higher court, a route that is discussed below. But, before

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9. For an example of such a case see the discussion of *Canell v. State*, 58 P.3d 847 (Or. Ct. App. 2002), in Chapter 2, *The Ethical, Professional Advocate.*

doing so, you should consider whether to ask the intermediate appellate court to reconsider its decision (or rehear the case—the two phrases are often used interchangeably).

If you ask the intermediate appellate court to reconsider its decision, you have two options. If the court is one that sits in panels made up of fewer than all the judges on the court, you can ask the panel that decided the appeal to reconsider its decision, or you can ask all the judges of the intermediate appellate court to review the panel's decision. When all the judges on a court review a panel's decision, the review is called an "en banc review." Whether you request review by a panel of judges or by all the judges, court rules limit the circumstances in which reconsideration will be allowed.

If you ask a panel to reconsider its decision, the panel will usually do so only if a party can show that the panel failed to consider a salient fact or misunderstood the law. The Federal Rules of Appellate Procedure, for example, require that a party seeking panel reconsideration "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended."[10] Many state courts have identical requirements.[11]

Thus, if you wish to persuade an intermediate appellate panel of judges to reconsider, first, look carefully at the criteria for reconsideration. If your case does not meet those criteria, do not waste your time, the court's time, and your client's money in the name of zealous representation. Appellate judges do not like petitions for rehearing that simply repeat the arguments made in the briefs. If, however, the opinion clearly shows that the court missed an important fact in the record or a point of law—one that will make a difference—a petition for rehearing may be appropriate. In that case, your goal is to carefully point out to the court what the factual or legal error is and, perhaps more importantly, why it makes a difference. Appellate courts want to correctly apply the law, but, like most of us, they occasionally make a mistake. By respectfully pointing out the mistake and explaining why a different outcome is warranted, you allow the court to fix its error and you achieve a better result for your client.

If, however, the panel that decided your case reached a legally supportable conclusion, you might consider asking all the judges of the intermediate court to review the panel's decision. However, en banc review is available in only a limited number of jurisdictions. Moreover, persuading a full court to grant en banc review is more difficult than persuading a panel to grant rehearing. For example, under the federal rules, petitions for rehearing en banc are "not favored and ordinarily will not

10. Fed. R. App. P. 40(a)(2).
11. *See, e.g.*, Iowa R. App. P. 6.1204(3); Wash. R. App. P. 12.4(c).

be ordered" unless you persuade the court that "en banc consideration is necessary to secure or maintain uniformity of the court's decisions" or that "the proceeding involves a question of exceptional importance."[12]

Thus, if seeking a rehearing en banc, your goal is to point out that the panel's decision is inconsistent with the decisions of other panels of the same court and that the panel's decision should be rejected in favor of the rule announced by other panels.

In summary, petitions for reconsideration or rehearing are specialized persuasive documents that are appropriate in a limited number of circumstances. By consulting the rules to determine when reconsideration will be allowed and making sure that your case meets those criteria, it is possible to obtain a better result for your client without the time or expense of seeking review in a higher court.

## H. Review in a Discretionary Court

Above, we have discussed the typical appellate process as a case moves from the trial court through an appellate court. Most states, though, and the federal judiciary have two levels of appellate review: an intermediate appellate court and a supreme court.[13] Thus, after an intermediate appellate court issues its final decision in a case, a party may still request that the court of last resort—typically the supreme court—review the intermediate appellate court's decision.

We must emphasize the word "request." One of the big differences between intermediate appellate courts and supreme courts is that intermediate courts tend to be non-discretionary and supreme courts tend to be discretionary. That is, intermediate appellate courts generally have to consider every appeal that is filed, and their primary goal is to correct trial court or agency error rather than to announce rules of law. In contrast, supreme courts typically have control over which cases they review. Supreme courts usually limit their docket to those cases that represent an important issue or a conflict in the law that needs to be resolved.

Some exceptions do exist to a supreme court's ability to determine its docket. In many states, statutes will require that state's highest court to review a limited range of cases. For example, death penalty cases are often reviewed directly by the supreme court, rather than the intermediate appellate court. However, the kinds of cases that a supreme court must hear are limited. Therefore, remember that your one shot at winning may be in the intermediate appellate court; use it wisely.

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12. Fed. R. App. P. 35(a).

13. Delaware, Maine, Montana, New Hampshire, Rhode Island, North Dakota, South Dakota, Vermont, West Virginia, and Wyoming are states without typical intermediate courts.

**Be Precise!**
**Appellant vs. Petitioner**

A party who appeals a trial court's decision and has an appeal as of right, is called an "appellant." The party responding is the "appellee" or "respondent."

By contrast, when a party seeks review in a discretionary court, the party instigating the review is called the "petitioner" not the "appellant." The instigator is called the "petitioner" because that party must petition for the right to be heard. The party responding is called the "respondent," never the appellee.

**Supreme Courts**

Nearly every jurisdiction designates its highest court as the "supreme" court of that jurisdiction. Exceptions, however, exist. New York and Maryland, for example, both call their highest court the "Court of Appeals." And, in New York, the trial courts are called "Supreme Courts."

For convenience, we use the term "supreme court" to refer to the highest court in a given jurisdiction.

## I. Motions in Appellate Courts

Finally, many lawyers are surprised to learn that it is possible to file motions in appellate courts. As in trial courts, if you want an appellate court to take some action, you file a motion asking the court to do so. Depending on court rules, the motion should include an argument or should incorporate a separate memorandum that includes an argument. The federal rule is illustrative: "A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it."[14]

What might you ask an appellate court to do? Just as with a trial court, the answer is that you may ask the court to do anything that is within its power and that will benefit your client. A few common examples include (1) a motion to file an overlength brief; (2) a motion for an extension of time in which to file a brief or other document; (3) a motion to dismiss based on mootness; and (4) a motion asking the court to take judicial notice. Court rules regarding motions generally are fairly specific, and you

14. Fed. R. App. P. 27(a)(2)(A).

should consult them before filing a motion. Most courts permit responses to motions.[15] Typically, though, appellate courts do not allow oral argument on motions.

In addition to understanding the appellate process, writing an effective appellate brief requires you to also understand several uniquely appellate concepts. These concepts include (1) appellate jurisdiction and justiciability; (2) preservation of error and plain error; (3) harmless error; (4) right for the wrong reason; and (5) standards of review. The next section explains these concepts in further detail.

## V. Fundamental Appellate Concepts

Several appellate concepts shape how appellate courts handle appeals. Understanding these concepts will allow you to make an initial assessment of whether an appeal is likely to succeed and will allow you to advise your client appropriately. If you decide to proceed with an appeal, understanding these appellate concepts will also allow you to speak a language that appellate judges understand and to shape your writing to fit comfortably into the appellate setting in which it will be considered. Finally, familiarity with these concepts will also give you a deeper understanding of the many appellate opinions you will read in your legal career. What follows is a short discussion of some fundamental appellate concepts.

### A. Appellate Jurisdiction and Justiciability

As with trial courts, an appellate court must have jurisdiction over a matter and the matter must be justiciable, that is, capable of being resolved by the court.

Lack of trial court or appellate court jurisdiction generally may be raised at any time, so even if the case has been tried, your most persuasive argument on appeal could be that the trial court lacked jurisdiction or that the appellate court lacks jurisdiction. You might, for instance, argue to a federal court of appeals that the federal district court never had jurisdiction over the case because the parties were adjudicating a state law matter, but were not actually citizens of different states, as re-

15. *See, e.g.*, Fed. R. App. P. 27(a)(3).

quired by 28 U.S.C. §1332(a)(1). Or, even if the district court had jurisdiction over the case, there might be an argument that the appellate court does not have jurisdiction because, for example, the district court never issued a "final decision," as required by 28 U.S.C. §1291.

Similarly, you should consider whether the case is justiciable, that is, capable of being decided by the court. Just as you might argue to a trial court that a dispute is not justiciable because the case is moot or is not yet ripe for adjudication, that same argument may be made to an appellate court. If, for example, events have occurred while the case is on appeal that would render any relief on appeal meaningless, the case may have become moot. If your case has become moot or is otherwise nonjusticiable, your strongest argument (as a respondent, of course) might be a procedural one: The case should be dismissed.

The point is that being aware of and thinking about jurisdiction and justiciability may provide you with persuasive arguments that are not related to the legal merits of the case. Sometimes the best argument is the simplest one.

## B. Preservation of Error and Plain Error

Another important concept that occupies appellate courts is the principle known as "preservation of error." The general rule is that an appellate court will not consider a claim of error that was not raised at trial. That is, if a litigant wants to challenge a trial court's ruling on appeal, that same issue must have been brought to the trial court's attention, or the appellate court typically will not consider it. For example, if you want to argue to an appellate court that the trial court erred in admitting a piece of evidence, you must have objected to admission of the evidence in the trial court. Similarly, if you want to challenge the length of your client's prison sentence, the appellate court normally will not consider your argument unless you first raised the matter in the trial court.

Why require that a claim of error be preserved? First, the requirement promotes judicial efficiency by making the trial court aware of the claimed error when it still has a chance to take action to correct it. Second, the requirement ensures that the appellate court will have a complete record to review. For example, if the claim is that the trial court erred when it excluded a witness's testimony, challenging the exclusion at trial may allow the lawyer to describe the excluded evidence (on the record, but outside the presence of the jury). If, even in light of that description, the trial court still refuses to admit the evidence, the appellate court will know what it was that the trial court excluded. Finally—for judicial efficiency and just plain fairness—the rule prevents a litigant who notices a claimed error from "lying in the weeds," that is, waiting until after a loss to jump out and claim an error.

**The Importance of Preserving a Claim of Error**

Because appellate courts typically will not consider issues that were not "preserved," attorneys must think about appellate issues long before an appeal is filed. Success on appeal often hinges on trial counsel anticipating the arguments that will win on appeal and ensuring that a proper record is developed to support those arguments should an appeal follow. For an attorney who takes over a case on appeal and who sees a promising issue on which to base an appeal, nothing is more frustrating than to learn that the issue was not preserved by the trial lawyer. In that case, it may be necessary to abandon the appeal altogether or to rely only on issues that might be less persuasive. Therefore, trial lawyers should always assume that an appeal will follow and act accordingly.

Whether the action a lawyer took in the trial court was adequate to preserve the claim of error is something that appellate lawyers are happy to argue about and appellate courts are happy to write about. In fact, you may read appellate opinions in which the sole disagreement between the majority and dissent is whether a claim of error was preserved. What it takes to preserve a claim of error varies from jurisdiction to jurisdiction and from legal issue to legal issue. Nonetheless, a good guideline is that an objection or other action that may preserve a claim of error must be both timely and specific to preserve a claim of trial court error; how timely and how specific, however, varies with the context.

For our purposes, you should be aware of the following: (1) claims of error generally must be preserved for an appellate court to address them; and (2) appellate courts take the requirement seriously and many claims do not get addressed for lack of preservation. Thus, before proceeding with an appeal or raising a certain issue on appeal, you must consider whether the issue was preserved for appeal.

That said, some exceptions to the preservation requirement may allow an appellate court to address unpreserved claims. The most common exception is known as "plain error." If the trial court made a mistake that is so obvious that even a schoolchild would know it was an error, an appellate court may consider an argument based on that error. So, for example, if a trial court instructed a jury that it could convict a criminal defendant of a felony based on a preponderance of the evidence (rather than beyond a reasonable doubt) and that defendant was found guilty, that instruction would constitute plain error, and an appellate court could review the trial court's instruction to the jury despite a lack of preservation. Similarly, if a trial court refused to allow a jury trial even though one was required by the United States Constitution, an appellate court typically would address the error even if not preserved. But the trial court's foul-up must be obvious before an appellate court will be willing to treat it as plain error.

**Be Precise!**
**A Note on the Phrase "Preservation of Error"**

Most appellate practitioners use the phrase "preservation of error"; indeed, rules of appellate procedure use the phrase. That phrase is not quite accurate. Think about it: In the lower tribunal, a lawyer does not "preserve *error*." Rather, the lawyer preserves a *claim* or *argument* that the tribunal has committed error. Accordingly, although you will often (including in this chapter) see the phrases "preservation of error" or "preserve error" used as shorthand, remember that it is just shorthand. Accordingly, rather than writing, "Counsel for plaintiff *preserved the error* by objecting to the trial court's ruling," be more precise: "Plaintiff's counsel *preserved the claim of error* by objecting to the trial court's ruling." Appellate sticklers will love you.

## C. Harmless Error

Another concept relating to how appellate courts will dispose of claims of error on appeal is known as "harmless error." Consider this example: The trial court commits an error; you object, preserving the claim of error; on appeal, you raise the claim of error, make a brilliant argument, and seek reversal of the trial court's judgment. You win, right? Not necessarily. If the trial court's error—although indisputably an error—did not ultimately affect the outcome of the case, the appellate court will not reverse the decision based on the error. Thus, if one witness's testimony was admitted erroneously, but the jury heard the same information from three other witnesses, the error in admitting the first witness's testimony may be harmless. Under what circumstances an error will be considered "harmless" varies, but all appellate courts recognize the doctrine. You should consider whether an error is harmless when deciding whether to appeal and when choosing which issues to raise on appeal. In other words, no harm, no foul.

## D. Right for the Wrong Reason

Another important appellate concept is known as "right for the wrong (or a different) reason." Under this principle, an appellate court may affirm a trial court's ruling, even if the trial court's reasoning was incorrect, if the trial court ultimately reached the legally correct result. Thus, when deciding whether to appeal and when considering which issues to raise on appeal, you should also consider whether the trial court was right for the wrong reason. Similarly, a respondent who is seeking to uphold a trial court's ruling should carefully consider whether there is a colorable argument that the trial court was right for the wrong reason—sometimes, that argument may be the only one available for affirmance.

**Right for the Wrong Reason: The Tipsy Coachman**

Here is a bit of colorful legal history. In Florida and Georgia, the "right for the wrong reason" rule is known as the "tipsy coachman" rule. The "tipsy coachman" label comes from a nineteenth century Georgia case, *Lee v. Porter*, 63 Ga. 345, 346 (1879), in which the Georgia Supreme Court, noting that the "human mind is so constituted that in many instances it finds the truth when wholly unable to find the way that leads to it," quoted a portion of Oliver Goldsmith's 1774 poem, *Retaliation*. That portion described "honest William . . . [h]is conduct still right, with his argument wrong . . . ."

> Here lies honest William, whose heart was a mint,
> While the owner ne'er knew half the good that was in't;
> The pupil of impulse, it forc'd him along,
> His conduct still right, with his argument wrong;
> Still aiming at honour, yet fearing to roam,
> The coachman was tipsy, the chariot drove home;
> Would you ask for his merits? alas! he had none;
> What was good was spontaneous, his faults were his own.

## E. Standards of Review

The final—and probably most important—appellate concept addressed here is standards of review. Appellate judges live and breathe standards of review, so it is important to be familiar with the concept. In this section, you will learn what standards of review are and what different standards may apply to different cases. Then, in Chapter 11, *Constructing Appellate Briefs*, you will see how standards of review can inform your legal arguments.

Appellate standards of review can be described in various ways:

- The degree of deference that an appellate court gives to a lower tribunal's resolution of an issue
- The level of scrutiny an appellate court gives to a lower tribunal's determination
- The lens through which the appellate court will view the lower tribunal's determination

You are, no doubt, familiar with standards of review in non-legal settings. You may have asked a friend or colleague to review something you wrote to see if it is "in the ballpark." In that case, you are not asking the reviewer to tell you whether you have crossed every "t" and dotted every "i," but rather you seek a general level of scrutiny. Contrast that standard of review with the case in which you ask someone to look something over "with a fine-toothed comb." In that case, you are asking the reviewer to perform a very different type of review—a level of review with much greater scrutiny.

The sports world also has standards of review. For example, in the National Football League, a referee's initial call on the field may not be overruled absent "incontrovertible visual evidence" that the call on the field was incorrect. Such a standard gives high deference to the call on the field because it permits the call on the field to be overruled only when it is "incontrovertibly" clear that the call on the field was wrong. As a result, coaches are less likely to "appeal" decisions than if the standard were, say, "some" visual evidence.

As with standards outside the legal world, some appellate standards of review are more deferential to the trial court, while others are less deferential. Some allow the appellate court to substitute its view for that of the lower tribunal, while others require the appellate judge to say, in essence, "Well, I would not have done that, but in light of the standard of review, we cannot reverse." Before turning to specific standards of review, a few important points about standards of review are in order.

First, standards of review are tied to specific issues, not to entire cases. For example, if you are challenging a trial court's interpretation of a constitutional provision, the standard of review—de novo, as discussed below—is the same whether that issue arises in a securities regulation case or a death penalty case. That also means that different issues you raise on appeal may be (and often are) governed by different standards of review.

Second, because standards of review vary by issue you will need to research what the standard of review is for each issue you raise on appeal. Although it happens rarely, you may find an issue for which the standard of review is unsettled. If the standard of review is unsettled, you will begin your argument to the court by arguing for the standard of review that you believe is appropriate—and beneficial for your client. After presenting your argument about the appropriate standard of review, then, you will proceed to your substantive argument.

Third, standards of review are critically important. The standard of review for a given issue can affect everything from the decision whether to appeal, to your likelihood of prevailing on appeal, to how you couch your argument, to how the appellate court will think about your case. If you do not consciously consider (and set out) the proper standard of review for every issue you raise on appeal—and tie your substantive argument and relief sought to it—your brief will not have that special appellate flavor to it and the brief will be far less persuasive.

Various standards of review exist; the following discussion focuses on the most common standards of review that apply in appeals from trial court decisions. Be aware that different standards of review may apply to judicial review of agency decisions.

### 1. Rulings on issues of law

The most familiar standard of review is for error of law. Whether the lower tribunal correctly interpreted the law is reviewed de novo by the ap-

pellate court. That is, the appellate court determines "anew" what the correct interpretation is, and the appellate court owes no deference to the lower court's interpretation.[16] This same standard is also described by saying that the appellate court reviews the lower court's ruling "as a matter of law" or by saying that the appellate court's review is "plenary." If you lost in the court below—and assuming that you have a persuasive legal argument—this standard of review is the one under which you are most likely to prevail because under this standard the appellate court owes no deference to the lower court.

### 2. Factual findings

The second common standard of review relates to how the appellate court will consider the trial court's factual findings. A court is engaged in fact-finding—and not legal analysis—if its conclusion is based solely on the record, with no reference to a legal standard. For example, was the traffic light red when the pickup truck barreled through it? What exactly were the dimensions of the room in which the police officer interrogated the defendant, and how many hours did the interrogation last? Did the driver have three India Pale Ales before he jumped in his car and drove, or was it seven? The responses to all of those questions are findings of fact.

When an appellate court reviews a trial court's factual findings, the standard of review is significantly more deferential to the trial court. An appellate court will reverse a trial court's factual finding only if the trial court's findings of fact were "clearly erroneous." Under this standard, an appellate court will not re-weigh the evidence in the record. Rather, the trial court's judgment about how to resolve any conflicts in the record will stand, and the appellate court will reverse only if the trial court's factual determination is implausible, and the appellate court is left with a "firm and determined" conviction that the trial court's factual findings was a mistake.

The strong deference that appellate courts give to factual findings may affect the likelihood of your argument prevailing on appeal. If your

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16. Although the phrase "de novo" is most commonly used as described above, de novo review may have a different meaning in different jurisdictions, so be careful to check how the phrase is used in your jurisdiction. For example, in Oregon the phrase de novo review applies to reviewing errors of fact and not errors of law:

> In Oregon, "*de novo* review" remains tied to its origins in equity cases, which appellate courts tried anew upon the record; it thus refers to the review of factual findings. The phrase is inapplicable to actions at law, such as this case, in which there is the right to a jury trial on the facts. The [United States Supreme] Court, however, uses the phrase to refer to appellate review of the trial court's legal decisions; it contrasts that standard of review with review for abuse of discretion.

*Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570, 573 (Or. Ct. App. 2003) (citation omitted).

argument on appeal depends on the appellate court finding the facts contrary to the way they were found by the trial court, you will have a steep uphill battle.

### 3. Discretionary rulings

The third common standard of review is for abuse of discretion. For some rulings, no rule of law provides a single correct disposition. Rather, a trial court may choose from among a number of legally justifiable actions. In those cases, unless the trial court made a choice that is outside those that are legally available, an appellate court will not disturb the trial court's choice.

The abuse of discretion standard is often applied to a trial court's decision about court processes because trial courts are permitted significant leeway when managing courtroom proceedings. Assume, for example, that a rule of civil procedure states that, upon proper request, the trial court must give a party oral argument on any motion. Assume that the rule also states that the court may determine the amount of time the party may have for oral argument. Whether a trial court chose to give a party 15 minutes or 90 minutes, the appellate court would be unlikely to consider either ruling to be in error; that choice is within the "sound discretion" of the trial court. If, on the other hand, the trial court gave a party only 30 seconds for oral argument on a complex issue, that choice might constitute an abuse of discretion. In the first instance, the trial court chose from among legally permissible options, while in the second case, the trial court's choice was outside the range that the rule permitted.

Other decisions regarding court processes to which the abuse of discretion standard of review might apply include a court's decision to grant (or deny) motions to amend a complaint; to amend a judgment; to seal court records; or to grant a continuance.

Trial courts also often have leeway with more substantive decisions. For example, Federal Rule of Evidence 403 provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Because weighing those considerations requires a court to choose from among more than one permissible outcome, rulings under Federal Rule of Evidence 403 are reviewed for an abuse of discretion. As a rule of thumb, if a lower court takes an action pursuant to a statute or rule stating that the court "may" do something, the action probably will be reviewed for an abuse of discretion.

Like the clearly erroneous standard for factual findings, the abuse of discretion standard of review is deferential to the lower tribunal. On balance, however, the abuse of discretion standard is probably slightly more favorable to the party who lost below than the clearly erroneous stan-

dard. An appellant may be slightly more likely to persuade an appellate court that a trial court abused its discretion than that a trial court's factual finding is clearly erroneous.

### 4. Mixed questions of fact and law

Things in standard-of-review land get murky when considering mixed questions of fact and law. The United States Supreme Court has "noted the vexing nature of the distinction between questions of fact and questions of law,"[17] and commentators have written volumes on the subject of the proper standard of review when the two are combined. This section addresses the issue briefly, simply to provide a feel for it.

In many cases, a trial court must perform a three-step process to resolve an issue before it. First, it must determine the facts. As you know, the standard of review for that part of the process is very deferential, and the facts as found by the trial court will not be disturbed on appeal, absent "clear error." Second, having determined the facts, the trial court must interpret a rule, a statute, a constitution, or common law to determine the appropriate rule of law. As you also know, the trial court's decision in that part of the process is entitled to no deference—it is reviewed de novo. Finally, the trial court must apply the rule it has determined to the facts it has found.

This last step—when the court applies the rule that it has discovered to the facts it has found—is the so-called mixed question of fact and law. That is the tricky part: What is the proper standard of review for that part of the process? It depends. If the application of the law to the facts in a given case is more like fact-finding, then the clearly erroneous standard applies. If, in contrast, the application is more like interpreting the law, the de novo standard applies. Unfortunately, courts and commentators may disagree about when the application of law to facts is more "fact-finding-like" and when it is more "law-interpreting-like."

Thus, if you are faced with an issue that turns on a mixed question of fact and law, do your research. Determine whether the courts in your jurisdiction have reached a conclusion. With luck, the courts will have already decided the appropriate standard of review for your issue. If not, as suggested previously, you should argue for the standard that benefits your client.

### 5. No articulated standard of review

Sometimes, the courts have not reached a conclusion about the appropriate standard of review. In that case, you will need to advocate that a particular standard of review should apply. In doing so, you should consider whether the particular issue is one that would better be resolved

17. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982).

by the fact finder—who is in the better position to make factual calls—or the appellate court—which is more suited to decide legal questions. Of course, if you won below you will hope that you can make a good faith argument that the trial court's decision should be upheld unless it is clearly erroneous—a standard under which you are more likely to prevail. Alternatively, if you lost below, you will similarly look for a good faith argument that the standard of review is de novo.

Effective appellate advocacy requires an understanding of standards of review. Often, they are obvious and undisputed; in other cases, they are unclear and open to argument. Other cases are more complicated. For example, what first appears to be one issue may need to be pulled apart into several sub-issues and different standards of review will be applied to different sub-issues depending on whether the sub-issue involves fact finding, interpreting the law, or choosing from among legally permissible conclusions.[18] Whether obvious or complicated, standards of review play a role in every appellate case, and you must think about them carefully when you are working on an appeal.

The discussion above provides a brief overview of the standards of review that you will most often see in practice. Table 5-C summarizes those standards and provides examples of when each standard would be used. If you write appellate briefs, familiarize yourself with the other standards of review that exist—for example, those standards that govern review of an agency's factual findings. Entire books could be and have been written on the subject of standards of review.[19] Most importantly, remember that standards of review are critical to appellate judges.

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18. For example, as the First Circuit Court of Appeals explained,

> The appellate standard of review for [Federal] Rule [of Evidence] 702 rulings is abuse of discretion. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). "This standard is not monolithic: within it, embedded findings of fact are reviewed for clear error, questions of law are reviewed de novo, and judgment calls are subjected to classic abuse-of-discretion review." *Ungar v. Palestine Liberation Org.*, 599 F.3d 79, 83 (1st Cir. 2010); *see also Baker v. Dalkon Shield Claimants Trust*, 156 F.3d 248, 251-52 (1st Cir. 1998) (noting these three dimensions of the abuse of discretion standard in reviewing exclusion of expert testimony).

*Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11, 13-14 (1st Cir. 2011).

19. *See, e.g.,* Harry T. Edwards & Linda A. Elliott, *Federal Courts Standards of Review: Appellate Court Review of District Court Decisions and Agency Actions* (2007); *see also* U.S. Ct. of App. for the 9th Cir., *Standards of Review*, http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000368 (accessed June 4, 2015) (defining and outlining standards of review in criminal and civil proceedings and in review of agency decisions).

**Table 5-C • Standards of Review: Federal Courts***

| STANDARD OF REVIEW | DE NOVO | ABUSE OF DISCRETION |
|---|---|---|
| **Type of decision under review** | Question of law and some mixed questions of fact and law | Discretionary action |
| **Lower-court decision-maker** | Trial judge | Trial judge |
| **Degree of deference given to lower-court decision-maker** | No deference | Substantial deference |
| **Party typically benefitted by this standard** | Appellant | Respondent |
| **Definition** | "[W]e review the matter anew, the same as if it had not been heard before, and as if no decision previously had been rendered." *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006).<br>"When de novo review is compelled, no form of appellate deference is acceptable." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991). | "Under this standard, a reviewing court cannot reverse absent a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors." *Valdivia v. Schwarzenegger*, 599 F.3d 984, 988 (9th Cir. 2010).<br>"An abuse of discretion occurs where the district court clearly erred or ventured beyond the limits of permissible choice under the circumstances." *Wright ex rel. Trust Co. of Kan. v. Abbott Labs., Inc.*, 259 F.3d 1226, 1233 (10th Cir. 2001).<br>"Under an abuse of discretion standard, a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances. That is to say, we will not alter a trial court's decision unless . . . the court's decision was an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Id.* at 1235-36 (citations and internal quotation marks omitted). |
| **Examples** | Motions for summary judgment; constitutional questions; statutory interpretation; mootness, ripeness, and standing; contract interpretation. | Amount of Rule 11 sanctions; attorney's fees; courtroom management and discovery issues (such as whether to grant a motion for continuance or whether to grant a motion to compel the production of documents); injunctions; temporary restraining orders. |

* Professor Terri Pollman, University of Nevada, Las Vegas William S. Boyd School of Law, created the original version of this chart. Numerous other professors within the legal writing community have since updated and modified it.

| | CLEARLY ERRONEOUS | SUBSTANTIAL EVIDENCE | ARBITRARY AND CAPRICIOUS |
|---|---|---|---|
| | Question of fact | Question of fact | Agency resolution of a question of fact |
| | Trial judge | Jury | Administrative law judge |
| | Significant deference | Extreme deference | Extreme deference |
| | Respondent | Respondent | Respondent |
| | A reviewing court "will not reverse a lower court's finding of fact simply because [it] would have decided the case differently. Rather, a reviewing court must ask whether, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (citations and internal quotation marks omitted).<br>"If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).<br>*See generally* Fed. R. Civ. P. 52(a) | When evidence is supported by substantial evidence, it means that there is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).<br>The "unsupported by substantial evidence" is more deferential than the "clearly erroneous" standard. *Stern v. Marshall*, 131 S. Ct. 2594, 2627 (2011), *reh'g denied,* 132 S. Ct. 56. | The absence of a rational connection between the facts found and the choice made. There should be a clear error of judgment; an action not based upon consideration of relevant factors and so is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law or if it was taken without observance of procedure required by law. *Natural Resources Defense Council, Inc. v. United States EPA*, 966 F.2d 1292, 1297 (9th Cir. 1992) |
| | Findings of fact made by a trial court. | A finding of fact from a jury, or a finding of fact made by an administrative agency under an Administrative Procedure Act adjudication or formal rulemaking. | A government agency's resolution of a question of fact decided by informal rulemaking under the Administrative Procedure Act. |

## Practice Points

- An appellate brief typically has these parts:
  - Cover
  - Table of contents
  - Table of authorities
  - Statement of jurisdiction
  - Statement of the issues (or questions) presented
  - Statement of the case
  - Summary of the argument
  - Argument
  - Conclusion and relief sought
- Before you begin drafting determine the following:
  - The rules that govern appellate procedure
  - Whether it makes sense to appeal
  - Which issues should be raised on appeal
  - Whether those issues have been preserved
  - The standard (or standards) of review that apply to each issue on appeal

Chapter 6

# Themes for Persuasive Arguments



Developing a persuasive argument depends on telling a cohesive story about the law, the facts, and the conclusion that the court should adopt. Developing a theme is one way in which attorneys create a cohesive, compelling narrative for the court.[1] This chapter explains what a theme is, the purpose of having a theme, how to develop a theme, and how to integrate that theme into your argument.

## I. The Purpose of a Theme

A "theme" is some unifying idea that quickly and simply explains why the court should rule in your client's favor. A brief to the court—whether at the trial level or on appeal—will usually address multiple claims. Each of those claims is, in turn, supported by a series of distinct legal arguments. A theme links the law and facts in those otherwise distinct legal arguments in a way that justifies the end that your client seeks.

1. Although many people use "theory of the case" and "theme" interchangeably, they are a bit different. The theory of the case is your comprehensive plan for convincing the judge or the jury to rule in your client's favor. You develop your theory of the case when preparing for trial. *See* John Korzen, *Make Your Argument: Succeeding in Moot Court and Mock Trial* 153 (2010); Thomas A. Mauet, *Trials: Strategy, Skills, and the New Powers of Persuasion* 8 (2d ed. 2009) ("[T]he theory of the case . . . is simply each party's version of what really happened."). Your theme is a quick and simple explanation or summation of the overarching theory of the case.

A coherent theme counter-balances a problem that can arise when trying to tell a compelling legal story. A compelling legal story must account for all the relevant facts and law. A compelling legal story is, therefore, detailed and often lengthy. Keeping track of those details can be difficult. A theme can help the judge organize and make sense of the details within your story by providing a bottom line to which all those details connect.

One well-known theme comes from the trial of the legendary football star and actor O.J. Simpson: "If it [the glove] doesn't fit, you must acquit." That single, catchy sentence explained the crux of O.J. Simpson's argument. Simpson was accused of killing his estranged wife and a local restaurant server at her home. Part of the evidence against him included a bloody glove found on Simpson's estate, and a matching glove found at the crime scene. In a surprising move, prosecutors had Simpson try on the exhibit during trial, but the glove did not fit. From that event, the defense latched on to a winning theme of the case, and Simpson was later acquitted of murder.

More often, legal themes are not nearly as catchy as the one presented to the jury in the O.J. Simpson trial. In fact, many scholars warn against the use of a catchy theme because it can alienate the judge and undermine your credibility.[2] Thus, in developing a theme for your argument, be careful not to undermine your credibility by choosing a theme that is too simplistic or that sacrifices substance for flash.

## II. Developing a Theme

Lawyers will look for a theme in one of three places: in the procedural legal standard, in a policy underlying the law, or in a social good or value that is at stake. Thus, as you develop a theme, look closely at those three areas.

### A. Based on Procedural Law

Judges examine legal issues within their procedural posture. For that reason, your theme will most often be based on the legal standard for the issue before the court. For example, if you are opposing a motion for summary judgment, you will likely build a theme around the standard for denying a motion for summary judgment, as in Table 6-A. If you want to overturn a jury verdict, you would build a theme around that standard, as in Table 6-B. Both themes emphasize the applicable standard, which often is more compelling to the court than the catchy O.J. Simpson theme.

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2. *See* Korzen, *supra* note 1, at 40-43.

**Table 6-A • Developing a theme to oppose a motion for summary judgment**

| | |
|---|---|
| **The case** | You want to argue that summary judgment should not be granted. |
| **Legal standard** | Summary judgment may be granted only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). |
| **Theme** | There *is* a "material issue of fact" and, therefore, summary judgment is inappropriate. |
| **Technique** | As frequently as possible (1) state that a genuine issue of fact exists and that the fact is material, and (2) prove the dispute by pointing to contradictory factual assertions and prove that the factual dispute is material by explaining the relationship between the fact and the legal standard. Thus, the summary judgment standard becomes the touchstone to which you will return because it governs how the court will decide the issue. |

**Table 6-B • Developing a theme to overturn a jury verdict**

| | |
|---|---|
| **The case** | You want to argue that the court should overturn a jury's verdict. |
| **Legal standard** | A judgment of acquittal must be entered for any offense for which the evidence is insufficient to sustain a conviction. Fed. R. Crim. P. 29. Evidence must be viewed in the light most favorable to the winning party. United States v. Augustine, 663 F.3d 367, 373 (8th Cir. 2011). |
| **Theme** | Even considering the evidence in the light most favorable to the winning party, the evidence does not support the verdict. |
| **Technique** | In the conclusion for every element, and as frequently as otherwise possible, (1) state that the evidence does not support the element, and (2) prove the evidence does not support the element by bringing forward all the evidence put forward by the winning party and explaining why it cannot support the element. Thus, the standard for a judgment of acquittal becomes the touchstone to which you will return. |

## B. Based on Substantive Law and Its Underlying Policy

Themes may also arise out of the substantive law and the policies, or reasons, for that law. Take, for example, the case *Oregon v. Ashcroft*.[3] In that case, the State of Oregon passed a statute that permitted physician-assisted suicide. The U.S. Attorney General then issued an interpretive regulation that would allow the federal government to revoke the license of any physician who dispensed a controlled substance sufficient for a person to commit suicide under the state statute. If that interpretive regulation went into effect, it would prevent all physician-assisted suicides in Oregon. Thus, the State of Oregon sought to enjoin the United States Attorney General from enforcing his interpretive regulation.

Table 6-C shows how the U.S. Attorney General might approach the argument for a motion to dismiss, and Table 6-D shows how the State of Oregon might approach its brief in response.[4] As you can see, the U.S. Attorney General can emphasize his statutory authority to regulate controlled substances, and the State of Oregon can emphasize a State's authority to regulate medical practice. Note that, although both perspectives are valid, they emphasize different laws and the reasons for those laws.

## C. Based on a Social Good or Value

Themes can also relate to an important social goal or shared, core value. Themes can emphasize that a decision will promote (or undermine) an ideal, such as fairness, justice, individual autonomy, individual responsibility for damages caused, or the public's health, safety, or welfare. Themes can also emphasize core values about our legal or political system, such as efficiency in the administration of justice, separation of powers between branches, or the appropriate allocation of authority between states and the federal government.[5]

For example, advocates in the *Bush v. Gore* litigation developed themes that focused on core values about our political and legal system. In *Bush v. Gore*, the candidates for President of the United States disputed which candidate had earned Florida's electoral votes in the 2000 general election. Before the United States Supreme Court, the legal questions were whether the Florida Supreme Court's decision was consistent with certain federal statutes and the Federal Constitution. Although the legal questions fo-

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3. 192 F. Supp. 2d 1077 (D. Or. 2002), *aff'd*, 368 F.3d 1118 (9th Cir. 2004), *aff'd, Gonzales v. Oregon*, 543 U.S. 1145 (2005).

4. Tables 6-C and 6-D are based on Brief for Appellants, 368 F.3d 1118 (9th Cir. 2004) (No. 02-35587), and Appellee's Brief of the State of Oregon, 368 F.3d 1118 (9th Cir. 2004) (No. 02-35587), respectively.

5. Ellie Margolis, *Teaching Students to Make Effective Policy Arguments in Appellate Briefs*, 9 Perspectives 73, 75 (Winter 2001).

**Table 6-C • Developing a theme for a motion to dismiss based on the substantive law**

| | |
|---|---|
| **The case** | The State of Oregon passed a statute that permitted physician-assisted suicide. Citing his authority under the Controlled Substances Act, the U.S. Attorney General issued an interpretive regulation that would allow the U.S. Attorney General to revoke the licenses of physicians who prescribed drugs sufficient for an individual to commit suicide under the state statute. Among other things, the interpretive regulation stated that, "assisting suicide is not a 'legitimate medical purpose' within the meaning of [the Controlled Substances Act and its regulations]." 66 Fed. Reg. 56,607-02 (Nov. 9, 2001). The state and several private parties filed a complaint that sought to enjoin the Attorney General from enforcing that interpretive regulation. You are an Assistant U.S. Attorney seeking to dismiss that complaint. |
| **Legal standard** | Under the Controlled Substances Act, "[a] prescription for a controlled substance . . . must be issued for a legitimate medical purpose." 21 C.F.R. § 1306.04 (2015). The Attorney General has the authority to promulgate "rules and regulations . . . relating to the registration and . . . distribution and dispensing of controlled substances." *Id.* § 801. |
| **Theme** | The Controlled Substances Act permits the distribution of controlled substances for only a "legitimate medical purpose" and assisted suicide is not a "legitimate medical purpose." |
| **Technique** | In the brief, emphasize the everyday and historical understanding of "medicine" as "healing" and that Congress delegated to the Attorney General authority to regulate controlled substances. In this case, the U.S. Attorney General properly used that authority. |

cused on the intersection of federal and state laws and the Florida Supreme Court's interpretation of those laws, the parties developed themes that focused on what was at stake in the litigation. As illustrated in Table 6-E, George W. Bush argued that, if the Florida Supreme Court's decision stood, the rule of law would be ignored and "electoral chaos" would ensue. By contrast, and as illustrated in Table 6-F, Albert Gore focused on the "legitimacy of public power" and "respecting the intent of the electorate."[6]

6. Table 6-E is based on Brief for Petitioner, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949). Table 6-F is based on Brief of Respondent Albert Gore, Jr., *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949) (emphasis in the original).

**Table 6-D • Developing a theme opposing the motion to dismiss based on the substantive law**

| | |
|---|---|
| **The case** | Same scenario as in Table 6-C, but you are an Assistant Attorney General for the State of Oregon, and you are arguing against the motion to dismiss and in favor of an injunction. |
| **Legal standard** | The clear statement doctrine: When "Congress intends to alter the 'usual constitutional balance between the States and Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Historically, states have retained the authority to regulate the practice of medicine. |
| **Theme** | The U.S. Attorney General's interpretive regulation is an unwarranted federal intrusion into the sovereign interests of Oregon, the medical practice of its physicians, and end-of-life decisions. |
| **Technique** | In the motion, emphasize the state's historical right to regulate medical practice and that, in enacting the Controlled Substances Act, Congress meant to regulate drug trafficking, not medical practice. Thus, the U.S. Attorney General overreached his authority under the Controlled Substances Act. |

### D. Based on Undisputed Law, Facts, or Values

Whatever the inspiration for your theme may be, remember that it must be consistent with the law and facts relevant to the argument. In fact, to the extent that you can incorporate facts or concepts that are not in dispute, your theme is more likely to be accepted. For example, in Tables 6-A and 6-B, which illustrated themes based on a procedural legal standard, no one can dispute the standard for summary judgment or overturning a jury verdict. Similarly, in Tables 6-C and 6-D the themes were based on the substantive law—the Controlled Substance Act and the clear statement doctrine, respectively. The themes in Tables 6-E and 6-F rely on core values that everyone would agree are "good" values—the importance of following the rule of law and that, in an election, every vote should count. In each case, the theme is founded on a law or principle that is not in dispute.

## III. When to Develop a Theme

Attorneys develop their themes at different times. Many attorneys begin to think about a theme as part of their theory of the case at the beginning. It develops as they get to know their client and research the

**Table 6-E • Developing a theme that focuses on a policy or social value that is at stake**

| | |
|---|---|
| **The case** | After a close general election in 2000, the Florida Supreme Court ordered a statewide manual recount of all votes. Petitioner argued that ordering such a recount violated federal law. Specifically, the petitioner argued that ordering a statewide recount violated the U.S. Constitution's guarantee to equal protection because each county had different recount procedures and, therefore, votes might be counted differently in different counties. In addition, the petitioner argued that in ordering the recount, the Florida Supreme Court established procedures that differed from those legislatively authorized, and in so doing the Florida Supreme Court inappropriately exercised legislative power. |
| **Theme** | "This case is the quintessential illustration of what will inevitably occur in a close election where the rules for tabulating ballots and resolving controversies are thrown aside after the election and replaced with judicially created *ad hoc* and *post hoc* remedies . . . . The Florida Supreme Court has not only violated the Constitution and federal law, it has created a regime virtually guaranteed to incite controversy, suspicion, and lack of confidence not only in the process but in the result that such a process would produce." |
| **Technique** | Petitioner returns to this theme throughout the brief. A few examples are provided below.<br><br>**Statement of the case: "**The thirty-three days since the election have been characterized by widespread turmoil resulting from selective, arbitrary, changing, and standardless manual recounts."<br><br>**Argument: "**The decision below therefore ushers in a regime that cannot possibly be supported by any reasonable reading of the contest statute or any other provision of the Florida Election Code. The authority to count votes, entrusted by the Legislature to county officials subject to limited judicial review, has now been seized by the state judiciary . . . ."<br><br>**Argument:** "The Florida Supreme Court's decision is a recipe for electoral chaos. The court below has not only condoned a regime of arbitrary, selective and standardless manual recounts, but it has created a new series of unequal after-the-fact standards. This unfair, new process cannot be squared with the Constitution." |

Petitioner's theme suggests that the decision of the Florida Supreme Court to order manual recounts violates the rule of law and, if upheld, will undermine confidence in federal elections and in the government.

**Table 6-F • Developing a theme that focuses on a policy or social value that is at stake**

| | |
|---|---|
| **The case** | Same case as in Table 6-E, above. Respondent argues that the Florida Supreme Court has properly exercised judicial review of Florida election law. |
| **Theme** | "This case raises the most fundamental questions about the legitimacy of political power in our democracy. In this case, the Court will decide whether the Electors for President of the United States, and thus the President of the United States himself, will be chosen by ascertaining the actual outcome of the popular vote in Florida in the election of November 7, 2000, or whether the President will instead be chosen without counting all the ballots lawfully cast in that state." |
| **Technique** | **Introduction:** "The question is whether this Court may properly override Florida's own state-law process for determining the rightful winner of its electoral votes in this Presidential election. Such intervention would run an impermissible risk of tainting the result of the election in Florida — and thereby the nation. For this Court has long championed the fundamental right of all who are qualified to cast their votes "and to have their votes counted."<br><br>**Argument:** The Florida Supreme Court's order does nothing more than place the voters whose votes were not tabulated by the machine on the same footing as those whose votes were so tabulated. In the end, all voters are treated equally: Ballots that reflect their intent are counted.<br><br>**Argument: "**[P]etitioners would have the Court abruptly end the counting altogether and *toss out lawfully cast ballots that have been, and are now being, counted.* That is an absurd and unprecedented response . . . , and one that surely is not required by the U.S. Constitution."<br><br>**Argument:** "The only due process right even arguably implicated by this case is the right of voters to have their ballots counted . . . ." |

To create a theme, the respondent steps back from technical arguments about whether the Florida Supreme Court's order is consistent with federal law to remind the court that the value at stake is respect for the intent of the voters.

facts and law surrounding the case. Often, though, a theme does not fully emerge until they have researched the law and developed their arguments. At that point, the attorney has a full grasp of the law and facts. Also at that point, the attorney can take a step back to reflect on the argument and develop a cohesive theme consistent with the theory of the case.

Do not worry too much if a theme is not immediately evident. Often when you begin working on an argument, you will not know what the

theme will be. As you continue to write and think about a case, the key legal or moral principle will likely reveal itself. You may not see a theme early on, but one may emerge after you have started organizing your arguments or developing the strengths and weaknesses of your case. As you wrestle with your case's legal and factual minutiae, if you find yourself saying, "What's *really* going on here is …" you have likely found your theme. Once a theme has emerged—be it a legal standard or something more "catchy"—you can go back and make sure you have integrated the theme into the structure of your legal argument.

## Practice Points

- Develop a theme that is consistent with both the law and your facts and reminds the court why you win.
- Lawyers often develop themes from examining the procedural legal standard, a policy underlying the substantive law, or a social value that is at stake.
- When developing a theme, remember that the court is more likely to accept your theme to the extent that you can incorporate facts or concepts that are not in dispute.
- Continue to develop and refine your theme as you write.