

JAMES AZADIAN'S TOP FOURTEEN

(The Top Fourteen Things to Remember in a Ninth Circuit Appeal)

1) Make sure you have educated your client (in writing) as to the likely fees and costs on appeal, as well as the various options with which the court of appeals could resolve the appeal. In the civil litigation arena, bring the appeal only if you are persuaded, after reviewing the germane standards of review, that the appeal has merit (and at least some modicum of a chance for success). Nevertheless, inform your client (in writing) that, generally speaking, the chances for civil appellants to win on appeal are low, but that you are confident the appeal has merit and, accordingly, has a better chance for success. In sum, manage your client's expectations, and this must start before the appeal even takes off the ground.

2) Make sure to read and understand the entire Ninth Circuit information packet that you receive after you've filed your notice of appeal with the district court/agency. If you are new to the Ninth Circuit or to appellate litigation, take advantage of the Ninth Circuit Appellate Mentoring Program. It is an outstanding program with exceptional mentors, including Appellate Law Representatives. You will be paired with a mentor in your field (e.g., criminal appeals, civil appeals, immigration appeals, habeas appeals) and be given guidance on style, application of governing rules to the procedures for your appeal, etc. (everything but for substantive legal advice, which mentors are prohibited from giving).

3) Begin developing your theme for the appeal as soon as the trial proceedings are winding down. Same goes for appellee's counsel: don't wait until you receive appellant's brief to begin thinking about your theme on appeal; develop the theme in advance of receiving appellant's opening brief, and then adjust it as may be helpful or needed. Everything you write should punctuate or further that theme in some way. If you have ideas for different themes, run your ideas by various trusted colleagues, who will share with you their honest reactions and help you get a better sense of the themes that may resonate better and be more effective in securing a win for your client(s) on appeal.

4) Make sure to calendar all upcoming deadlines triggered by the filing of the notice of appeal. A very important, fast-approaching deadline is the deadline for appellant's designation of transcripts with the district court – 30 days after filing the notice of appeal. Appellee may counter-designate within 10 days after appellant's designation. For your own organization, also calendar internal deadlines for coming up with your theme on appeal, for preparing an outline of the arguments on appeal, review of the record and selection of the parts of the record that will become the excerpts of record.

5) Fill out the mediation questionnaire and be aware of the Ninth Circuit's mediation program and the initial mediation assessment conference the attorneys have to participate in (usually held by way of a conference call). Clients are not invited to participate in the initial mediation assessment conference (call). (The circuit mediation program is reserved mostly (if not completely) for civil appeals.) Don't give up on this mediation program before you give it an honest shot. You will be amazed at how gifted and experienced the circuit mediators are – they are truly the best in the field, and they are well known for their consistent successes in settling even the most complex, high-stakes cases. You will get out of the mediation process what you contribute to it.

6) There is a single automatic extension of time (up to 30 days) built into the rules to file an opening, answer, or reply brief that could be triggered without a motion. If you have exhausted your single automatic extension, you may file a motion for extension of time at least seven days before a brief's due date.

7) Review all applicable rules (including the Federal Rules of Appellate Procedure and corresponding Ninth Circuit Rules) for formatting, style, filing, contents, etc. And be especially sure to read the germane portions of the Appellate Lawyer Representatives' Practice Guide, also found on the Ninth Circuit's website, and easily downloadable.

8) Requests for judicial notice may be filed with the brief and be referred to in the brief, but don't assume the court will grant your request for judicial notice. The court may deny your request and strike any such references appearing in your brief. Typically, the request for judicial notice is decided in conjunction with the merits briefing.

9) Review the rules for how to prepare the excerpts of record and what is required to be included therein.

10) Carefully review the trial court docket and all pertinent (and potentially pertinent) trial court documents to decide what parts to include in your excerpts of record (input from trial counsel, to the extent it is available, usually proves invaluable here).

11) Understand the importance of the governing standard(s) of review and properly research and decide which standard applies to which issue in your appeal (the Ninth Circuit offers a 200-page guide and summary of the different standards of review on its website).

12) Always, always consider jurisdiction/justiciability as potential issues – the Court should not be the first to flag such issues.

13) Think of yourself more as a teacher in writing your brief – trying to hide bad facts will only cause you to lose credibility with the Court. You have to set forth the pertinent facts in an objective manner and then explain why certain facts matter more than others, or why certain facts shouldn't affect the outcome you're advocating for. Think about which facts matter to your overall storyline and specific analysis. For example, if there aren't any issues that will relate to dates or timing (such as statute of limitations issues), then why would you want to include a bunch of dates in your factual background sections of the brief? A bunch of dates signals to the reader that the reader must try to keep certain dates or a certain timeline in mind because it will ultimately be relevant to the analysis which will follow. But most of the time, dates end up serving no purpose, thus wasting space, making it harder on the reader, and making the brief less interesting to read.

14) Use appendices to briefs sparingly. It is generally best to attach copies of statutes, rules, ordinances, agency policy rulings, etc. to a brief so long as they are the central focus(es) of your analysis. This will give the reader a quick reference for convenience.