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The three types of appeals and how to argue them

YOUR GOALS MUST BE DIFFERENT, DEPENDING ON IF THE CASE IS A CLEAR LOSER, A CLEAR WINNER OR A TOSS-UP

Appellate oral argument can be intimidating. The prospect of arguing in front of three justices, each of whom may pepper you with pointed questions, is daunting. Knowing the type of appeal that you are going to argue will help ensure that your presentation is well received.

Appeals generally fall into one of three categories: (1) clear losers, (2) clear winners, and (3) cases that could go either way, depending on what the court focuses on. Your goals at oral argument should vary based on the type of appeal you are arguing.

For clear losers, your focus should be on a graceful presentation that contains the resulting damage as well as possible. For clear winners, your focus should be on an efficient presentation that does not waste the court's time. And for cases that can go either way, your focus should be on directing the court to your best points while maintaining flexibility so that you can quickly move between topics.

There is a complicating factor; it may not always be easy to determine which category your appeal falls into. And it is important to be honest with yourself when making that determination. Ideally, that will be aided by a tentative opinion from the court.

Tentative opinions

Tentative opinions are always helpful in preparing for oral argument. They provide a window into what the court is thinking and help direct parties to the issues that the court finds important. They also signal which category a court believes an appeal falls into.

Some tentative opinions are not "opinions" at all; they are simply requests that counsel focus on certain issues in their argument. But these "focus letters" make clear that the principal aspects of the appeal of interest to the court are the issues raised in the letter. That can help you decide what type of appeal you have.

Other courts, particularly Division Two of the Fourth District, send out a full tentative opinion and have argument a month or two afterward. These make clear what kind of case you have!

But be aware that most courts take the "tentative" aspect seriously. While it is not common for courts to change their decision after issuing a tentative, it happens often enough that you need to be prepared for it, regardless of whether the tentative is in your favor or against you.

While focus letters and tentatives are more common than they used to be, they are still not the norm. In most cases, you walk into oral argument without any idea of what the panel is thinking. But that does not mean that the court has not made up its mind. In the California Courts of Appeal, the courts generally will not hold oral argument until they have an opinion written, even if they do not share it with the parties beforehand.

How to argue a clear loser

So, you have concluded that your appeal is a clear loser. Perhaps you have received a tentative opinion against you, or perhaps you know that you are simply wrong on the law or the facts. However you got here, your chances of prevailing are minimal. What do you do?

It is important to be realistic and to accept that you are unlikely to change the outcome in the case. Your goal at argument should no longer be to win. That will be a waste of your energy. Instead, focus on what you can accomplish: damage control. Do your best to limit the scope of the adverse decision. Look for ways to narrow the holding and try to get the court to limit it to its facts. Emphasize during oral argument that the court's logic does not apply to all circumstances, even if it does apply to the circumstances of your case.

If the court has issued a tentative opinion that goes against you, address it directly during your argument. It is not disrespectful to say that the tentative is wrong. But remember that the court will very likely stick to its reasoning. So, look for factual or legal distinctions that show the court's thinking, even if correct, is inapplicable.

Ideally, the court will issue an unpublished opinion, and while you will have lost the appeal, you will not have created adverse law. But, even if the court publishes its opinion, if you made headway during oral argument about the fact-based nature of the court's determinations, then you may succeed in limiting the opinion's precedential impact.

Of course, you still must effectively advocate your position. In doing so, your aim should be to present your position in a respectful way that does not upset or offend the justices, and you want your argument to be clear and easy to understand, even if the justices disagree with you. This takes skill and discipline, but it preserves your credibility with the court and may limit the damage to your client.

One key aspect is transparency. Do not try to conceal the flaw that makes your case a clear loser. The court already sees it, and attempting to hide from it will only frustrate the justices and undermine your credibility. Instead, acknowledge the problem head-on and make your best case for why it should not be fatal. If the court presses you on a position that it clearly does not accept, do not withdraw it. Simply state that it is your position and move on. If need be, you can acknowledge that your argument may be in tension with whatever facts or law make your case a clear loser. If a specific justice continues to challenge you on a specific issue, you may even acknowledge that the justice does not agree with your position. But do not be beaten down by the court's questions. You are never required to

concede defeat, even when arguing a clear loser.

One of the best examples of losing gracefully I ever saw was by my dad, Jeffrey Ehrlich, when he argued *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.* (2022) 77 Cal.App.5th 753. The *Musso* case concerned whether a restaurant that was forced to close due to shutdown orders issued during the COVID-19 pandemic had suffered a "physical loss" of its property such that it was entitled to insurance coverage for its business losses. (*Id.*, at p. 755.) At the time of the oral argument in *Musso*, two recent opinions had addressed whether shutdown orders resulted in "physical loss," and both had rejected the argument.

He was unfazed. He smiled broadly and joked with the justices about technical issues with remote appearances. He methodically presented his position and stayed calm throughout the argument, even when he was pressed by the justices in a manner that made clear they disagreed with him. And he did not hide from the adverse authority. He directly acknowledged it and explained why its reasoning was flawed and should not be followed.

My dad did not win the *Musso* case. The court issued an opinion agreeing with the adverse authority. But he lost gracefully. At the end of his argument, Justice Miriam Vogel said: "I give you an A+ for your presentation." If you hear something like that when you are done arguing a clear loser, be proud.

About a year later, I argued *Coast Restaurant Group, Inc. v. Amguard Ins. Co.* (2023) 90 Cal.App.5th 332. It was no mystery that the appeal was a clear loser. At the time of my argument, there were at least five published opinions in California rejecting our position and holding that COVID shutdown orders did not result in "physical loss," with not a single opinion to the contrary.

During argument, I did not try to hide from that adverse authority. I explained that courts rejecting our position had grounded their holdings on *MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.* (2010) 187 Cal.App.4th 766, and that the policy language in *MRI Healthcare* was distinguishable. I got the justices' attention when I gave pinpoint citations to each published opinion that went against us, showing that every single one had relied on *MRI Healthcare*. Ultimately, my arguments persuaded the court that the COVID shutdown orders did result in a "physical loss." (*Coast*, 90 Cal.App.5th at p. 343.)

I did not win the *Coast* case. The court issued an opinion holding that a virus exclusion in the policy at issue barred claims relating to COVID-19. (*Id.*, at p. 345.) But the very same arguments that were accepted in *Coast*, including the attack on *MRI Healthcare*, were rejected in *Musso*. This shows that even if you have a clear loser, you should still show up and make the best presentation you can. You never know what will happen.

Now let's turn to a more pleasant scenario: Arguing a clear winner.

How to argue a clear winner

You've received a tentative opinion in your favor. Congratulations! Your appeal is a clear winner.

If you have a tentative in your favor, then your goal is now for argument to be as uneventful as possible so that the court sticks with its tentative. Be confident, but not insufferable. There is no need for grandiosity. Do not waste the court's time in rehashing points that it has already accepted in the tentative. Instead, focus on efficiently reinforcing why the tentative opinion is correct and why your opponent's main contentions do not withstand scrutiny. The key to an effective presentation is restraint. Do not try to do too much when you've essentially already won.

To that end, place a premium on efficiency. Your presentation should be brief and to the point. Identify the two or three strongest arguments your opponent is likely to make, explain why each fails, and then sit down. The court does not need a lecture on points it already agrees with. Demonstrating that you understand the issues and can quickly address your opponent's best arguments will be far more persuasive than a lengthy summary of the points you made in your brief. And remember, if the tentative is in your favor and your opponent did not appear to make any headway in arguing against it, you may not need to argue at all. If that occurs, then ask if the panel has any questions, and if they do not, then sit down.

Critically, if you do not receive a tentative opinion, then do not prepare as if you have a clear winner. Even if you believe that your appeal is a clear winner, do not assume that the court agrees with you. Be prepared to argue the appeal as if it could go either way. You may be pleasantly surprised during the argument to learn that the court believes you have a clear winner. But never assume the court feels that way until it has actually voiced that to you. Thinking that you have a clear winner, only to discover during oral argument that the court disagrees, is likely to derail your presentation and lead to poor results.

How to argue a case that could go either way

Cases that could reasonably go either way present the biggest challenge at oral argument. These are cases where both sides have strong enough arguments to prevail, and the outcome will depend on what issues the court determines to be most important.

These cases require you to be nimble and prepared to pivot quickly based on where the court's questions lead. If a case could go either way, then it's unlikely that you will win on every point. Your primary goal should be to frame the most important issues for the outcome of the case as the ones where you hold the stronger position. You want to convince the court that if you win those points, then the others do not matter.

This type of appeal requires the most careful preparation, because you need to be able to emphasize your best points while responding to your opponent's best points. If your knowledge of the relevant facts and law is not comprehensive, then you may be caught off guard by the court's questions and fail to provide

accurate responses.

Oral argument can go sideways very quickly when that occurs. So, try to anticipate the questions the court is likely to ask of both you and your opponent. Thinking through the court's likely questions for you will help you respond to them effectively, and thinking through the court's likely questions for your opponent will enable you to address those same issues during your own argument. The questions the court asks reveal what it considers important to the case's resolution. If the court spends significant time questioning your opponent about a particular point, you should be ready to comment on that point, either to reinforce concerns the court has expressed or to explain why those concerns should not be dispositive.

Consider preparing a flexible outline rather than a rigid script. It may be helpful to have the first few sentences that you intend to say written out in full, but writing out an entire speech will make it hard to adjust on the fly once the court starts asking questions. So, identify the three or so most important points you want to make, and be ready to discuss each one in depth if the court's questions take you there.

At the same time, prepare concise explanations on a wide range of issues that allow you to quickly and efficiently touch on multiple potential points of interest in the case. You should be able to expand or contract your discussion of any given issue depending on the court's level of interest.

Do not wait for the court to raise your opponent's strongest arguments. Address them proactively. Demonstrating that you understand the weaknesses in your case and can explain why you still should win will result in a far more persuasive presentation than pretending like those weaknesses do not exist. And, if the court fixates on a weak point in your case, acknowledge it briefly and then pivot to explain why other considerations should carry the day.

And remember that an appeal may be one that could go either way, even if you receive a tentative opinion. If you received one in your favor, then use oral argument as an opportunity to reinforce the reasoning in the tentative and to address any of the court's concerns. If the tentative is against you, then focus on the points where it expressed doubt or acknowledged merit in your position. Those are your openings.

Conclusion

Oral argument can be intimidating, but it is also an opportunity. It is your chance to speak directly with the justices, to address their concerns in real time, and to advocate for your client in a way that written briefs cannot replicate. By identifying what type of appeal you are arguing and preparing accordingly, you can approach the lectern with confidence.

Whether you are preserving a favorable tentative, narrowing an unfavorable one, or persuading an uncertain court, the right preparation can make all the difference. And if you argue effectively, then you will have done right by your client and earned the court's respect, win or lose.

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