Law Practice, Appellate Practice
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It’s not easy being green

Exceptionally Appealing: A monthly column devoted to exploring exceptions to general appellate rules.

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As Americans, we take great pride in the fairness of our judicial system. We embrace the notion that all are equal before the law -- rich or poor; David or Goliath; Rizzo the Rat or Big Bird. Parties appearing in court are supposed to stand on equal footing, with no favoritism and no side starting out with any innate advantage. Every party is to be impartially heard and follow the same rules and procedures: "may the best man (or woman, or corporate or governmental entity) win."

And yet, any practicing lawyer knows that the system is not truly equal for a variety of reasons, some good, some not so good. Most obviously, litigants do not start from the same place in trial courts because plaintiffs bear the burdens of proof and persuasion. This burden follows from the fundamental premise that the party who invokes the justice system to "get something" must "prove its case," i.e., "do more" than the other side to make that happen. This burden carries through on appeal, where an appellate reversal requires the appellant to affirmatively pursue the appeal and to properly establish not just error, but prejudicial error. Or as our state Constitution puts it: a "miscarriage of justice." Cal. Const., art. VI Section 13. What this means is that appellants -- who file the green-covered opening brief -- often feel like Kermit the Frog, who crooned "It's Not Easy Bein' Green." Kermit singing the blues (about being green) is nowhere truer than on appeal. Why is it not easy being green? Let us "Count" the ways. *Von, two, three...*

To begin, appellants bear the burden of perfecting and pursuing the appeal. That means filing the notice of appeal. So appellants have to figure out what's appealable, when, by whom and how. Screw that up, and it's game over: *Hi-ya*! The appeal goes down faster than Kermit receiving one of Miss Piggy's famous karate chops.

Then appellants must file a record designation, civil case information statement, and often other administrative-type preliminary forms -- paying all appropriate fees along the way. While the appellant is laboring to do all this, the respondent can pretty much sit back and do nothing. (If appellants are Kermit, then respondents are Donovan -- you can call them Mellow Yellow.) And, this important paper-pushing phase, which must be done to a tee, is the easy part.

Assuming the appellant can perfect the appeal and the record, then the really hard work begins. Having provided a record with all relevant material, the appellant must carefully cite to that record (and not matters dehors the record), and apply it, along with pertinent legal authority, in presenting a coherent legal argument. *See MacDonald v. Kempinsky* (B283424, unpub'd Jan. 24, 2020, citing *Lonely Maiden Prods, LLC v. GoldenTree Asset Mgm't, LP*, 201 Cal. App. 4th 368, 384 (2011), *Dietz v. Meisenheimer & Herron*, 177 Cal. App. 4th 771, 779-801 (2009), *Kurinij v. Hanna & Morton*, 55 Cal. App. 4th 853, 867 (1997); *Keyes v. Bowen*, 189 Cal. App. 4th 647, 655-56 (2010)). In other words, the appellant must file an opening brief, and mistakes in that brief, procedural or substantive, can doom the appeal. *E.g.*, *Sekiya v. Gates*, 508 F.3d 1198, 1200 (9th Cir. 2007) (brief stricken for multiple shortcomings). The brief must have all the correct moving parts in working order. Like an explosive concoction in Bunsen and Beaker's laboratory, bad appellant's briefs are likely to explode. Meep!

And proper briefing may not simply reference arguments already made in the trial court or merely regurgitate it. *Soukup v. Law Offices of Herbert Hafif*, 39 Cal. 4th 260, 294, n.20; *Marriage of Shaban*, 88 Cal. App. 4th 398, 407-11 (2001). As one court recently explained, "[a]n appeal is not a 'do over,' a 'second chance,' or 'another bite at the apple.'" *Smart v. San Dieguito* (D074775, Feb. 18, 2020, unpub'd). An appellant who

relies on copying trial court papers (which obviously didn't get the job done in the first place) won't get far. Nor would such briefing address whatever alleged flaw resulted in the adverse ruling.

In short, there are all sorts of briefing niceties to be obeyed on penalty of losing: "there are rules and procedures that must be followed." *Smart*. Apart from the various formatting rules (hey, you better see new Rule 8.74!) and figuring out how to use Truefiling, the briefs must cite to the record; cite to authority; be organized properly (using headings); and, of course, contain some sort of winning argument. Ignoring these requirements spells disaster. Nearly every day in California an appeal is ignominiously fatally dispatched for stumbling over some procedural rule.

Then there's the actual merits. Now things get even harder. First, there may be record preservation problems: A winning argument usually can't win unless it was raised in the trial court. *Fretland v. County of Humboldt*, 69 Cal. App. 4th 1478, 1489 (1999). The Bert and Ernie combo of waiver and forfeiture are redoubtable obstacles. *Niko v. Foreman*, 144 Cal. App. 4th 344, 368 (2006); *Badie v. Bank of Am.*, 67 Cal. App. 4th 799, 784-85 (1998). Second, there's a slew of nasty adverse presumptions, starting with the formidable presumption that the trial court's judgment is correct -- again the appellant always has the burden to demonstrate reversable error. *Jameson v. Desta*, 5 Cal. 5th 594, 608-609 (2018); *Denham v. Superior Court*, 2 Cal. 3d 557, 574 (1970). And strike three: those pesky standards of review, with anything short of *de novo* setting an appellant on the path to lose.

All the while, with appellants flailing like Super Grover, respondents stand confidentially like a Sunshine Superman -- or perhaps heckling and jeering appellants from the balcony -- like Statler and Waldorf. Sure, respondents must follow the briefing rules, too. But respondents aren't even required to file briefs at all, and shortcomings in yellow briefs, though bad *per se*, don't mean the respondent will lose (sanctions, perhaps). And respondents have the ability to win on any ground in the record (raised or not, relied on by the trial court or not); and can also win even if the trial court reached the right result for the wrong reason. *Schabarum v. Cal. Legislature*, 60 Cal. App. 4th 1205, 1216 (1998). Again, the ultimate burden is always on the appellant, so it's the appellant who suffers most severely for any shortcomings.

Nor may appellants look for help from the court. Appellate courts often say that they will not "act as counsel for appellant by furnishing a legal argument" *Century Surety Co. v. Polisso*, 139 Cal. App. 4th 922, 963 (2006); *Alvarez v. Jacmar Pac. Pizza Corp.*, 100 Cal. App. 4th 1190, 1206, n.11 (2002). This goes for courageous, usually foolhardy, pro pers too: "A lay person ... who exercises the privilege of trying his own case must expect and receive the same treatment as if represented by an attorney -- no different, no better, no worse." *Taylor v. Bell*, 21 Cal. App. 3d 1002, 1009 (1971); *Rappleyea v. Campbell*, 8 Cal. 4th 975, 984-85 (1994).

Indeed, just about every substantive area of appellate practice seems like little more than hurdles for hopeful appellants to overcome: appealability, standing, proper filings, record preparation, "scope and limits of appellate review" (aka big problems for appellants).

Movin' Right Along -- Add this all up and what you get is the stark, cold reality that appellants lose at least 80% of the time. Year after year, statistics consistently show that only about 17% of civil appeals result in a reversal (about 3% are dismissed, often because appellant did something wrong procedurally). Federal statistics are roughly the same.

Worse yet, this is how it should be. If appeals had any higher rate of success, then that would signal something wrong with the system itself. No one benefits from proceedings that can be undone on a coin-flip's chance. Can You Picture That? That would be dysfunctional.

The bottom line is that Kermit had it exactly right: *It's not at all easy being green.* (And for Elmo fans, it's even harder being red -- writ petitions are summarily denied at rates of over 95%.) Thus, every appeal that is successful, particularly those facing a substantial evidence or abuse of discretion review really are to be cherished as exceptional. Every appellant who wins a reversal should recognize and celebrate the accomplishment. And after every expected, loss? Well, "I Hope That Somethin' Better Comes Along."

Epilogue: Cutting "The Rainbow Connection." This month's thematic conceit is "brought to you by" the fact that opening brief covers are green. But with e-filing and the new rules we have largely lost the colorful world of appeals. Although Rule 8.40(a)(1) still lays out the hues for various briefs (green, yellow, tan, white, gray, blue, orange, red), that only applies to "covers of briefs and petitions filed in paper form." With "mandatory electronic filing" in appellate courts (Rule 8.71(a)), paper copies are rarely seen these days. And Rule 8.74(a)(8) states "An electronic document must not have a color cover." (Apparently, electronic documents with colored covers took up too many bits and bytes, making the files unnecessarily large.)

Coda: Those thinking this column would be about the difficulties of "going green" in court were probably hoping for a different story. Rule 1.22 requiring lawyers to use recycled paper, adopted in 2007, was repealed in 2014, as were Rules 2.101, 2.131, 8.144, and 10.503, the last one requiring courts to use recycled paper (originally adopted in 1994). Yes, cost drove the repeal. So one form of green outweighed another.