

LITIGATION



presents

2024 Litigation and Appellate Summit

Appellate Advocacy: Winning Ways and Fatal Flaws/Behind the Scenes

Friday, April 26, 2024
10:30am - 12:00pm

Speakers: Hon. John Segal, Randee Barak, Wendy Lascher, and Carl Chamberlin

Conference Reference Materials

Points of view or opinions expressed in these pages are those of the speaker(s) and/or author(s). They have not been adopted or endorsed by the California Lawyers Association and do not constitute the official position or policy of the California Lawyers Association. Nothing contained herein is intended to address any specific legal inquiry, nor is it a substitute for independent legal research to original sources or obtaining separate legal advice regarding specific legal situations.

© 2020 California Lawyers Association
All Rights Reserved

The California Lawyers Association is an approved State Bar of California MCLE provider.

**Appellate Advocacy: Winning Ways and Fatal Flaws / Behind the Scenes
CLA Litigation and Appellate Summit
April 26, 2024**

PROGRAM MATERIALS

AGENDA

1. Introduction
 2. Appeal?
 3. Appellate Record
 4. Motions
 5. Briefing
 - Issue Selection
 - Organization
 - Introductions
 - Fact Statements
 - Arguments
 - Writing
 - Formatting
 6. Use of Amicus Briefs
 7. Judicial Process
 8. Oral Argument
 9. The Decision
 10. Other Matters
- Q&A

ATTACHMENTS

Speaker Bios

New California Court of Appeal Rules for 2024 (Selected)

New Federal Rules of Appellate Procedure for 2024

New Ninth Circuit Rules for 2024 (and Current Proposals)

Examples of California Appellate Court Local Rules

Resources

Speaker Bios

John Segal has served as an Associate Justice of the California Court of Appeal, Second Appellate District, Division Seven, since 2015. He served as a trial judge on the Los Angeles County Superior Court from 2000 to 2015. Before his appointment to the bench, he was an associate and partner with the law firm of Mitchell, Silberberg and Knupp, where he helped run the Appellate Practice Group. He received his Bachelor of Arts degree in Mathematics and Philosophy from Williams College and his law degree from the University of Southern California School of Law.

Justice Segal has served on the Executive Committee of the Section of Litigation of the Los Angeles County Bar Association, the Board of Governors of the Beverly Hills Bar Association, the Board of Governors of the Los Angeles Chapter of the Association of Business Trial Lawyers, and as an advisor to the Executive Committee of the Litigation Section of the State Bar of California.

Justice Segal is married to retired United States Magistrate Judge Suzanne H. Segal. He teaches Remedies and Legal Writing at the University of Southern California School of Law, sings tenor in a congregational choir, and plays third base for his softball team.

Randee Barak spent 25 years at the California Court of Appeal, Second Appellate District, most of them as a Lead Appellate Court Attorney in Division Seven. Prior to her work with the appellate court, Ms. Barak specialized in business and health care litigation for Sidley Austin, working in both its litigation and appellate practice groups. She graduated with honors from UCLA School of Law in 1992 and, following graduation, served as law clerk to the Honorable Judge Arthur Alarcon on the United States Court of Appeals for the Ninth Circuit. Ms. Barak currently works as a professor at Loyola Law School Los Angeles where she teaches Appellate Advocacy and Legal Ethics.

Wendy Lascher has been an appellate lawyer for more than 50 years. She is a partner at Ventura County's Ferguson Case Orr Paterson, LLP. Wendy has been a State Bar certified specialist in appellate law since the program began in the 1990s. She is a past president of both the American Academy of Appellate Lawyers, www.appellateacademy.org and of the California Academy of Appellate Lawyers, www.calappellate.org. Outside law practice, Wendy is a grandmother, private pilot, and vegetable gardener.

(Moderator) Carl Chamberlin has been a Lead Appellate Court Attorney for the California Court of Appeal, First Appellate District, for over 20 years. Before that, he practiced at Orrick, Herrington & Sutcliffe, primarily in intellectual property, securities, and complex civil litigation. For over 25 years, he has been an adjunct professor at UC Law SF (formerly Hastings) and on the faculty of the National Institute for Trial Advocacy. His publications include one of NITA's flagship products, The Effective Deposition, and a book on Trial Advocacy. He is a member of CLA's Committee on Appellate Courts and Racial Justice Committee, Chair of the Trial Practice Section of the Alameda County Bar Association, and past Chair of the Legal Ethics Committee of the Bar Association of San Francisco.

New California Court of Appeal Rules for 2024 (Selected)

Effective 1/1/24:

- Rule 8.124. Appendixes
- Rule 8.130. Reporter's transcript
- Rule 8.144. Form of the record
- Rule 8.204. Contents and format of briefs
- Rule 8.452. Writ petition to review order setting hearing under Welfare and Institutions Code section 366.26
- Rule 8.456. Writ petition under Welfare and Institutions Code section 366.28
- Rule 8.504. Form and contents of petition, answer, and reply
- Rule 8.622. Certifying the trial record for accuracy
- Rule 8.834. Reporter's transcript
- Rule 8.838. Form of the record

New Federal Rules of Appellate Procedure for 2024

Effective 12/1/23:

- FRAP 2 – emergency suspension of rules
- FRAP 4 – coordination with Emergency Civil Rule 6(b)(2)
- FRAP 26 – adding to court holidays
- FRAP 45 – same (re clerk’s office)

Effective 12/1/24 (pending):

- FRAP 32 – certificate of compliance with type-volume limitation
- Merger of FRAP 35 and 40 – Panel Rehearing; En Banc Determination

New Ninth Circuit Rules for 2024 (and Current Proposals)

Effective December 2023:

- Circuit Rule 4-1 (Counsel in Criminal and Habeas Appeals)
- Criminal Justice Act Plan – providing eligible persons with timely appointed counsel

Proposed Rules Changes 2024:

- Circuit Rules 40-1 – 40-4, 35-1-35-4 (petitions for panel rehearing and petitions for rehearing en banc)
- Circuit Rules 3-4, 10-3, 15-2 (deadlines for ordering transcripts and filing mediation questionnaires)
- Circuit Rules 25-5 and related provisions (electronic filing of case initiation pleadings)
- Circuit Rules 28-1, 28-1.1, 30-1, 32-1 (briefs and excerpts of record)

Examples of California Appellate Court Local Rules

First Appellate District

Rule 1. Obligation of Superior Court Clerk to Prepare and File Docketing Statements in Certain Criminal, Juvenile, Dependency, and Family Matters

Rule 2. Extensions of Time for Superior Court Clerk or Court Reporter to Prepare Transcripts

Rule 3. Obligation of Court Reporters to Include Transcripts of Specialized Proceedings in Criminal and Juvenile Dependency Appeals

Rule 4. Augmentations to the Record

Rule 5. Parties' Stipulation to Use Original Superior Court File as the Appellate Record

Rule 6. Requests for Judicial Notice

Rule 7. Motions to Consolidate

Rule 8. Notification of Settlement or Basis for Early Resolution

Rule 9. Settlement Conferences in Civil Appeals

Rule 10. Motions for Stipulated Reversal of Judgment

Rule 11. Extensions of Time for Filing Briefs

Rule 12. Electronic Filing

Rule 13. Oral Argument

Rule 14. Oral Argument by Teleconference

Rule 15. Focus Letters and Tentative Opinions

Rule 16. New Authority Prior to Oral Argument

Rule 17. Electronic Devices in the Courtroom

Rule 18. Media Coverage of Oral Argument

Rule 19. Abbreviated Opinions

Rule 20. Circuit-riding Sessions

Rule 21. Parties' Obligation to Notify Court of Bankruptcy Stays

Examples of California Appellate Court Local Rules, Cont.

Second Appellate District

Rule 1. Contents of reporter's and clerk's transcripts

Rule 2. Augmentation of record and correction of omissions from record

Rule 3. Designation of the record in civil appeals under California Rules of Court

Rule 4. Proposed orders

Rule 5. [none]

Rule 6. Advance notice of request for immediate relief in juvenile dependency writ petitions

Rule 7. Repealed October 30, 2017

Rule 8. Filing of an appeal in a dependency matter by a person who is not the child, parent, guardian or social services agency

Rule 9. Record in later appeals in the same dependency cases

Resources

[*People v. Ashford University, LLC* 2024 Cal. App. LEXIS 166](#)

[*Grant v. City of Long Beach* 2024 U.S. App. LEXIS 6834](#)

California Academy of Appellate Lawyers, “Resources for Better Appellate Practice – A Bibliography”

RESOURCES FOR BETTER APPELLATE PRACTICE — A BIBLIOGRAPHY

These are some of the resources that Academy members have found useful in honing their skills as appellate advocates. Many other good ones exist. This list is not a commercial endorsement of any resource.

ADVICE ON APPELLATE PRACTICE

- Charles A. Bird, *Advanced Topics in Appellate Practice* (Full Court Press, 2021)
- Tessa L. Dysart, Leslie H. Southwick, Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* (Clark Boardman Callaghan, 2017)
- Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. Rev. 325 (1992) available at (< <https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=1748&context=lawreview> >) (as of Mar. 1, 2024)
- Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown, 1960)
- Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (Thomson/West, 2008)
- Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West, 2012)
- Catherine Wright Smith, *The Accidental Advocate: Tips for the Reluctant Rhetorician* available at (< <https://www.washingtonappeals.com/article-the-accidental-advocate.php> >) (as of Mar. 1, 2024)

ORAL ARGUMENT

- Bryan A. Garner, *The Winning Oral Argument* (West Publishing Co., 2009)
- Margaret M. Grignon, *Oral Argument: Facing the Challenge and Embracing the Opportunity*, American Bar Association Litigation Section, 26 March 2014

PRACTICE GUIDES

- Sharon Baumgold & James R. Lambden, *Action Guide: Handling Civil Writs in the Court of Appeal* (Continuing Education of the Bar, 2022)
- Continuing Education of the Bar, *Action Guide: Handling Civil Appeals* (2022)
- Continuing Education of the Bar, *California Civil Appellate Practice* (3d ed. with May 2023 update), especially Chapter 2A, Michael M. Berger, “Analyzing the Prospects for Success on Appeal”)
- Jon B. Eisenberg & Laurie J. Hepler, *California Practice Guide, Civil Appeals and Writs* (The Rutter Group, 2023), especially Chapter 1, Preliminary Considerations
- Stephen M. Shapiro, Kenneth S. Geller, Timothy S. Bishop, Edward A. Hartnett, and Dan Himmelfarb, *Supreme Court Practice* (Bloomberg Law, 11th ed. 2019)

ADVICE ON WRITING

- Stephen V. Armstrong, Timothy Terrell & Jarrod F. Reich, *Thinking Like a Writer: A Lawyers’ Guide to Effective Writing and Editing* (Practicing Law Institute, 2021)
- Bryan A. Garner, *The Winning Brief* (3d ed. Oxford University Press, 2014)
- Richard Marius, *A Writer’s Companion* (McGraw-Hill Education, 1998)
- Robert A. Olsen, *A Few of My Favorite Things: Tips for Persuasive Writing* (4th Quarter 2004), *Verdict Magazine*, pp. 38–43 available at (< <https://www.gmsr.com/wp-content/uploads/2016/08/A-Few-of-My-Favorite-Things-Tips-for-Persuasive-Writing.pdf> >) (as of Mar. 1, 2024)
- William Strunk, Jr. & E.B. White, *The Elements of Style* (4th ed. MacMillan, 1999)

TYPOGRAPHY

- Matthew Butterick, *Typography for Lawyers* (2d ed. O'Connor's, 2018)
- Seventh Circuit Court of Appeals, *Practitioner's Handbook for Appeals* (2020) (< <https://www.ca7.uscourts.gov/rules-procedures/Handbook.pdf> >) (as of Mar. 1, 2024) especially Chapter XXIII *Requirements and Suggestions for Typography in Briefs and Other Papers*

REFERENCES

- *The Chicago Manual of Style* (17th ed. The University of Chicago, 2017)
- Harvard Law Review Association, *The Bluebook: A Uniform System of Citation* (19th ed. 2020)
- Edward W. Jessen, *California Style Manual: A Handbook of Legal Style for California Courts and Lawyers*, (4th ed. West Group, 2000)