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Normal is not

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From its inception this column has drawn inspiration from the Oliver Wendell Holmes quote, "The young man knows the rules but the old man knows the exceptions." (Immediate digression: This quote itself is exceptional. Although often wrongly attributed to the famous jurist, OWH *Junior*, it actually comes from the 1871 valedictory address delivered to the graduating class of the Bellevue Hospital College by his father, the physician, poet and professor, OWH *Senior*. *See Turner v. State of Florida*, 261 So. 3d 729, 732 (Fla. App. 2018) (citing 13 N.Y. Med. J. 420, 426 (1871)). Clearly there are many valuable lessons to be learned from the unusual and unexpected twists and turns that can happen in extraordinary cases on appeal. But does it really make sense to talk about the exceptional without first establishing a baseline for what is ordinary for comparison? Let's assume not and examine the presumably typical appeal.

Here's the lifecycle of your quotidian *Appealus Californicus Civilus*: After trial court proceedings, probably a motion or possibly a full trial, an obviously appealable order or final judgment is entered. No messy post-trial motions practice ensues. Notice of that entry is duly served, and a simple notice of appeal (usually the Judicial Council form) is timely filed without incident. The clerk's notice of "notice of appeal" is sent. Respondent has no need to cross-appeal. The appellant timely files a record designation (again, let's assume, on the JC form) for an "average-length record," i.e., one volume of clerk's transcript (or appendix) and two volumes of reporter's transcript. Cal. Rules Court, rule 8.63(b)(3). The record designation is a paragon of perfection, so respondent need not counter-designate. The appellant has, of course, joyously tendered all fees and required deposits to the penny, and also has complied with all applicable rules, statewide and local, including the filing of a crystal clear and honest civil case information statement (required exhibits attached, natch) and any locally required settlement forms. (Settlement — after fastidious and careful consideration is — politely declined and is off the table, now and forever).

Meanwhile, the record is prepared promptly, without error or omission, and swiftly transmitted to the Court of Appeal and the parties (who have, of course, happily paid any remaining costs or are quickly refunded any deposited overage). This triggers the appellant's biblical 40-days (and nights) to prepare the opening brief. This brief is prepared with due concentration and attention to the law, the facts of record, the standard of review, and all applicable rules and guidelines for captioning, formatting, organization and citation (to the record and the law). This brief (and maybe an accompanying appendix) is calmly and lovingly e-filed without glitch or glower. Upon receipt, the respondent eagerly begins and completes a responsive brief within the allotted 30 days, artisanally forging and filing a bespoke work of exquisite beauty rivaled only by the preceding opening and forthcoming reply briefs — the latter arriving within the appointed 20 days.

Briefing completed, the lawyers gracefully take their leave to relax, confidently relinquishing matters to the court. The briefs are gratefully dissected for their helpful intelligence and much appreciated for their elegance and erudition. Employing Solomonic wisdom, the court drafts a tentative decision (shared internally only), and then invites the lawyers to a fruitful oral argument, to leisurely and insightfully develop a more perfect ruling. Penetrating questions are asked and answered directly, with dignity and aplomb. Well-within the mandated time (the esteemed "90-days"), a comprehensive and unanimous written decision is shared with the world: An unpublished affirmance (costs awarded to respondent).

From here, little of consequence ensues. If a rehearing petition is timely filed (within 15 days from the decision), graciously phrased, it is equally graciously denied. Finality attaches (30 days after the decision). Assuming a petition for review is timely filed (10 days after finality), raising a colorable issue, it is timely denied. The remittitur issues, respondent files a modest costs bill (within 40 days) and these costs are neither disputed nor left to languish unrequited. *Finis: exeunt* all, with bows. *Sic transit gloria* — rinse and repeat as necessary.

Perhaps that is more the ideal appeal, rather than the typical appeal. But even ignoring the sarky adjectives, how truly normal does that theoretical appeal appear to you? Possibly this quintessential appeal exists or has existed. But practitioners know that reality diverges significantly just about every time, and often in very many and meaningful ways. While we can conceive of, say, the perfect triangle, making or finding one for real is another matter.

Timing is one obvious area where real appeals veer. In most appeals, extensions are common, by stipulation and by application. And then the grace period/default notice provides extra time for principal briefs as well. So really that should be considered more the norm than not. Similarly, the "average-length record" posited by the rules seems as aspirational as the weight listed on a typical driver's license. And while most appeals result in an affirmance, there are significant numbers of reversals (and dismissals), every one of these worthy, in theory, of the moniker "exceptional."

The "normal" appeal is like a perfectly formed model skeleton: There is a framework, but dangling alone, it says little about how the whole body actually functions. It's the organs and soft tissue that make things work. Thus, an understanding of the basic framework is necessary but not sufficient. Thinking "that is all there is to it" fosters the misconception that an appeal is simply a fancy exercise in law and motion (tripartite briefing plus court hearing equals decision). But slapping a green cover onto a slightly edited motion does not convert it into an appellate brief worthy of the name. In *Marriage of Shaban*, 88 Cal. App. 4th 398 (2001), when a party argued that "appellate practice consists … of 'simply changing the trial points and authorities into an appellate format'" the Court of Appeal emphatically stated: "We reject that contention in the strongest possible terms."

When that party further asserted that "most of the work that would have to be done by appellate counsel on appeal had already been done in connection with the trial," the Court of Appeal snapped back: "Appellate work is most assuredly not the recycling of trial level points and authorities," starting with how "the orientation of trial work and appellate work is obviously

different." In a footnote, the *Shaban* court recognized the sad reality that conditions may force an appeal to be "financed on a well-worn shoestring" resulting in "substandard product." But the court stressed that "low level work should hardly be treated as the norm." (From here, we'll leave it to the appellate justices to opine just how normal poor work product is on appeal.)

Setting aside all the advanced artistry that goes into a sophisticated appellate practice, despite being at heart procedural, there is a boatload of actual substantive law along for the ride. Handling civil appeals is a specialty certified by the State Bar. The specialization exam covers tricky post-trial proceedings, questions of appealability, standing, timing and procedural complications (because cases regularly wander off the proper and expected path), record preservation, record designation problems, jurisdictional and stay quandaries, inevitable motions, applications and requests, the details of proper briefing, argument, decision making and post-decision practice, publication and citation rules, stare decisis issues, and writs (by definition, extraordinary proceedings). If that all still sounds purely procedural, then consider all the legal and equitable doctrines comprising the scope and limits of appellate review: standards of review, presumptions on appeal, mootness, waiver, forfeiture, invited error, prejudicial error, and on and on. Each doctrine has myriad details, rules, exceptions, and often exceptions to exceptions. Few of these are considered during trial proceedings, yet any one of them can end up being decisive on appeal. Hence, the limitless fodder for this column.

The upshot is that the proverbial "normal appeal" isn't that normal at all. For further confirmation, merely review a week's worth of appellate decisions (published and unpublished) and the online dockets for those appeals. This exercise spotlights how a large percentage of cases do not simply connect-the-dots procedurally and paint-by-numbers substantively. It is this depth of complexity beneath the surface that keeps appellate practice, and this column, focused on the exceptional.

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