

Contemporary Appellate Advocacy

Contemporary Appellate Advocacy

Ann Ching

CLINICAL PROFESSOR OF LAW
ARIZONA STATE UNIVERSITY
SANDRA DAY O'CONNOR COLLEGE OF LAW

David B. Gass

CHIEF JUDGE
ARIZONA COURT OF APPEALS
DIVISION ONE



CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2025
Carolina Academic Press, LLC
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Names: Ching, Ann author | Gass, David B. author
Title: Contemporary appellate advocacy / Ann Ching, David B. Gass.
Description: Durham, North Carolina : Carolina Academic Press, 2025. |
Includes bibliographical references and index.
Identifiers: LCCN 2025005486 | ISBN 9781531026523 paperback |
ISBN 9781531026530 ebook
Subjects: LCSH: Appellate procedure—United States | Trial practice—
United States | Appellate procedure | Legal composition
Classification: LCC KF9050 .C49 2025 | DDC 347.73/8—dc23/eng/20250207
LC record available at <https://lcn.loc.gov/2025005486>

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
(919) 489-7486
www.cap-press.com

Printed in the United States of America

Contents

Acknowledgments	xv
Introduction	xvii
Why choose this book?	xviii
Using <i>Contemporary Appellate Advocacy</i> to enhance your skills	xix
 Part 1 • Introduction to Contemporary Appellate Advocacy	
Chapter 1 • Overview of Appellate Practice in the United States	3
I. Introduction	3
II. How to be a successful appellate advocate	4
III. Appellate practice in federal courts	5
IV. Appellate practice in state courts	10
V. Appellate practice in tribal courts	12
VI. Appeals of administrative agency decisions	13
VII. Conclusion	15
Discussion Questions	15
Chapter 2 • Navigating the Appellate Process	17
I. Introduction	17
II. Understanding the rules governing appeals	19
III. The mechanics of an appeal	23
A. Initiating an appeal	24
B. Formatting the brief	25
C. Jurisdiction over appeals	27
D. Relief sought	28
IV. Types of appeals: Of right, discretionary, and interlocutory	28
A. Of right appeals	28
B. Discretionary appeals	29
1. Lower courts want guidance	31
2. Issues of first impression	31
3. Nature of the issues and legal principles	32
4. Public importance	32
5. Merits of the appeal	33

6. Judicial economy	33
7. Likelihood of recurrence	34
C. Interlocutory appeals	34
V. Appellate motion practice	35
A. Motion to stay the action in the trial court	36
B. Motion to dismiss	38
C. Motion for summary disposition	41
D. Motion for leave to file amicus brief	42
VI. Conclusion	43
Discussion Questions	44
 Chapter 3 • Ethics and Professionalism in Appellate Advocacy	 45
I. Introduction	45
II. Frequently encountered ethical issues in appellate practice	46
A. Issues that arise when dealing with clients	47
B. Issues that arise in identifying appellate claims	48
C. Issues that arise when writing briefs	51
1. Using your prior work or another lawyer's work	51
2. Delegating work to assistants	53
3. Criticizing judges, counsel, and opposing parties	54
4. Citing adverse authority and obeying court rules	56
D. Issues that arise in oral argument	57
E. Diversity and cross-cultural competence	58
F. Creating your professional identity	60
III. Conclusion	61
Discussion Questions	61
Exercises	62
 Part 2 • Building Appellate Arguments and Drafting Appellate Briefs	
 Chapter 4 • Appellate Foundations: Preserving the Record, Identifying Issues, and Understanding Standards of Review	 65
I. Introduction	65
II. Preserving the record	66
A. Verbatim record of proceedings	67
B. Motion practice	68
1. Pretrial motions and dispositive motions	68
2. Motions in limine	69
3. Post-trial motions	69
C. Trial objections	70

D. Offers of proof	70
E. Admission and retention of evidence	71
F. Specific factual and legal findings	71
G. Facts not in the record: Judicial notice and late-occurring jurisdictional facts	71
III. Reviewing appellate records	72
IV. Standards of review	73
A. Factual findings: Clear error and substantial evidence	74
B. Discretionary rulings: Abuse of discretion or arbitrary and capricious	75
C. Legal rulings: <i>De novo</i> — generally	77
D. Mixed questions of fact and law	78
E. Unpreserved issues: Plain or fundamental error	79
F. Prejudice	81
V. Conclusion	82
Discussion Questions	82
Chapter 5 • Crafting Compelling Arguments	83
I. Introduction	83
II. Selecting arguments to present on appeal	84
III. Organizing appellate arguments	87
A. Large-scale organization	87
1. Threshold arguments first	88
2. Strongest arguments first	88
3. Topical grouping	88
4. Chronological order	89
5. Arguing in the alternative	89
B. Connecting multiple arguments within a brief using roadmaps and point headings	89
1. Roadmaps	89
2. Point Headings	92
a. Characteristics of effective point headings	92
b. Types of point headings	92
c. Best practices for crafting effective headings	94
C. Small-scale organization of individual arguments	95
1. Follow an analytical paradigm	95
2. Start with your primary argument, not the opposing side's argument	95
3. Always balance the facts and the law	96
4. Pay attention to hierarchies of authority	96
5. Apply the law, not cases	97
6. Connect arguments and sub-arguments to create a cohesive and logical flow	97

IV. Constructing standard forms of legal arguments	97
A. Arguing from precedent: Analogical reasoning	97
1. Use cases to illustrate legal rules	98
2. Focus on the relevant facts	100
3. Choose influential cases	100
4. Anticipate counterarguments	100
B. Rule-based arguments	101
C. Statutory interpretation	103
D. Policy arguments	106
E. Empirical arguments (Brandeis briefs)	108
V. Identifying and avoiding logical fallacies in appellate advocacy	110
A. Logical fallacies defined	111
B. Frequently encountered fallacies in legal writing	112
C. Best practices to avoid fallacies in appellate arguments	113
Exercise	115
VI. Conclusion	115
Discussion Questions	116
Chapter 6 • Drafting Effective Briefs: Beyond the Argument	117
I. Introduction	117
II. First impressions: Cover Page, Table of Contents, and Table of Authorities	118
A. Cover Page or Case Caption Page	119
B. Table of Contents	119
C. Table of Authorities	119
III. Setting the stage: Introduction and Jurisdictional Statement	120
A. Introduction	121
B. Jurisdictional Statement	123
IV. Crafting the questions: Issues Presented	123
A. Format 1: “Whether” statements	124
B. Format 2: Under/does/when construction	125
C. Format 3: The deep issue	126
V. Telling a story: Statement of the Case	127
A. Procedural History	128
B. Statement of Facts	128
VI. Previewing your case: Summary of the Argument and Standard of Review	130
A. Summary of the Argument	130
B. Standard of Review	131
VII. Closing it out: Conclusion and Certificates	132
A. Conclusion	132
B. Certificate of Compliance	133

C. Certificate of Service	134
D. Request for attorney fees and costs	134
VIII. Conclusion	135
Discussion Questions	135
Chapter 7 • Formatting Briefs for the Modern Reader	137
I. Introduction	137
II. Local court rules and guidelines	138
III. Formatting briefs for screen readers	139
A. Typefaces	139
B. White space and point headings	141
C. Hyperlinks, bookmarks, and images	143
D. Complying with electronic filing requirements	145
IV. Formatting hard-copy briefs	145
V. Writing for text-to-speech	146
VI. Conclusion	148
Exercises	148
 Part 3 • A Contemporary Advocate's Guide to Persuasive Writing	
Chapter 8 • Fundamentals of Good Legal Writing	151
I. Introduction	151
II. Developing your writing process	152
A. Pre-writing	152
B. Writing	154
C. Editing and polishing	154
Exercises	156
III. Writing clearly and concisely: The ACE approach	156
A. Accuracy	157
B. Clarity	158
1. Words	158
2. Sentences	160
3. Paragraphs and sections	162
C. Efficiency	163
1. Avoid the passive voice	163
2. Avoid nominalizations	164
3. Avoid expletives	166
Exercise	168
IV. Maintaining a professional tone	168
Discussion Questions and Exercises	171
V. Citing authorities and avoiding plagiarism	171
VI. Conclusion	173
Discussion Questions	173

Chapter 9 • The Science of Persuasion: Modern Theories and Strategies	175
I. Introduction	175
II. Conceptualizing the persuasion process	176
A. The advocate	177
1. Authority	178
2. Liking	179
3. Strategies for advocates: Increasing authority and likeability	180
Discussion Questions	181
B. The decision-maker	181
1. Fast and slow thinking	182
2. Mental shortcuts and cognitive biases	183
3. Cognitive load and decision fatigue	184
4. Strategies for advocates:	
Persuading the decision-maker	185
a. Use natural, conversational language	185
b. Pay attention to formatting	186
c. Be selective when presenting facts and arguments	187
Discussion Questions	188
C. The message	188
1. The “rules” of persuasive writing	189
2. Strategies for advocates:	
Crafting a persuasive message	189
a. Priming and framing	190
Exercise: Priming in a statement of facts	191
Exercise: Framing the issues	193
b. Abstract vs. Concrete language	193
Discussion Questions and Exercises	195
c. The context	195
III. Conclusion	196
Discussion Questions and Exercises	196
Chapter 10 • Advanced Persuasive Writing Techniques	199
I. Introduction	199
II. The three Ps of persuasive writing	199
A. Perspective	200
Exercise: Writing rules from a client’s perspective	203
B. Perception	203
Exercise: Word choice and perception	205
C. Position	205
Exercise: Positions of emphasis	206

III. Telling a story with your legal writing	207
A. The power of narratives	208
B. Story components: Theme, conflict, and archetypes	208
1. Theme	208
Exercise: Articulating a theme	210
2. Conflict	210
Exercise: Sources of conflict	211
3. Archetypes	211
Exercise: Telling a story from a different perspective	212
IV. Conclusion	212
Discussion Questions	213

Part 4 • Oral Argument in the Modern Era

Chapter 11 • Mastering Oral Argument: From Preparation to Delivery	217
I. Introduction	217
II. The role of oral argument in your appellate strategy	218
A. When to request oral argument	218
1. Complex or novel issues	219
2. Split in authority	219
3. Far-reaching consequences	219
4. Close cases	219
B. Waiving oral argument in appellate cases	220
III. The dynamics of face-to-face persuasion: Theories and insights	221
IV. Oral argument: Practice and procedures	222
A. Logistical preparation	223
B. Substantive preparation	224
1. Researching judges	225
2. Choosing arguments to present	225
3. Organizing your argument	226
a. Introduction	226
b. Argument	227
c. Conclusion	227
d. Rebuttal	228
4. Anticipating questions	228
5. Preparing your materials	231
V. Oral argument: Virtual and hybrid proceedings	232
A. Virtual oral arguments	232
1. How virtual oral arguments work	232

2. Best practices for virtual oral arguments	233
a. Video considerations	233
b. Audio considerations	235
c. Presentation style	236
B. Hybrid proceedings	237
VI. Presenting your best self during oral argument	238
A. Projecting confidence	238
B. Authenticity matters	239
C. Speaking like a pro: Advice from other disciplines	240
VII. Dealing with challenges	241
A. Extreme anxiety	241
B. Addressing biases	242
VIII. Conclusion	243
Discussion Questions	244

Part 5 • Special Considerations in Modern Appellate Advocacy

Chapter 12 • Technology’s Evolving Role in Contemporary Appellate Practice	247
I. Introduction	247
II. The ethics of using legal technology	248
III. Selecting legal technology for your practice	250
IV. Using legal analytics in appellate advocacy	252
A. Legal analytics overview	254
B. Using legal analytics in appellate practice	256
1. Identifying trends and patterns	256
2. Assessing case strength	256
3. Crafting effective arguments	257
V. The role of artificial intelligence in appellate practice	257
A. Technology’s impact on the practice of law	259
B. AI, defined	262
C. The lawyer’s responsibility	263
1. Establishing competence	263
2. Protecting confidentiality	263
3. Detecting bias	264
D. Best practices when using AI in appellate practice	266
VI. Conclusion	268
Discussion Questions	268

Chapter 13 • Appellate Advocacy in Other Contexts:	
Moot Court, Clerkships, and Pro Bono Advocacy	269
I. Introduction	269
II. Moot court programs	270
A. Succeeding in moot court competitions	270
1. Preparation is key	271
2. Know the rules and strategize	272
3. Write a winning brief	272
4. Rehearse early and often	273
5. Dazzle the judges	274
6. Enjoy the ride	274
B. Coaching a moot court team	275
1. Establish clear expectations	275
2. Empower student leadership	275
3. Understand the pressures students face	276
4. Provide effective on-site coaching	276
5. Encourage the team to reflect	276
III. Preparing for appellate court clerkships	277
A. The basics of the job	278
B. Due diligence	279
C. A personalized cover letter	281
D. An informative and readable resume	282
E. A useful writing sample	283
F. The interview	284
IV. Pro bono appeals	285
V. Conclusion	287
Discussion Questions	288
 Appendices	 289
Appendix A: Sample Appellate Brief Editing Checklist	291
Appendix B: Sample Oral Argument Checklist	295
Appendix C: Other Suggested Texts	297
 Index	 299

Acknowledgments

Contemporary Appellate Advocacy is the culmination of my appellate practice experience as both a lawyer and educator. I am grateful for the support and contributions of numerous individuals who have guided and inspired me throughout the journey of writing this book.

I would like to express my sincere appreciation to my appellate advocacy students at the Pepperdine Caruso School of Law and the Arizona State University Sandra Day O'Connor College of Law. Their thoughtful feedback has significantly influenced the development of this book. I also wish to thank my research assistants, Kenneth Misajet and Mira Eissa, for their outstanding contributions.

I am fortunate to have worked alongside exceptional legal writing colleagues at Pepperdine and Arizona State University. Their encouragement and willingness to share teaching materials and practical insights has been invaluable.

To my family and friends, I offer heartfelt thanks for their unwavering support throughout the writing process. My husband deserves special recognition for his patience and partnership. I also wish to honor the memory of my parents, Nancy Ann Ching and Anthony B. Ching, whose enduring influence continues to inspire me. My father, Arizona's first Solicitor General, has been a lasting role model for me and many others in the appellate practice community, and his legacy motivates me to strive for excellence.

Finally, I extend my deepest gratitude to the editors at Carolina Academic Press, particularly David Herzig, for believing in this project. As an educator who has long relied on CAP's publications, I am honored to contribute to their collection of high-quality legal writing texts.

Ann Ching

I will be brief, otherwise the acknowledgment would be longer than the book. I start with my husband Donald Karl, who believed in me before I did. I advance to my mother, Betty Gass, who endured so much and who found her options limited because of others. My options came because of her. Then

I move on to my granny, Velma Jean Moser, who taught me love and kindness and acceptance. I cannot end without mentioning my co-author, Ann Ching, who envisioned a book to help students in an ever changing world. It truly is her book. And lastly, I have Ann's husband Al to thank, who adores Ann and encourages her to live her dreams, like writing this book. His love for Ann is inspiring and endearing. He makes us both laugh.

David B. Gass

Introduction

Appellate advocacy is often viewed through an aura of nobility and intellectual challenge. Think of the movies and television shows that depict a lone advocate standing before a panel of esteemed judges, passionately arguing on behalf of a deserving client. In popular culture, appellate practice is typically portrayed as a high-stakes, dramatic showdown between advocates and jurists.

However, the reality of appellate practice is more nuanced. While it can be a noble pursuit, it can also be routine, even unappreciated. Yet appellate practice remains both a vital component of the U.S. legal system and a laudable career goal. Effective appellate advocates play a crucial role in representing clients while ensuring adherence to high ethical standards and the rule of law.

For law students, studying appellate advocacy offers a unique opportunity to hone written and oral advocacy skills. Developing expertise in appellate advocacy can enhance your ability to analyze complex legal issues, craft persuasive arguments, and communicate effectively with judges, clients, and colleagues.

For practicing lawyers, appellate advocacy presents a chance to refine skills, expand knowledge, and make a meaningful impact. Even those who practice appellate law only on a pro bono basis want to deliver their best performance. Career appellate practitioners can also benefit from exploring new perspectives and best practices.

This textbook aims to demystify the appellate process by providing a comprehensive guide to the art and practice of appellate advocacy. Through a combination of theoretical foundations and practical advice, this book explores the intricacies of appellate practice and empowers you to become a more effective advocate.

Why choose this book?

Contemporary Appellate Advocacy is a comprehensive textbook designed to teach the fundamentals of appellate advocacy to law students and lawyers. This book aims to be a practical, relatable, and engaging guide to the art and science of appellate advocacy.

Contemporary Appellate Advocacy stands out from other textbooks due to its:

- Practical approach, making complex concepts accessible and easy to understand
- Emphasis on ethics and technology, reflecting the evolving nature of appellate practice
- Direct discussions of professionalism and bias, promoting self-awareness and effective advocacy
- Reliance on disciplines outside the law, such as psychology, economics, and social science, to teach concepts relating to persuasion
- Modern approach to writing style and grammar, eschewing old-fashioned rules in favor of a more conversational style

Based on these qualities, *Contemporary Appellate Advocacy* is a suitable text for a wide variety of audiences. You'll find this book to be useful, whether you are:

- New to appellate practice and seeking a comprehensive introduction
- Looking to sharpen your writing skills and improve your advocacy
- Interested in understanding the psychology of persuasion and effective legal writing
- Teaching appellate advocacy and seeking a valuable resource for your students
- Participating in a moot court program or clerking for a judge

The practical nature of this text extends beyond these pages. For one, both authors bring a wealth of real-world expertise and practical wisdom to these pages. Ann Ching is an experienced lawyer and a full-time law professor. Even throughout her teaching career, Professor Ching has continued to serve as a part-time judge, a volunteer appellate attorney for veterans, and a volunteer ethics lawyer for the State Bar of Arizona. David Gass is a seasoned judge, having served on the trial bench of the Arizona Superior Court and as an appellate judge for the Arizona Court of Appeals, Division One. Judge Gass is

nationally recognized for his excellence in teaching judges and lawyers the finer points of written and oral advocacy.

Using *Contemporary Appellate Advocacy* to enhance your skills

This book is designed to support your goals and enhance your skills in appellate advocacy. It can be used as a:

- Primary textbook for appellate advocacy courses
- Supplemental resource for moot court programs or clerkships
- Reference guide for practicing lawyers seeking to improve their skills

The way you approach this book will be guided by your purpose in using it. In terms of structure, this book is divided into five parts:

1. Introduction to Appellate Advocacy
2. Constructing Appellate Briefs
3. A Contemporary Advocate's Guide to Persuasive Writing
4. Oral Argument: Strategies for Success
5. Special Considerations (including legal technology, moot court, and clerkships)

If you're a teacher adopting this book as a primary text, then you'll want to assign chapters of the book in a way that best fits your lesson plans. For example, you may want students to draft only the appellate argument before turning in a full brief. If so, then you'll want to skip the chapter on other parts of the appellate brief early in the semester, returning to that material after the first draft. Or perhaps you'd prefer to discuss the ethics of appellate practice at the midpoint of the semester, rather than at the beginning. Although the ethics chapter is in Part 1, you could easily assign it later in the semester without sacrificing meaning or context. The Teacher's Manual provides a sample syllabus in addition to exercises and other materials.

If you're a student using this book as either a primary or supplementary textbook for an appellate advocacy class, you have several options. You can certainly follow your teacher's syllabus, reading the material as assigned. But given the manageable length and readability of this text, you could also choose

to read ahead and focus on parts that interest you most. So, for example, if you'd like to start your semester reading about the psychology of persuasion, you could skip to Part 3.

Practicing lawyers, even those with significant experience, can also benefit from this text. If you're an experienced appellate lawyer, then perhaps you can skim or skip some of the foundational chapters on the appellate process or the different parts of an appellate brief. However, you'll likely learn something new in the other chapters, especially with regard to technology-related topics like formatting briefs for text-to-speech, using legal analytics and generative artificial intelligence tools, and the ethical considerations for lawyers seeking to adopt new legal technology.

Regardless of your purpose in using *Contemporary Appellate Advocacy*, thank you for taking the time to read and engage with this text. We're confident it will help you gain a deeper understanding of the complexities of appellate practice, enabling you to become a more effective and persuasive advocate.

Ann Ching
Clinical Professor of Law
Arizona State University
Sandra Day O'Connor College of Law

David B. Gass
Chief Judge
Arizona Court of Appeals
Division One