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# Mastering Appellate Advocacy and Process

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*To J.D., 1997–2010, who watched while we wrote.*





# Contents

Table of Cases	xxi
Table of Statutes and Rules	xxvii
Series Editor’s Foreword	xxix
About the Authors	xxxi
Acknowledgments	xxxiii
Introduction	xxxv
<b>Chapter 1 • Appellate Court Systems</b>	<b>3</b>
Roadmap	3
I. Federal Courts	3
a. Overview	3
b. Federal District Courts	4
c. United States Courts of Appeal—Circuit Courts	5
United States Court of Appeals for the First Circuit	7
United States Court of Appeals for the Second Circuit	8
United States Court of Appeals for the Third Circuit	8
United States Court of Appeals for the Fourth Circuit	8
United States Court of Appeals for the Fifth Circuit	9
United States Court of Appeals for the Sixth Circuit	9
United States Court of Appeals for the Seventh Circuit	9
United States Court of Appeals for the Eighth Circuit	10
United States Court of Appeals for the Ninth Circuit	10
United States Court of Appeals for the Tenth Circuit	11
United States Court of Appeals for the Eleventh Circuit	11
United States Court of Appeals for the District of Columbia Circuit	12
United States Court of Appeals for the Federal Circuit	12
d. The United States Supreme Court	12

II. State Courts	14
a. State Intermediate Appellate Courts	14
b. State Courts of Last Resort	15
Checkpoints	16
<b>Chapter 2 • Preserving Error for Appeal</b>	<b>19</b>
Roadmap	19
I. The General Rule Regarding Preservation of Error	19
II. Preservation of Error in the Trial Court	20
a. Evidentiary Errors	20
b. Arguments and Conduct of Counsel at Trial	22
c. Jury Instructions	22
d. Preserving Issues in Responsive Pleadings and Pre-Trial Motions	23
e. Post-Trial Motions	24
III. Preservation of Error During the Appeal	25
a. Record or Appendix on Appeal	25
b. Briefing the Appeal	26
c. Oral Argument	26
IV. Exceptions Regarding Preservation of Error	27
a. Plain or Fundamental Error	27
b. Subject Matter Jurisdiction	28
c. Standing	29
A Final Note Regarding Mootness	30
Checkpoints	30
<b>Chapter 3 • Appealability: The Final Judgment Rule and Exceptions</b>	<b>33</b>
Roadmap	33
I. The Final Judgment Rule	33
II. Exceptions to the Final Judgment Rule	35
a. The Collateral Order Doctrine	35
b. Partial Final Judgments under Federal Rule of Civil Procedure 54(b)	36
c. Appeals of Interlocutory Orders under 28 U.S.C. § 1292	38
1. Orders Regarding Injunctions — 28 U.S.C. § 1292(a)(1)	38
2. Receivership Orders — 28 U.S.C. § 1292(a)(2)	39
3. Orders Involving Controlling Questions of Law— 28 U.S.C. § 1292(b)	39
d. Class Certification Decisions under Federal Rule of Civil Procedure 23(f)	40

e. Review by Extraordinary Writ (Writ of Mandamus)— 28 U.S.C. § 1651(a)	41
f. Pendent Appellate Jurisdiction	42
III. State Systems	43
Checkpoints	49
<b>Chapter 4 • Initiating an Appeal</b>	51
Roadmap	51
I. Notice of Appeal: Contents and Requirements	52
a. Basic Requirements—Federal and Many State Court Systems	52
b. Additional Requirements—Certain State Court Systems	53
II. Filing the Notice of Appeal	55
a. Location	55
b. Time Limits	56
1. Generally	56
2. The Federal System	57
3. Other Jurisdictions—Some Examples	58
4. Premature Notices of Appeal	59
5. Relief from the Consequences of Failing to Timely File the Notice of Appeal	60
III. Effect of Filing the Notice of Appeal	63
a. The Judgment Below—Stays Pending Appeal	63
1. Money Judgments—Bonding the Appeal— Supersedeas Bonds	64
2. Injunctions	65
b. Jurisdiction of the Trial Court While the Appeal Is Pending	66
Checkpoints	66
<b>Chapter 5 • Parties and Non-Parties on Appeal</b>	69
Roadmap	69
I. General Rule: Parties That Are Aggrieved	69
a. Parties	70
b. Appeals by Non-Parties	70
c. Intervention	71
d. Substitution of Parties on Appeal	72
e. Persons Aggrieved	74
II. Constitutional Standing and Mootness	76
a. Standing	76
b. Mootness—The Mootness Doctrine	77

---

c. Exceptions to the Mootness Doctrine	78
d. Mootness by Reason of Settlement	79
III. Amicus Curiae	80
Checkpoints	82
<b>Chapter 6 • The Record on Appeal</b>	<b>83</b>
Roadmap	83
I. Purpose	83
II. Contents	84
a. Generally	84
b. Documents Filed in the Trial Court: The Clerk's File	84
c. Record of Oral Proceedings	86
1. The Transcript	86
2. When a Transcript Is Unavailable	88
d. Agreed Statements	88
III. Correcting and Expanding the Record on Appeal	89
a. General Rule	89
b. Correcting Errors or Omissions in the Record	89
c. Judicial Notice	90
d. Inherent Authority of Appellate Courts to Supplement the Record	93
IV. The Appendix	94
a. Content of the Appendix	96
b. Form of the Appendix	97
Checkpoints	98
<b>Chapter 7 • Appellate Legal Analysis</b>	<b>101</b>
Roadmap	101
I. Using Fresh Eyes and Focusing on Error	101
II. Tools for Analyzing and Interpreting Statutes	102
a. Using Tabulation to Explode a Statute	102
b. Using the Structure and Other Sections of the Same Statute	104
c. Using Case Law Interpreting a Statute	104
d. Plain Meaning—The Wording of the Statutory Section at Issue	105
e. Legislative History	106
f. Similar Statutes in the Same Jurisdiction	107
g. Similar Statutes in other States or Jurisdictions	107
h. Canons of Construction	107
i. Law Review Articles & Scholarly Commentary	109

III. Reviewing, Using, and Synthesizing Cases	109
a. Reviewing and Revisiting cases	109
1. Caption	109
2. Summaries and Headnotes	110
3. Disposition	110
4. Procedural Facts	110
5. Underlying Facts	110
6. Issues	110
7. Statements of Law and their Explanation	111
8. Application of Law	111
9. Policy	111
10. Holding	112
11. Dicta	112
b. Using Cases: A Checklist	112
1. Where Does the Case Come From?	112
2. Does the Case Deal with the Same Issue as Your Problem or Matter?	113
3. What Laws Does the Court Apply or Articulate?	113
4. What Does the Court Say about Those Laws?	113
5. What Are the Facts of the Case?	113
6. How Does the Court Apply the Laws to the Facts?	113
7. What Is the Court's Holding—The Court's Decision and the Basis for It?	113
8. Does the Opinion Contain Any Useful Dicta?	114
c. Synthesizing Multiple Cases—Putting It All Together to Advocate a Position	114
1. Getting Started—Review the Cases Starting with the Most Recent	114
2. After Reading the Cases, Write a Holding for Each	115
3. Sorting and Grouping	115
4. Distilling and Synthesizing the Law	115
IV. Final Steps in the Analysis	117
V. Organizing a Persuasive Legal Analysis—IRAC and CRAC Formats Checkpoints	118 122
 <b>Chapter 8 • Appellate Legal Drafting: Techniques and Strategies</b>	 125
Roadmap	125
I. Three Strategies for Organizing Appellate Legal Drafting	125
a. Establish the Context before Adding the Details	126

---

b. Place Familiar Information before New Information	128
c. Make the Structure Explicit	129
II. Paragraphs	130
III. Sentences and Word Choice	131
a. Where Possible, Always Make Your Subject a Person or Entity—Something That Acts—Rather Than a Concept	131
b. Use Plain Language	132
c. Use Fewer Words	132
d. Stamp Out Narration	133
e. Avoid Nominalizations	133
f. Avoid Intrusive Phrases or Clauses	133
g. Choose the Right Word	133
h. Use the Past Tense When Describing Events That Have Already Occurred	133
i. Put Yourself in the Position of the Distracted, Unfamiliar Reader	134
j. Remember to Keep It Simple	134
IV. The Drafting Process	135
a. Organizing Preliminary Materials into an Outline— Creating an Explicit Structure	135
b. The First Draft	135
c. Revising and Rewriting	136
d. Editing	137
e. Proofreading	137
Checkpoints	138
<b>Chapter 9 • Citation and Quotation on Appeal: Why, When, and How?</b>	141
Roadmap	141
I. Why	141
a. Overview	141
b. Citations to Legal Authority	142
c. Citations to the Record—The Appendix	144
d. Quotations	144
II. When to Cite or Quote	145
a. Legal Authority	145
b. Factual Authority—Citations to the Appendix or Appellate Record	146
c. Quotations	147

---

III. How to Cite	148
a. Legal authority	148
b. Cites to the Appendix or Appellate Record	153
c. How to Quote	154
1. Using Quotation Marks	154
2. Indicating Omissions or Alterations in a Quote: Ellipses and Brackets	155
3. Citing Original Sources and Indicating Emphasis	156
IV. Conclusion	156
Checkpoints	157
<b>Chapter 10 • Standards of Review and Reversible versus Harmless Error</b>	<b>159</b>
Roadmap	159
I. Introduction	159
II. Standards of Review	160
a. In General	160
b. Specific Standards of Review	161
De Novo: Wrong	161
Clearly Erroneous: Very Wrong	161
Substantial Evidence: Very Wrong	162
Abuse of Discretion: Very, Very Wrong	162
Other Standards of Review	163
III. Reversible versus Harmless Error	164
a. In General	164
b. Errors Requiring Automatic Reversal—Structural Errors and Errors Based on Lack of Substantial Evidence	164
c. Harmless Error Analysis	165
IV. Conclusion	166
Checkpoints	167
<b>Chapter 11 • Drafting Appellate Briefs</b>	<b>169</b>
Roadmap	169
I. The Audience—Intermediate Appellate Courts and Courts of Last Resort, Judges, Law Clerks, and Court Attorneys	170
a. Basics	170
b. Intermediate Appellate Courts	171
c. Courts of Last Resort	172
II. Purpose and Goals of an Appellate Brief	173
a. Basics	173

---

b. Accomplishing these Goals: Developing and Delivering a Message	174
1. Developing a Message	174
2. Delivering Your Message	175
III. Appellate Brief Formats and Components	176
IV. Statement of Issues on Appeal	177
V. The Statement of the Case	179
Statement of the Case Drafting and Editing Checklist	182
VI. The Statement of Facts	183
a. Goals	183
b. Material Facts in the Record	184
c. Organizing the Statement of Facts	185
1. Overall Organization	185
2. Placement of Individual Facts	186
3. Treatment and Tone	186
4. Final Words	187
d. Appellate Brief Statement of Facts Drafting and Editing Guidelines	188
1. Substance/Analysis	188
2. Organization	188
3. Sentence Structure, Word Choice, Tone	189
4. Paragraph structure	189
5. Technical Aspects: Proofing, Grammar, Etc.	190
VII. Summary of the Argument	190
VIII. Discussion or Argument: Purpose and Goals	191
IX. Organizing the Discussion Section	192
a. Basics	192
b. Main Sections	192
Ordering Main Sections	192
c. Subsections	193
X. Statements of the Standard of Review	194
XI. Persuading the Appellate Court	195
a. Basics	195
b. Using the CRAC Structure to Persuade	195
1. C: Conclusion—The Heading	196
2. R: Rule/Law—Identifying, Explaining, and Illustrating the Law	196
3. A: Application/Analysis	198
4. C: Conclusion	199
c. Dealing with Adverse Authority	199



---

d. Using Policy to Persuade	199
XII. Drafting the Components of the Appellate Brief: Order and Timing	201
XIII. Appellate Brief Discussion/Argument Drafting and Reviewing Guidelines	202
a. Substance/Analysis	202
b. Organization	203
c. Sentence, Word Choice, and Tone	203
d. Paragraph Structure	204
e. Technical: Proofing, Grammar, Bluebook, Etc.	204
XIV. Heading and Topic Sentence Outline	204
XV. Appellate Brief Final Editing Checklist Checkpoints	205 206
<b>Chapter 12 • Oral Argument</b>	<b>209</b>
Roadmap	209
I. Purpose, Audience, and Goals of Oral Argument	210
a. Purpose of Oral Argument	210
b. Audience	210
1. Generally	210
2. The Bench—Intermediate Appellate Courts	211
3. The Bench—Courts of Last Resort	212
4. Goals of Oral Argument	213
II. Preparing for Oral Argument	213
a. Goals	213
b. Knowing the Case	214
1. Knowing the Law	214
2. Knowing the Facts	214
3. Knowing the Context	215
4. Knowing What You Are Asking the Court to Do and the Possible Effects	216
c. Developing Talking Points	217
1. What Talking Points Are and How to Use Them in Oral Argument	217
2. Deciding on Your Talking Points	219
d. The Introduction and Conclusion	221
1. The Introduction	221
2. The Conclusion	222
e. Preparing Your Materials for the Courtroom— The Manila File Folder	222

f. Becoming Conversant—Practice	224
g. Knowing the Rules, Procedures, and Format for Oral Argument	225
III. In the Courtroom	226
a. Remain Flexible and Remember Your Goals	226
b. Presenting Your Argument	227
1. The Opening	227
2. Your Main Argument—The Favorable Talking Points	228
3. Concluding	229
4. Rebuttal	230
c. Answering Questions from the Bench	231
1. Welcome Questions and Answer Them Immediately and Directly	231
2. Handling Questions: A Multi-Step Process	232
3. Answering Particular Questions	234
d. Presentation	239
1. Creating a Good Impression	239
2. Physical Appearance	240
3. Delivery	241
Checkpoints	243
<b>Chapter 13 • Moot Court</b>	247
Roadmap	247
I. Purpose, Audience, and Goals of Moot Court Competitions	248
a. Purpose	248
b. Audience	248
c. Goals	249
II. Getting Started	250
a. Deciding Which Competition to Enter	250
b. Understanding the Rules and Devising a Timeline	251
c. Reviewing and Understanding the Problem	252
d. Learning and Understanding the Context	254
e. Research	254
III. Brief Writing	255
a. Goals	255
1. Generally	255
2. Accomplishing Your Goals	256
b. Working Collaboratively	258
IV. Oral Argument	260
a. Goals	260
b. Preparation	260

---

c. Practice Rounds	262
d. Handling Questions	263
1. Hostile Questioning	263
2. Friendly Questions	264
3. The Dead Bench	264
e. Courtroom and Competition Demeanor	265
Checkpoints	266
<b>Mastering Appellate Advocacy and Process Checklist</b>	<b>269</b>
<b>Appendix • Sample Appellate Brief and Resulting Order</b>	<b>289</b>
<b>Index</b>	<b>315</b>



# Table of Cases

- Access Now v. Southwest Airlines, Co.*, 385 F.3d 1324 (11th Cir. 2004), 26
- Ahrenholz v. Bd. of Trs. of Univ. of Illinois*, 219 F.3d 674 (7th Cir. 2000), 40
- Alabama Power Co. v. I.C.C.*, 852 F.2d 1361 (D.C. Cir. 1988), 74
- American Games, Inc. v. Trade Prods. Inc.*, 412 F.3d 1164 (9th Cir. 1998), 79
- American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981), 162
- Annandale Advocate v. City of Annandale*, 435 N.W.2d 24 (Minn. 1989), 71
- Arbaugh v. Y & H Corp.*, 546 U.S. 500, (2006), 24, 28, 29, 77
- Arneson v. Jezwinski*, 556 N.W.2d 721 (Wis. 1996), 47
- ASARCO, Inc. v. Sec’y of Labor*, 206 F.3d 720, (6th Cir. 2000), 75
- Bank of Herrin v. Peoples Bank of Marion*, 473 N.E.2d 1298 (Ill. 1985), 63
- BankAmerica Corp. Sec. Litig.*, 270 F.3d 639, 641 (8th Cir. 2001), 42
- Barnes v. Dale*, 530 So.2d 770 (Ala. 1988), 27
- Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511 (1959), 42
- Bitler v. A.O. Smith Corp.*, 252 F. Supp. 2d 1123, 1124 (D. Colo. 2003), 90
- Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834–35 (7th Cir. 1999), 41
- Bolarinwa v. Williams*, 593 F.3d 226, 230–31 (2d Cir. 2010), 61
- Bowers v. Baystate Technologies*, 320 F.3d 1317 (Fed. Cir. 2003), 127, 153
- Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993), 166
- Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469, 473 (2d Cir. 2010), 72
- Bryant v. Yellen*, 447 U.S. 352, 366–68 (1980), 72
- Byrd v. Reno*, 180 F.3d 298, 300 (D.C. Cir. 1999), 71
- Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1555 (11th Cir. 1989), 94
- Caitlin v. United States*, 324 U.S. 229, 233 (1945), 33
- California v. Rooney*, 483 U.S. 307, 311 (1987), 74
- Carley v. Wheeled Coach*, 991 F.2d 1117 (3d Cir. 1993), 93
- Chambers v. Ohio Dept. of Human Services*, 145 F.3d 793, 796 (6th Cir. 1998).
- Chapman v. California*, 386 U.S. 18, 24 (1967), 165, 181, 182

- Chemetron II*, 212 F.3d at 209–10, 154, 156
- Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 38 (2004), 42
- Church of Scientology Intern. v. Eli Lilly & Co.*, 778 F. Supp. 661, 666 (S.D.N.Y. 1991), 92
- Church of Scientology v. United States*, 506 U.S. 9, 18 n. 11 (1992), 71
- Cobbledick v. U.S.*, 309 U.S. 323, 325 (1940), 33
- Cohen v. Bd. of Trustees*, 867 F.2d 1455, 1465 n. 9 (3d Cir. 1989), 38
- Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), 36
- Colbert v. Potter*, 471 F.3d 158, 165–167 (D.C. Cir. 2006), 94
- Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990), 162
- Corbin v. Cannon*, 838 F. Supp. 561 (M.D. Fla. 1993), 93
- Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 10 (1980), 37
- Dairy Queen, Inc. v. Wood*, 369 U.S. 472 (1962), 42
- Davis v. U.S.*, 512 U.S. 452, 457–58 & n. \* (1994), 81
- Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980), 69, 74, 75, 76
- Detroit Edison Co. v. Nat'l Labor Relations Bd.*, 440 U.S. 301, 317 (1979), 92
- Devlin v. Scardelletti*, 536 U.S. 1 (2002), 70
- Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1992), 35
- Dilliplaine v. Lehigh Valley Trust Co.*, 322 A.2d 114 (Pa. 1974), 27
- Dilworth v. Riner*, 343 F.2d 226, 229 (5th Cir. 1965), 39
- Dippin' Dots, Inc. v. Frosty Bites Distrib. LLC*, 369 F.3d 1197, 1203–04 (11th Cir. 2004), 92
- Drewett v. Aetna Cas. Sur. Co.*, 539 F.2d 496, 498 (5th Cir. 1976), 97
- Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981), 93
- Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162, 166 (11th Cir. 1997), 37
- Electrical. Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939), 74
- Elliott Indus. Ltd. Partnership v. BP American Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005), 72
- Endress + Hauser, Inc. v. Hawk Measurement Sys. Pty. Ltd.*, 932 F. Supp. 1147, 1148–50, 64
- Environmental Prot. Info. Ctr., Inc. v. Pacific Lumber Co.*, 257 F.3d 1071, 1075 (9th Cir. 2001), 74, 75, 76
- Federal Election Com'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007), 78
- Federal Prescription Serv., Inc. v. American Pharm. Asso.*, 636 F.2d 755, 758 (D.C. Cir. 1980), 64
- Federated Mut. Ins. Co. v. McNeal*, 943 So.2d 658, 663 (Miss. 2006), 71
- First Nat'l Bank of South Carolina v. United States*, 413 F. Supp. 1107, 1110 (D.S.C. 1976), 92
- Forney v. Apfel*, 524 U.S. 266, 271 (1998), 74
- Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000), 78

- Fry v. Pliler*, 551 U.S. 112, 114 (2007), 165
- Garriga v. Sanitation Dist. No. 1*, 2003 Ky. App. LEXIS 305 at \*22, n. 26 (Ky. App. 2003) (Ky. Ct. App. 2003), 29, 30, 77
- General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997), 162
- Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 66 (1st Cir. 2001), 121
- Grant v. Superior Court*, 275 Cal. Rptr. 564, 568 (Cal. App. 1990), 64
- Graphic Commc' n Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 6 (1st Cir. 2001), 61
- Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 347–48 (5th Cir. 1982), 91
- Harris v. Del Taco, Inc.*, 396 F. Supp. 2d 1107 (C.D. Cal. 2005), 93
- Hershey Foods Corp. v. Hershey Creamery Co.*, 945 F.2d 1272, 1277 (3d Cir. 1991), 38
- Hexcel Corporation v. Stepman Co.*, 239 B.R. 564, 570 (N.D. Cal. 1999), 150, 151
- Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), 64, 65
- Hohn v. United States*, 524 U.S. 236, 241 (1998), 82
- Holmes Group, Inc. v. Vornado Air Circulation Sys. Inc.*, 534 U.S. 826 (2002), 12
- Hone v. Hanafin*, 104 S.W.3d 884, 886 (Tex. 2003), 62
- In re C.J.*, 758 N.E.2d 335, 337 (Ill. App. Ct. 2001), 63
- In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003), 36
- In re Chance Industries, Inc.*, 367 B.R. 689, 708 (Bankr. D. Kan. 2006), 154, 155
- In re City of Memphis*, 293 F.3d 345, 346 (6th Cir. 2002), 39
- In re Eagle-Pitcher Indus., Inc.*, 255 B.R. 700, 704 (Bankr. S.D. Ohio 2000), 150
- In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 1107–08 (10th Cir. 2001), 38
- In re Marriage of Link*, 839 N.E.2d 678, 680 (Ill. App. Ct. 2005), 46
- In re Olivia C.*, 868 N.E.2d 307, 310 (Ill. App. Ct. 2007), 47
- In re Orshansky*, 804 A.2d 1077, 1090 (D.C. 2002), 71
- In re Parullo*, 13 B.R. 953 (Bankr. N.D. Ill. 1981), 93
- In re Paul*, 513 S.E.2d 219, 221 (Ga. 1999), 46
- In re School Asbestos Litig.*, 977 F.2d 764, 777–78, 42
- Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1012 (6th Cir. 2003), 93
- Intercounty Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.*, 310 F.3d 537, 539–40 (7th Cir. 2002), 36
- International Broth. of Elec. Workers v. I.C.C.*, 862 F.2d 330, 334 (D.C. Cir. 1988), 75
- Irons v. Federal Bureau of Investigation*, 811 F.2d 681, 683–84 (1st Cir. 1987), 36
- Johnson v. United States*, 520 U.S. 461, 466–67 (1997), 27, 164
- Jones v. Chemetron Corp.*, 212 F.3 199, 209–210 (3rd Cir. 2000), 151

- Jones v. White*, 992 F.2d 1548, 1566 (11th Cir. 1993), 93
- Kazales v. Minto Leasing, Inc.*, 61 A.D.2d 1039, 1040 (N.Y.A.D. 1978), 28
- Keith v. Volpe*, 118 F.3d 1386, 1391 (9th Cir. 1997), 71
- Kerr v. United States Dist. Court for Northern Dist. of Cal.*, 426 U.S. 394, 403 (1976), 42
- Lassa v. Rongstad*, 718 N.W.2d 673, 694 (Wis. 2006), 47
- Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 144 (4th Cir. 2001), 41
- Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003), 83, 89, 97
- Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992), 77
- Luxton v. North River Bridge Co.*, 147 U.S. 337, 341 (1893), 33
- Maine School Admin. Dist. 35 v. Mr. and Mrs. R.*, 321 F.3d 9, 17 (1st Cir. 2003), 121
- Marino v. Ortiz*, 484 U.S. 301, 304 (1988), 70, 71, 72
- Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 379 (1985), 66
- Marsh v. Mountain Zephyr, Inc.*, 50 Cal. Rptr. 2d 493, 498–99 (Cal. App. 1996), 46
- Mason v. Mathiasen Tanker Industries, Inc.*, 298 F.2d 28 (4th Cir. 1962), 92
- McBride v. CITGO Petroleum Corp.*, 281 F.3d 1099, 1104 (10th Cir. 2002), 53
- McFarlin v. Conseco Services, LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004), 39
- McKaskle v. Wiggins*, 465 U.S. 168 (1984), 165
- Meredith v. Oregon*, 321 F.3d 807, 815 (9th Cir. 2003), 43
- Michigan v. Mosley*, 423 U.S. 96, 104 (1975), 181, 182
- Miranda v. Arizona*, 384 U.S. 436 (1966), 181
- Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985), 36
- Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12–13 (1983), 36
- Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), 163
- Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950), 150, 151, 154, 155, 156
- Murphy v. Hunt*, 455 U.S. 478, 481 (1982), 77, 89
- National R.R. Passenger Corp. v. ExpressTrak, L.L.C.*, 330 F.3d 523, 528 (D.C. Cir. 2003), 43
- Neeld v. Nat'l Hockey League*, 594 F.2d 1297 (9th Cir. 1979), 92
- Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 132–33 (3d Cir. 2002), 81
- Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001), 41
- Oakville Dev. Corp., v. FDIC*, 986 F.2d 611, 613 (1st Cir. 1993), 121
- Oliver v. Hallett Const. Co.*, 421 F.2d 365 (8th Cir. 1970), 93
- Ornelas v. United States*, 517 U.S. 690, 695 (1996), 161



- People v. Moye*, 213 P.3d 652, 659 (Cal. 2009), 23
- People v. Samuels*, 113 P.3d 1125, 1137 (Cal. 2005), 166
- People v. Superior Court (Romero)*, 917 P.2d 628 (Cal. 1996), 104
- Perdon Coal Co./United Coal Co. v. Stiltner*, 323 S.E.2d 110 (Va. 1984), 26
- Pioneer Invest. Services Co. v. Brunswick Asso. Ltd. P'ship*, 507 U.S. 380, 388 (1993), 61
- Prado–Steiman v. Bush*, 221 F.3d 1266, 1274–76 (11th Cir. 2000), 41
- Rabbi Jacob Joseph School v. Province of Mendoza*, 425 F.3d 207, 210–11 (2d Cir. 2005), 34
- Raines v. Byrd*, 521 U.S. 811, 817 (1997), 29, 76
- Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130, 1137–38 (9th Cir. 2002), 34
- Reno v. Koray*, 515 U.S. 50, 55 n.2 (1995), 81
- Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1290 n. 12 (11th Cir. 2002), 53
- Ross v. Kemp*, 785 F.2d 1467, 1474–75 (11th Cir. 1986), 94
- S.E.C. v. Black*, 163 F.3d 188, 195 (3d Cir. 1998), 39
- S.E.C. v. Forex Asset Management LLC*, 242 F.3d 325, 329 (5th Cir. 2001), 71
- Samnorwood Indep. School of Dist. v. Texas Educ. Agency*, 533 F.3d 258, 265–66 (5th Cir. 2008), 71
- Sears v. Hull*, 961 P.2d 1013, 1019 (Ariz. 1998), 77
- Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435–36 (1956), 37
- Seminole Tribe of Fla. v. Butterworth*, 491 F. Supp. 1015, 1019 (S.D. Fla. 1980), 92
- Shelby v. Subperformance Int'l*, 435 F.2d 42, 45–46 (1st Cir. 2006), 121
- Siedle v. Putnam Invests., Inc.*, 147 F.3d 7, 10 (1st Cir. 1998), 149, 151, 162
- Singh v. DaimlerBenz, AG*, 800 F. Supp. 260, 263 (E.D. Pa. 1992), 39
- Sosna v. Iowa*, 419 U.S. 393, 398 & n. 7, 402 (1975), 78
- Stack v. Boyle*, 342 U.S. 1 (1945), 36
- State v. McAdams*, 594 A.2d 1273 (N.H. 1991), 27
- State v. Sarabia*, 875 P.2d 227, 230 (Idaho 1994), 27
- Strange v. State*, 258 S.W.3d 184 (Tex. App. 2007), 62
- Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993), 165
- Sumitomo Copper Litigation v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001), 41
- Swinkle v. Illinois Civil Service Com'n*, 903 N.E.2d 746 (Ill. App. 2009), 56
- Swint v. Chambers County Comm'n*, 514 U.S. 35, 35–36 (1995), 35, 43
- Therrien v. Target Corp.*, 617 F.3d 1242, 1249 (10th Cir. 2010), 162, 165
- Trans World Airlines, Inc. v. Hughes*, 314 F. Supp. 94, 96 (S.D.N.Y. 1970), 64
- Trust for Certificate Holders of Merrill Lynch Mortg. Investors, Inc. Mortg. Pass-Through Certificates, Series*

- 1991-cl v. Love Funding Corp.*, 496 F.3d 171, 173 (2d Cir. 2007), 76
- Tumey v. Ohio*, 273 U.S. 510 (1927), 165
- U.S. Bancorp. Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25, 29 (1994), 79
- United States v. Mundy*, 806 F. Supp. 373, 377 (E.D.N.Y. 1992), 92
- United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230, 2234 (2009), 70
- United States v. BioPort Corp.*, 270 F. Supp. 2d 968, 972 (W.D. Mich. 2003), 93
- United States v. Gonzalez-Lopez*, 548 U.S. 140, 148–49 (2006), 165
- United States v. Gumbs*, 283 F.3d 128 (3d Cir. 2002), 92
- United States v. Perry*, 360 F.3d 519, 526–27 (2004), 72
- United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948), 161
- United States v. Van Hazel*, 468 F. Supp. 2d 792 (E.D.N.C. 2006), 93
- Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 199 & n. 3 (4th Cir. 2000), 79
- Verhoven v. Brunswick School Comm.*, 207 F.3d 1, 5 (1st Cir. 1999), 121
- Vitello v. J.C. Penny Co.*, 107 F.3d 869, 1997 WL 87248, at \*3, n. 1 (4th Cir. 1997), 98
- Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003), 80, 81
- Waller v. Georgia*, 467 U.S. 39 (1984), 164
- Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000), 41
- Welker ex rel. Bradbury v. Teachers Standards and Practices Comm'n*, 27 P.3d 1038, 1041 (Or. 2001), 60
- Wilkinson v. Fabry*, 869 P.2d 182 (Ariz. App. 1992), 56
- Wooden v. Missouri Pacific R. Co.*, 862 F.2d 560 (5th Cir. 1989), 92
- Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495 (10th Cir. 1997), 93

# Table of Statutes and Rules

11 U.S.C. 362(a)(2), 65	Wis. Stat. § 808.04, 59
18 U.S.C. § 700(d), 13	Wis. Stat. § 808.04(8), 60
28 U.S.C. § 41, 6	Wis. Stat. § 809.30(2)(b), 59
28 U.S.C. § 46(b), 6	
28 U.S.C. § 158(b)(1), (5), 5	<b>Federal Rules of Appellate Procedure</b>
28 U.S.C. § 158(d)(2), 5	Rule 1, 23, 37, 41, 57, 72, 73, 80, 87, 95, 111, 174, 191
28 U.S.C. § 371, 6	Rule 2, 23, 24, 47, 57, 59, 86, 105, 120, 174, 196, 226
28 U.S.C. § 1253, 13	Rule 3, 24, 33–35, 40, 47, 48, 53, 58, 62, 73, 126, 220
28 U.S.C. § 1291, 6, 33, 34, 36, 38, 43	Rule 4, 53, 56–59, 61, 87
28 U.S.C. § 1292, 38	Rule 5, 23, 26, 31, 61, 70, 74
28 U.S.C. § 1292(a)(1), 38, 45	Rule 6, 58
28 U.S.C. § 1292(a)(2), 39, 45	Rule 7, 23, 57, 62, 111, 119
28 U.S.C. § 1292(b), 39	Rule 8, 85
28 U.S.C. § 1292(c)(2), 34	Rule 10, 13, 84–87, 90, 95
28 U.S.C. § 1294, 5	Rule 11, 205
28 U.S.C. § 1295, 5	Rule 12, 23, 24
28 U.S.C. § 1331, 29	Rule 14, 65, 87
28 U.S.C. § 1332, 29	Rule 15, 23, 62
28 U.S.C. § 1651(a), 41	Rule 18, 134
28 U.S.C. § 1961, 64	Rule 19, 23, 24
42 U.S.C. § 1983, 77	Rule 23, 35, 40, 41, 50
28 U.S.C. § 2342, 5	Rule 24, 23, 71
28 U.S.C. § 2343, 5	Rule 25, 73
Cal. Code Civ. P. § 904.1, 43	Rule 26, 62
Cal. Code Civ. P. § 918(b), 65	Rule 28, 24, 33, 49
Cal. Com. Code § 2207(2), 103	Rule 29, 79–82
Cal. Pen. Code § 1259, 28	Rule 30, 63, 95
Ga. Code Ann. § 5-6-38(a), 59	Rule 33, 26, 81
Tenn. Code Ann. § 40-14-301-301, 88	Rule 35, 34, 35
U.S. Const. art. I, 4	
U.S. Const. art. III, 3, 4, 29	
Wis. Stat. § 808.03(2)(a) and (b), 47	

Rule 40, 40

Rule 43, 72–74

Rule 46, 20, 21

Rule 48, 47

**Federal Rules of Civil Procedure**

Rule 1, 23, 37, 41, 57, 72, 73, 80, 87,  
95, 111, 174, 191

Rule 6, 58

Rule 11, 205

Rule 12, 23, 24

Rule 23, 35, 40, 41, 50

Rule 24, 23, 71

Rule 50, 24, 25, 164

Rule 54, 34, 36, 37, 50

Rule 58, 57, 58

Rule 59, 25

Rule 61, 164

Rule 62, 64, 65

Rule 77, 62

Rule 79, 57, 58

**Federal Rules of Criminal Procedure**

Rule 29, 79–82

Rule 33, 26, 81

**Federal Rules of Evidence**

Rule 201, 90, 91

**Supreme Court Rules**

Rule 3, 24, 33–35, 40, 47, 48, 53, 58,  
62, 73, 126, 220

Rule 5, 23, 26, 31, 61, 70, 74

Rule 10, 13, 84–87, 90, 95

Rule 12, 23, 24

Rule 14, 65, 87

Rule 15, 23, 62

Rule 18, 134

Rule 23, 35, 40, 41, 50

Rule 24, 23, 71

Rule 25, 73

Rule 29, 79–82

Rule 30, 63, 95

Rule 33, 26, 81

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# Introduction

*Mastering Appellate Advocacy and Process* is intended for both upper division law students and practicing attorneys. Our goal in writing this book was to produce a source that comprehensively yet concisely covers all major aspects of an appeal—from preserving error, assembling an appellate record or appendix, through drafting effective appellate briefs and oral argument. We have also included a chapter on moot court, specifically on maximizing one’s chances of succeeding in law school’s longest running intercollegiate sport.

This book is unique in that it addresses both appellate *advocacy* and appellate *process*—subjects that are usually covered separately in different books, or taught in different courses in law school. We believe that advocacy and process go hand and hand, however. In real life, appellate process is of little moment in the abstract. It becomes relevant when attorneys are involved in an actual case in which they or the other side may pursue an appeal. Also, in real life, approaching appellate advocacy in isolation without knowing and appreciating the process involved is both foolish and dangerous. The best crafted appellate argument in the world will do the client little good if error was not preserved below, if a notice of appeal was not timely filed, if the record is inadequate, etc.

Appellate process begins long before the trial or other disposition in the trial court is concluded. It begins with producing and protecting the factual and legal record in the trial court and clearly communicating to all involved that a ruling on the merits or otherwise against one’s client can and will be effectively challenged and reversed on appeal should it issue. In other words, error must be preserved before it may be appealed.

After the proceedings in the trial court have concluded, the appellate process is formally initiated by filing the notice of appeal of a final order or judgment or petition for review of an interlocutory order. This is followed by preparation of the record on appeal, formulation of the statement of the issues, and briefing. These steps, in turn, are followed by oral argument and the appellate court’s disposition of the case.

At each juncture there are numerous technical requirements and traps for the unwary. Careful preparation and foresight are critical to effective appellate practice. The aim of this book is to provide a general guide, which, when

supplemented by the applicable specific rules of the jurisdiction involved, will guide the novice, whether law student or lawyer, through the process.

The book also explains techniques of advocacy, both in written submissions and in oral argument before the court. It begins with the building blocks of appellate legal analysis and research. Effective appellate advocacy takes looking at the facts and law with a fresh eye, and with a focus on error under the applicable standards of review. Techniques and strategies for compelling appellate legal drafting are reviewed, including organizational principles and using the CRAC (Conclusion, Rule/Law, Application, Conclusion) format to draft persuasively. Drafting the appellate brief itself then is covered extensively, from the various audiences and the processes by which they may review the briefs and decide the appeal, to developing a message or theme to package the arguments, to drafting individual components, to using policy to persuade. In the chapter on oral argument we introduce the talking points method for both conveying your main arguments as well as answering questions from the bench. The focus of all the chapters on advocacy is on *persuading a court to rule your way* as opposed to “winning an argument” or showing up the other side.

The book concludes with a chapter on moot court—where doing well means showing the judgments how much you know and how easily you can explain it all—versus actually persuading them to rule a certain way.

We welcome readers’ comments, reactions, and war stories on the subjects covered in this book. [dclooper@gmail.com](mailto:dclooper@gmail.com); [gkuney@utk.edu](mailto:gkuney@utk.edu).

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