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California Appellate Best Practices: Mixed Standards of Review on Appeal

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A mixed standard of review may apply on appeal depending on your circumstances, the order appealed and the issues presented. If the trial court judge makes factual conclusions to determine if an ultimate fact is met under the application of a rule of law, a mixed question of law and fact exists.

Also, a mixed standard of review applies where historical facts are established and the applicable law to be applied to those facts is undisputed, but, the question is, are the facts sufficient to meet the legal standard so as to constitute the ultimate fact under the applicable rule of law? When the law is applied to those factual circumstances, is the ultimate legal conclusion established?

In California, generally, the "abuse of discretion standard" or "substantial evidence standard" is applied to review the Court's factual determinations and decisions. For example, a denial of leave to amend on sustaining an order on demurrer is tested by the abuse of discretion standard.

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See Schifando v. City of LA (2003) 31 Cal. 4th 1074, 1081.

Generally, a *de novo* standard applies where the established undisputed facts require the application of law to determine the ultimate legal conclusions. But, the Court may first apply either the abuse of discretion standard or the substantial evidence standard of review to any factual determination made by the trial court before reviewing the ultimate legal conclusions *de novo*.

Multiple standards of review may also apply in federal appeals. In the Ninth Circuit, questions of fact are reviewed for "clear error" and matters of discretion are reviewed for an "abuse of discretion." *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000). Mixed questions of law and fact are generally reviewed *de novo*. *See Mathews v. Chevron Corp.*, 362 F.3d 1172, 1180 (9th Cir. 2004); *see Haile v. Holder*, 658 F.3d 1122, 1125 (9th Cir. 2011). ["We review … determinations of mixed questions of law and fact for substantial evidence."]

A comprehensive guide to standards of review in Ninth Circuit appeals is posted on the Ninth Circuit's website under "Guides and Legal Outlines, Standards of Review, Definitions." For complete information, please use the following link: http://cdn.ca9.uscourts.gov/datastore/uploads/guides/stand_of_review/I_Definitions.html.

Please feel free to contact me directly with any questions. Counsel Press' CA office specializes in rule-compliant appellate filings in the California Supreme Court and Court of Appeal, the U.S. Circuit Court of Appeals and the U.S. Supreme Court.

When the Only Law Available on the Issue is an Unpublished Decision, What Are My Options?

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Imagine counsel representing litigants before a court. An attorney for one party takes a position on the issue. The court responds that, in a previously filed pleading, counsel had taken the opposite position on behalf of his or her client. The attorney responds, "No, Your Honor, that was an 'unpublished' filing. Not only am I not bound by it, in this jurisdiction, you are not even permitted to bring that 'unpublished' filing to my attention."

The court would likely hold the attorney in contempt or sanction him or her for frivolous conduct. Yet, courts do this to litigants and counsel almost all the time by filing an overwhelming majority of their opinions—including lengthy, important decisions—as unpublished decisions. These are not binding precedent and, in many jurisdictions, litigants and counsel are

prohibited from even revealing the existence of these prior decisions to the court.

In a recent *New York Times* article[1] discussing unpublished decisions, it was noted that 88% of federal appeals court decisions are unpublished. The article focused on a 40-page decision from the Fourth Circuit Court of Appeals concerning the important issue of unlawful increases of a prison sentence out of vindictiveness, which the Fourth Circuit issued as "unpublished." The U.S. Supreme Court denied review of the case, but Justice Clarence Thomas noted in his dissent that the decision not to publish the opinion was "disturbing" and violated the Fourth Circuit's own standards for publication. While multiple Supreme Court justices have expressed concern over the prevalence of unpublished decisions and their potential for abuse by courts desiring to decide cases in an improper manner, the Supreme Court has repeatedly declined to address the propriety of designating decisions as "unpublished."

Meanwhile, several courts have concluded that purported blanket prohibitions on citation to unpublished decisions are illegal and unconstitutional. *Anastasoff v. United States*, 223 F.3d 898, 899-900 (8th Cir. 2000)

(holding that rule stating that unpublished decisions are not precedential and may not be cited is unconstitutional; the decisions are precedential); *Putnam v. Town of Saugus*, 365 F. Supp. 2d 151, 181, n. 17 (D. Mass. 2005) (agreeing with *Anastasoff* and holding that, while not precedential, unpublished First Circuit decisions could be cited and would be treated "with great care and respect" as persuasive authority); *Coggon v. Barnhart*, 354 F. Supp. 2d 40, 51, n. 4 (D. Mass. 2005) (same); *Cmty. Visual Communs., Inc. v. City of San Antonio*, 148 F. Supp. 2d 764, 773-775 (W.D. Tex. 2000) (agreeing with *Anastasoff* in part and lamenting that the inability to rely upon unpublished decisions makes the court's job more difficult). Indeed, Federal Rule of Appellate Procedure 32.1 was enacted to permit lawyers to cite federal unpublished decisions in federal courts if the decisions were issued after January 1, 2007. Judges, defending the practice, however, contend it is the only reasonable response to a crushing workload which precludes proper review of every decision to ensure it will not be misconstrued or misused and it is "safe as precedent." *See, e.g., Schmeir v. Supreme Court*, 78 Cal. App. 4th 703 (Cal. Ct. App. 2000).

As attorneys, we have all been faced with a situation where the most applicable or best case law is unfortunately

1. Article titled, "*Courts Write Decisions That Elude Long View*" is available via this link: http://www.nytimes.com/2015/02/03/us/justice-clarence-thomas-court-decisions-that-set-no-precedent.html?smid=nytcore-ipad-share&smprod=nytcore-ipad&_r=3.

buried in an "unpublished" decision. On some occasions, the only law available on the issue or the only factually similar case is an unpublished decision. When these circumstances arise, there are a handful of strategies to deal with them:

1. Check the Rule in Your Jurisdiction:

First, look at the rule for your jurisdiction. As stated above, some jurisdictions do not entirely prohibit citation to unpublished decisions and allow them to be cited as at least persuasive authority. There may be some additional requirement, such as providing a copy of the decision, but the unpublished decision may be cited.

2. Try a Request or Motion for Judicial Notice:

If your jurisdiction prohibits citation to unpublished decisions unless they are relevant for *res judicata* or collateral estoppel, then one approach is to request judicial notice of the unpublished decision as a court record, and then cite to the opinion as an exhibit to your judicial notice request. This permits the attorney to comply with the applicable rule by not citing the unpublished decisions directly while still bringing them to the court's attention. Judicial notice of court records is routinely accepted. *Rosenberg v. Renal Advantage, Inc.*, 2014 U.S. Dist. LEXIS 57538 (S.D. Cal. Apr. 24, 2014); *see also Baily v. Comm'r of Soc. Sec.*, 2014 U.S. Dist. LEXIS 152079 (S.D. Ohio 2014) (Courts take judicial notice of their own records). In many jurisdictions, judicial notice is mandatory, when requested, and the party seeking it supplies the court with the necessary information. An additional benefit is that, even if the request is denied, the court is made aware of the unpublished decisions which are relevant and may feel compelled to either decide your case in a similar fashion or at least explain why it did not do so in order to avoid criticism or the appearance of impropriety. The potential pitfalls of this strategy are that it may anger the court or be construed as an attempt to avoid compliance with court rules. However, it is supported by law and, in circumstances where your best, or only, applicable cases are unpublished, it may be your only real alternative.

3. Make an Argument for a Change in the Law:

Another alternative if your case is in a "no cite" jurisdiction is to make an argument for a change in the law and a determination that blanket prohibitions on citation to unpublished decisions are improper. There is ample authority, some of which is cited above, to support this contention, which should assuage any concerns about the argument being deemed frivolous or in bad faith. You may, however, want to research how many times such an argument has been made and whether it has been frequently rejected, as a court could potentially perceive the argument as frivolous because it has previously been rejected by your particular court or higher appellate courts in that jurisdiction.

Hopefully, these will help if you need to cite to unpublished decisions.

(This article was originally published on April 15, 2015 in *The Recorder,* California's leading legal news and analysis publication, under the title, "When the Best Case Goes Unpublished.")

California Supreme Court: What is the Value of Oral Argument?

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There has been some recent debate over the value of oral argument in the California Supreme Court. Specifically, Professor Daniel J. Bussel, from UCLA's School of Law, published a law review article titled, "Opinions First – Argument Afterwards," questioning whether litigants have a meaningful opportunity to sway the final outcome of a matter with oral argument.

Professor Bussel explains that the justices have "a powerful personal financial incentive not to reconsider the merits following oral argument. The justices' pay is suspended under California's '90-day rule' if the Court fails to issue a final decision within 90 days of 'submission.'" Logic follows that the justices will predetermine the outcome, to a substantial degree, prior to concluding oral argument so that they can issue the final decision in a timely manner. Granted, the justices are free to modify their final decision – Professor Bussel acknowledges this and states that the Court often refers to oral argument before publishing the decision. However, Professor Bussel opines that the majority has already signed onto a written opinion so oral argument in that Court is "a theater of the absurd…" The result is a tremendous waste of resources to the state and litigants and the ideal of due process is tainted.

Associate Justice Goodwin Liu responded in a rebuttal emphasizing that preliminary responses are intended to "enhance" oral argument by highlighting the "key sticking points" in a case. (*See* "How the California Supreme Court: Actually Works: A Reply to Professor Bussel.") Justice Liu emphasized that pre-argument preparation is thorough, but not final. In fact, the pre-argument process brings out the relevant issues for discussion at oral argument. In this way, the value of oral argument is heightened and a final determination is made after the litigants have had their opportunity to address the key issues. Justice Liu readily admits that the ultimate outcome of a case does not often change after oral argument. However, it does happen on occasion. Furthermore, a more common occurrence is a shift in the final vote tally. Justice Liu attributes this to the "fluidity of the Court's decision-making process" and proof that the justices are not opposed to changing their vote after oral argument, when it is warranted.

The truth may lie somewhere in-between. We have recently addressed this question in our popular Appellate Forum group on LinkedIn; everyone, who responded, stated that they would not waive oral argument. It was widely acknowledged that oral argument rarely changed the ultimate outcome, but the general sense was hopeful that there was a chance, however slim it might be, the justices could be swayed and this opportunity should not be wasted.

Practical Guidelines for Masterful Brief Writing: Five Briefs to Avoid

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Legal writing, or any writing for that matter, is a mentally demanding and complex activity requiring sustained effort and attention. Lawyers often face difficulty in providing that effort and attention within court-imposed deadlines for multiple reasons. Solo practitioners or small-firm lawyers have to wear many hats each day and have multiple administrative tasks that divert their attention from their caseload. Similarly, attorneys that practice in multiple areas are often required to mentally "shift gears" to entirely different subject matters as they move from file-to-file in a given day or project-to-project in their practice, preventing the kind of structured focus needed to write well. Many attorneys are deadline-driven, and, when competing deadlines overlap, it becomes difficult to juggle them all. Whatever the reason, the inability to devote full attention to legal writing causes the writing to suffer.

This is especially so with appellate brief writing, which

is a special type of advocacy that most attorneys do not specialize in or have a great deal of experience in preparing. When an attorney inevitably finds himself or herself against a deadline to file a brief, the rush to get the job done often has adverse consequences. Here, at CP Legal Research Group, we have assisted thousands of attorneys with their briefs. We frequently see the results of a looming deadline and inadequate time to provide the required focus on the brief. Below are five briefs to avoid, even when faced with a filing deadline:

1. The See-What-Sticks Brief:

This brief usually appears when the attorney has not taken the time to properly review the record and do some preliminary research on the potential issues to narrow down those issues with a moderate chance of success from the hopeless ones. Therefore, the attorney feels compelled to "throw everything against the wall and see what sticks." The results are almost always

dismal, and the brief reflects the lack of focus and direction.

Too many issues make a bad brief. An appeal is not a law school examination, where extra points are given for spotting and discussing every legal question buried in the case. Make sure that you properly evaluate the issues in your case and don't waste time and valuable real estate discussing esoteric points of law that have little chance of obtaining the desired result.

2. The Remix Brief:

This brief appears when an attorney procrastinates to the point that the filing deadline is imminent, and decides to just convert trial memoranda into a brief. Besides the obvious observation that merely recycling already rejected arguments is generally poor strategy, this tactic ignores the differences between appellate and trial advocacy. The way arguments are presented to a trial court differs from the way they are presented to an appellate court. This is especially so of "jury arguments," which are generally ineffective on an appeal. Good legal writing considers the audience and tailors the presentation to that audience. The same way that reading an appellate brief as a closing argument would be a terrible choice, so, too, is repackaging trial arguments to an appellate panel and hoping they fair better the second go-around. Make sure you take the time to do more than just rehash your trial arguments, and carefully tailor the contentions to your new audience.

3. The Frankenstein Brief:

This monster raises its head when an attorney attempts to cobble together a brief by cutting and pasting from various other documents, including PDF files. The result is a stitched-together document that lacks cohesion and structure. Numerous "cut and paste" errors appear, such as subject-verb agreement, misidentified courts, inconsistent naming conventions for parties and formatting problems. Indeed, attorneys often unwittingly manufacture formatting problems in their document when some code or electronic command is inadvertently picked up and copied into the new document. These hard-to-correct formatting errors transform what was intended as a timesaving shortcut into hours of struggling to properly format the new document. This causes numerous distracting errors that divert the reader's attention from

the arguments.

Whenever you cut and paste, you need to ensure that sufficient time remains to carefully review the brief and eliminate these pitfalls.

4. The Too-Many-Cooks Brief:

This brief appears when multiple lawyers collaborate on a brief, with each attorney responsible for one or more sections. Division of labor is a great way to tackle a difficult multi-issue appeal and to maximize the time you have by preparing multiple sections at once. The only caveat is that you need to leave sufficient time to harmonize all of the sections into one coherent document. Otherwise, you end up with parties and other players being identified by different names in different sections of the brief, crude transitions from section-to-section because writing styles clash, a lack of uniform citation because the same cases cited in different sections revert back-and-forth from short form to full form and other integration problems. In cases of too many cooks, you must have a master chef to unify the various sections and ensure that theme, style and naming conventions remain consistent.

5. The Un-Brief:

The "un-brief" results from the failure to leave sufficient time to edit out unnecessary verbiage and focus and sharpen the arguments. The result is a wordy, rambling document that lacks focus and clarity and is filled with run-on sentences. The length and lack of focus makes the "un-brief" hard to read and distracts the reader from the arguments.

It is called a "brief" for a reason! Take the time to be concise and avoid repetition. Appellate judges dislike unnecessarily long briefs!

We hope you find the above guidelines useful. Should you require assistance with the editing stage, proofreading or writing of your brief, CP Legal Research Group is here to help.

(This article was published on July 30, 2014 in *The Recorder,* California's leading legal news and analysis publication.)