OBJECTIVE ANALYSIS OF ADVOCACY PREFERENCES AND PREVALENT MYTHOLOGIES IN ONE CALIFORNIA APPELLATE COURT

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I. INTRODUCTION

Advice about appellate advocacy abounds.[1] How accurately does it teach lawyers the best ways to persuade appellate courts?

Since 1985, we have supported an appellate practice seminar sponsored every three years by Division One of the Fourth Appellate District of the California Court of Appeal and the San Diego County Bar Association. All justices of the court have participated in each seminar, presenting the usual topics of brief writing and oral argument, along with current and specialized matters. Over the years, justices have differed in their advice on subtle and technical points of advocacy.

Preparing for the 2001 seminar, we proposed, and the court accepted, an eighty-three-question survey of the entire

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1. *See e.g.* Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* (rev. 1st ed., Natl. Inst. for Tr. Advoc. 1996); *Appellate Practice Manual* (Priscilla Anne Schwab ed., ABA 1992); Bryan A. Garner, *The Winning Brief* (Oxford U. Press 1999); Michael E. Tigar & Jane B. Tigar, *Federal Appeals: Jurisdiction and Practice* (3d ed., West 1999); Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. Rev. 325 (1992).

professional staff—nine judges and twenty-nine staff attorneys. The main body of the survey asked for the responders' preferences on points of writing and advocacy that are frequently discussed in books and seminars. All nine judges and twenty-five staff attorneys responded. The results were published as bar-graph data in the book produced with the seminar, the *California Appellate Practice Handbook.*[2]

This article reports the results of the survey in an analytical and narrative form, from which advocates can draw inferences about effective presentation of appellate cases. In gathering and reporting the data, we also became immersed in questioning what appellate advocacy really is, given two conflicting mythologies by which many appellate judges and appellate advocates integrate their professional lives. This article describes those mythologies, comments on what the survey results taught about them, and suggests some fundamental principles of advocacy that should make this survey's results useful in courts that are very different from California's Fourth Appellate District.

We begin by describing the court and California appellate practice, so the reader can orient the survey results with practice in other courts. We then describe the survey process and our methodology for reporting the results. We briefly discuss professional mythology and then report the survey results. We conclude with further impressions of mythology and the principles we distilled from the survey process.

II. THE COURT

With 105 authorized positions,[3] the California Court of Appeal is the largest state intermediate appellate court in the nation. It always decides cases by a panel of three judges, and it has no en banc process.[4] It sits in six geographical districts,[5] but a published decision by any panel is a statewide precedent.[6]

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2. *California Appellate Practice Handbook* (Elaine A. Alexander et al. eds., 7th ed., San Diego County B. Assn. 2001) [hereinafter *Handbook*].

3. *See* Cal. Govt. Code §§ 69101-69106 (West Supp. 2001).

4. *See* Cal. Const. art. VI, § 3.

5. *See* Cal. Govt. Code § 69100 (West 1997).

6. *See Auto Eq. Sales; Inc. v. Super. Ct. of Cal.*, 369 P.2d 937 (Cal. 1962).

Three districts are subdivided into divisions. The Fourth Appellate District's divisions are geographical.[7] Division One, the subject of this article, has its chambers in San Diego and hears appeals from San Diego and Imperial Counties.[8] Its jurisdiction includes felony criminal cases in which the death penalty has not been imposed, juvenile delinquency and dependency, and civil cases except those defined as "limited civil cases," which are generally those in which the plaintiff demanded less than $25,000.[9]

When this survey was taken, Division One had nine authorized and funded judicial positions. All positions were filled, all justices were hearing full calendars, and all justices responded to the survey. Division One employs twenty-nine staff attorneys to support the justices. Each justice personally supervises two staff attorneys, whose sole responsibility is to support their supervising justice. The remaining attorneys comprise "central staff," which includes a writ department. Central staff attorneys serve at the pleasure of the court. Chambers attorneys serve at the pleasure of their justices, but the turnover rate is low. The court uses some externs, but does not hire short-tenure law clerks unless specially funded. Twenty-five staff attorneys responded to the survey. No externs were asked to respond.

The court's processing of appeals depends somewhat on its estimated work demands.[10] After the court receives the respondent's brief, the managing staff attorney reviews the case to classify it according to the amount of time needed to prepare the matter. The least demanding criminal cases[11] are assigned to central staff to prepare a bench memorandum in the form of a

7. *See* Cal. Govt. Code § 69104 (West Supp. 2001).

8. *See id.*

9. *See* Cal. Const. art. VI, § 11(a); Cal. Civ. Proc. Code § 85 (West Supp. 2001); Cal. Civ. Proc. Code § 904.1(a) (West Supp. 2001).

10. The internal operating practices and procedures of the court are published in *California Rules of Court–State* 589-591 (West 2002) and certain other compilations of California court rules. The discussion of Division One practices here is based on the published material, elaborations by members of the court in public presentations, and our personal knowledge.

11. Internal criteria provide that these criminal appeals involve issues resolvable with little difficulty based upon well-established caselaw or by statute. Also, there must appear to be no likelihood of dispute in applying the law to the facts.

draft opinion. Other cases receive a rating—three for the easiest to eight for the most burdensome—and are assigned to a lead chambers two months before the calendar on which the clerk has tentatively placed them. Chambers' loads are balanced by the weight factor, not by the raw number of cases. Within each chambers, the assignment of the bench memorandum to a staff attorney or the justice is the prerogative of the justice.

Writ petitions follow a unique path. Each month, three justices are assigned to the writ panel. The assignments rotate so that each justice over time bears an equal load of writ work. When a petition arrives at the court, the lead writ attorney assigns herself or another writ attorney to prepare a summary of the case and a recommendation as to whether to deny the petition summarily or accept it as a "cause" to be decided on the merits. If the panel decides to accept the case, the draft opinion may be prepared by a writ attorney or in the chambers of a member of the writ panel.

When parties submit cases without oral argument, the draft opinion circulates for vote and comment. Usually the assigned justices do not have a formal conference.

Division One hears argument one week each month. On the Monday of the week before argument week, court staff provides each justice with a binder containing the bench memoranda for each case to which the justice is assigned. Each justice has copies of all briefs, and all justices and staff attorneys have access to the record. The panels usually do not confer on cases before argument. In this respect, Division One's practice differs from virtually all other venues of the Court of Appeal and more closely resembles traditional federal practice.

The court typically permits up to fifteen minutes per side for oral argument. For good cause, the court will allow up to thirty minutes per side. Panels may not enforce time limits strictly if important points are being discussed.

Immediately after a session of arguments, the panels confer to decide the cases. If the bench memorandum reflects agreement on disposition, the lead chambers retains responsibility to edit and modify it to the satisfaction of the panel. If the writer of the lead chambers' bench memorandum does not command a majority and is not persuaded to change position, one of the other chambers prepares the majority

opinion. The court publishes as precedent approximately ten percent of its civil-case decisions and four percent of its criminal-case decisions.

III. CALIFORNIA APPELLATE PRACTICE

California appellate practice differs in some notable ways from practice in other jurisdictions. This section will highlight the differences pertinent to the survey. In California, the party defending against an appeal is called the respondent.

In criminal cases, the mechanics of moving a case from sentencing judgment to appellate decision are not unusual. The contents of the record are fixed by court rule.[12] Although augmentation of the record is sometimes needed, appellant's counsel's primary responsibilities are to file the opening and reply briefs, request oral argument if appropriate, and argue the case. The California Attorney General always represents the state as respondent in criminal appeals. A non-profit agency manages indigent criminal appellate representation.[13] The agency assigns each case either to its staff or to a member of a large panel of private attorneys that it oversees. Therefore, in criminal cases, both sides typically have either knowledgeable and experienced counsel or lawyers guided and supervised by seasoned practitioners.

In civil cases, the primary difference between California and other jurisdictions is in an option for assembly of the record. California appellate rules require the parties to designate papers from the superior court's files as a "clerk's transcript."[14] As an alternative, any party to a civil appeal can elect to have the entire appeal governed by Rule 5 of the California Rules of Court. In a Rule 5.1 appeal, the clerk of the superior court

12. *See* Cal. Ct. R. 33, 34, 35 (West 2001).

13. Five so-called "appellate projects" manage indigent criminal appellate representation in the Court of Appeal statewide. Each appellate project is a non-profit public benefit corporation that contracts with the California Administrative Office of the Courts to provide services for stated fees. Because this process is budgetary and contractual, there is no precise statutory citation for its existence. *See* Cal. Govt. Code § 68511.5 (West 1997); Cal. Penal Code § 1240 (West 1982). Appellate Defenders, Inc. manages indigent criminal appellate representation in all divisions of the Fourth Appellate District.

14. *See* Cal. Ct. R. 5 (West 2002).

prepares no appellate record. Instead, the parties jointly or separately prepare an "appendix" containing papers received by the trial court. Usually this method saves the parties money, but it can sometimes cause trouble if an inexperienced practitioner produces an inadequate or confusing record, or a sloppy lawyer provides drafts of papers that differ from the true record or copies with notes or other marks on them. Another benefit of the Rule 5.1 appendix is its inclusion of exhibits offered or received in evidence. In practice, a clerk's transcript does not include the evidence, despite contrary implications in the rules.[15] Because the San Diego County Superior Court always returns exhibits to the parties in civil cases, problems with exhibits occur in clerk's transcript cases. Rule 5.1 elections can make it easier for counsel to provide exhibits to Division One in a timely and efficient manner.

Aside from record assembly, briefing and argument in California civil cases flow in traditional streams. Metropolitan California, including Division One, has a well-developed appellate specialty bar. Nevertheless, many lawyers who handle civil appeals in Division One have little appellate experience.

California briefing rules are much more flexible than the Federal Rules of Appellate Procedure. The rules provide no fixed order of the sections of a brief and require only four sections. A brief must have a statement of the facts, a statement of proceedings in the trial court, a statement of appellate jurisdiction, and a legal argument with each distinct argument made under a separate caption.[16] Notably, the rules do not require an issue statement, a summary of argument, or a conclusion. By custom, California appellate briefs begin with an introduction and end with a conclusion surrounding the four mandatory sections.[17] By rule and practice, briefs have tables of contents and authorities.[18]

At the technical level, California rules offer many options for brief preparation. Counsel may choose between 10-

15. *See* Cal. Ct. R. 5(a) (West 2002).

16. *See* Cal. Ct. R. 13, 14(a) (West 2002).

17. *See* Jon B. Eisenberg et al., *California Practice Guide, Civil Appeals and Writs* § 9:111, at 9-30 (Rutter Group 1989).

18. *See* Cal. Ct. R. 14(a) (West 2002).

character-per-inch or 13-point-variable pitch type.[19] Line spacing may be 1.5 or 2.[20] Briefs may be bound in virtually any way that keeps them together and does not injure the reader.[21]

California's appellate system distinguishes itself from virtually all others by having its own manual of citation that differs substantially from *The Bluebook*.[22] Oddly, the appellate rules do not mention the style manual, and counsel may follow any citation style or none at all. Review of a California appellate decision immediately verifies the primary differences between California style and *The Bluebook*: (1) the date of a case and court identity (if needed) immediately follow the case title, and the date is advanced in virtually all non-case citations as well; (2) all citations are placed in parentheses; (3) secondary citations of cases usually include the full title followed by "*supra*"; (4) numbered or lettered separate textual parts of California statutes are always separated from the code section number by "subdivision" or "subd."; (5) abbreviations and symbols such as "§" are used in parenthetical citations, but all elements of the authority are spelled out in full in text.[23]

IV. HISTORY OF THE SURVEY

In 1985, Division One and the San Diego County Bar Association sponsored their first Appellate Practice Seminar. Staff attorneys and bar volunteers produced the first edition of the *Handbook*[24] as text for the seminar. The seminar and the *Handbook* were intended to provide comprehensive, but relatively basic, training in the entire intermediate appellate process, with emphasis on local practice in Division One. All

19. *See* Cal. Ct. R. 14(b) (West 2002).

20. *See* Cal. Ct. R. 14(b)(5) (West 2002).

21. *See* Cal. Ct. R. 14(b)(8) (West 2002).

22. *See* Edward W. Jessen, *California Style Manual* (4th ed., West 2000); *but see The Bluebook: A Uniform System of Citation* (17th ed., Harvard L. Rev. Assn. 2000).

23. *See* Jessen, *supra* n. 22, §§ 1:1 D, at 4; 1:2 B, at 6-7; 2:6, at 48-49; 2:7, at 49-50; 3:1, at 89; 4:57, at 162. *The Bluebook* user may find some of the differences idiosyncratic. The convention for statutory citations is important because of the undisciplined use of letters and numbers in the California codes. For example, California Penal Code § 647c prohibits obstructing a public thoroughfare, while § 647(c) outlaws soliciting alms in a public place.

24. *See supra* n. 2 and accompanying text.

active justices of Division One taught in the seminar. Every three years thereafter, Division One and the Bar have produced the seminar. It has grown to include experienced practitioners as presenters. The *Handbook*, now in its seventh edition, has grown to more than 400 pages.

Preparing for the 2001 seminar, the *Handbook*'s editors developed a survey of judicial preferences. Presiding Justice Daniel J. Kremer agreed to circulate it among justices and staff attorneys and to publish the results in the *Handbook* for the 2001 seminar.

A Division One staff attorney provided coded copies of the survey to each justice and staff attorney. All forms were returned to that staff attorney, who tabulated results, but preserved the individual anonymity of the responders. The seminar committee published the results in the *Handbook*.

V. INTERPRETING THE RESULTS.

The main body of the survey consisted of seventy-three statements of fact, each followed by an agree-disagree scale from one to seven. Instructions told the responders that marking four indicated indifference to the statement. The committee published the results as bar-graph data.

In the text of this article, we report results of individual questions as simple mean scores, stated in parentheses after the statement to which each applies. Thus, if all thirty-four survey respondents provided a response to the question, we report the sum of their responses divided by the number thirty-four. This number provides a good index of the overall strength of responders' views on a point. Means around four indicate neutrality or indifference. Means below two indicate strong positive preferences, and means above six indicate strong negative preferences. Our simplification masks subtleties in the data, however. A four mean could be based on a large number of marks in the three, four, and five boxes, indicating true indifference. It could also be based on a nearly equal number of marks in the one and seven boxes, indicating strong polar opposite preferences. Where the means mask conflict or other important subtleties, we discuss them in the text. We also

provide a chart of the data at the end of the article, so analysts and advocates interested in more subtleties can tease them out.

VI. MYTHOLOGY, PART I

The survey process and results illustrate the conflicting myths under which appellate lawyers and appellate courts operate. Lawyers live by the myth of the champion, and appellate courts live by the myth of the philosopher king.

A champion takes on the cause of the client and prevails by skill and perseverance. The archetypal champion actively persuades a court to decide favorably for the client. To be an appellate lawyer is to strive perpetually for higher skills of persuasion. That is what impelled the survey. The myth is indispensable. The appellate lawyer's life would be one of quiet desperation if the work consisted merely of delivering a list of issues and a record to a court that would decide cases without regard to the quality of advocacy. The meaning and inspiration reside in making a difference by skill and perseverance.

A philosopher king makes decisions by reason, with no regard for the emotions or personalities involved. The archetypal appellate judge or staff attorney anticipates and considers every idea relevant to a properly raised issue. To be an appellate judge or staff attorney is to strive constantly to reach the right decision, unaffected by either the flaws or the excellence of the advocates. Even the advocate's best presentation only makes it easier for the court to reach a result that should inevitably flow from the law and the record. The myth of the philosopher king is indispensable. The appellate judge's life would be one of quiet desperation if the work consisted of being swayed by advocacy to reach decisions without inherent principle, consistency, or reverence for the doctrine of stare decisis. The meaning and inspiration reside in making a difference by reason and objectivity.

The myths are to some extent inconsistent, and so neither can express the complete truth. The survey documents some of their boundaries.

VII. SURVEY RESULTS

A. Writing a Brief

1. The Introduction

Responders gave clear, strong guidance about introductions to briefs. They want an introduction that provides the procedural context of the appeal. (1.68.) They want to know the dispositive issues. (1.64.) The introduction should identify all the key parties involved, but not provide confusing details about minor players. (2.03.) In a very concise manner, the introduction should set the factual context. (1.97.)

Judges and judicial staff attorneys want to know what the case is about early in their reading. They want to tackle the detailed parts of the brief knowing how to think about what they are reading. Procedural context foreshadows standard of review. Knowing the issues provides a context for linking facts to the merits. The diminishing strength of the second pair of preferences indicates some flexibility for case-tailored omission of unhelpful material.

In contrast, responders were sharply and evenly divided over whether an introduction should argue the merits. Although the mean is almost perfectly neutral, it reflects an equal number of polar opposite preferences. (4.09.)

What does this survey say to the federal practitioner who is directed to begin each brief with a jurisdictional statement and follow with an issue statement?[25] A judge's desire to connect the case with familiar modes of thought is likely universal. An experienced federal practitioner recommended to one of us to violate the rules and begin a federal brief with an introduction for this very reason. This seems to risk disrupting the focus of rule-bound judges and judges who have their own way of using the model federal brief. Instead, all the information our survey responders wanted can be delivered in skillfully written preambles to issues presented.[26]

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25. *See* Fed. R. App. P. 28(a)(4)-(a)(5) (West 2001).

26. *See* Garner, *supra* n. 1, at 47-79.

2. *The Conclusion*

Responders passionately want counsel to write a conclusion that states exactly the relief they seek. This is especially true for appellant. (1.62.) It applies to respondents as well. (1.76.) Responders indicated a weak preference for a conclusion that summed up the merits. (3.5.) Based on narrative comments, any argument in the conclusion should be very short.

3. *Issue Statements and Summaries*

Perhaps because of the prevalence of introductions in California briefs, only a third of responders like a separate issue statement, and an equal number had a somewhat stronger preference against one. (4.12.) The summary of argument is a different story. Although the preferences are not strong, the responders line up in numbers heavily in favor of this optional section *in a long brief.* (2.97.)

4. *Standard of Review*

Responders strongly want appellants to state the standard of review for each issue. (1.79.) The respondent should do the same, especially if there is any dispute on the standard of review. Some responders assume the appellant has correctly stated the standard of review if the respondent is silent, although the majority swings the mean to disagreement. (5.06.)

5. *Organizing Arguments*

Responders think a brief should state its most persuasive arguments first. (2.42.) They show some flexibility by not condemning chronological organization harshly. (4.55.) Narrative comments indicate even more flexibility than the numbers suggest.

6. *Using Quotations and Authority*

Authority supplies the basis for the advocate's logic and analogy. Survey responses reflect the importance of effective use of authority.

Blocked quotations are dangerous. Half of the responders agreed that they tend to skim blocked quotations longer than six or seven lines, although the mean appears indifferent. (4.2.) Breaking up quotations and paraphrasing is not a perfect answer. Although many responders like that practice, in response to "I prefer short quotations or paraphrased text," some expressed strong dislike, and the mean preference was not powerful. (2.88.) Perhaps that response reflects cynicism caused by misleading ellipsis and paraphrase.

When the quoted material is a statute, the survey provided only minimal guidance. Responders express a preference for quotation of the statute in a footnote. (2.47.) Several narrative responses suggest that only the relevant part need be quoted, and others state that the reader should never have to go to a book to read a key statute. In federal practice, the appendix of statutes provides a complete solution. Although a Division One local rule discourages attachments to briefs, practical experience suggests that the court will grant leave to file briefs with useful statutory addenda.

Responders generally agree that string cites are unhelpful. (2.85.) Most approve of dealing with a large body of similar authorities by placing short, bracketed summaries or quotations between the citations. (2.76.)

Citations should always include a specific page reference. (1.35.) This was one of the two strongest briefing preferences expressed in the survey. Many responders are suspicious about whether authority stands for the cited proposition when there is no page reference. (3.24.)

Responders strongly prefer citations in *California Style Manual* format. (2.56.) The three "disagree" responders illustrate the risk to the writer of a reader's quirkiness. Narrative comments suggest that they dislike the manual that governs their own writing. Responders admitted that failure to follow any recognized style manual negatively affects the credibility of a brief. (3.27.)

7. Footnotes

Advocates should not make substantive arguments in footnotes. (1.26.) This was the most intense briefing preference expressed in the survey. For any purpose, footnotes should be

used sparingly. (2.29.) One responder reported personal knowledge of colleagues who do not read footnotes. Asked if they like the style of placing all citations in footnotes, eighteen responders marked "strongly disagree."[27] (5.82.)

8. Use of the Record

Responders are touchy about use of the record. They strongly agree that they are annoyed by immaterial information, such as dates of events and filings that do not matter. (1.85.) They want a reference to the record after every sentence that states a fact. (2.18.) Some responders are not so rigid when a paragraph reports only facts from a page or two of the record, but nearly half maintain their preference for sentence-by-sentence references. (4.18.) Although both writ and appeal records must be continuously paginated, responders want both volume and page numbers in record references. (2.38.)

9. Writing Points

Responders confirmed conventional wisdom about good legal writing. Long sentences can be distracting and confusing, even if grammatically correct. (1.97.) Readers notice and are bothered by legalese and old pleading language (2.74), excessive use of passive voice (2.97), use of adverbs such as "clearly" and "obviously" in place of logic or authority (2.74), arguments longer than six or seven pages without subheadings (3.15), use of throat-clearing phrases such as "it is important to note that" (3.03), and writing in first-person plural (3.45). They want advocates to use shortened names rather than acronyms for corporate parties, agencies, and statutes, unless the acronym is one of common usage. (2.88.)

27. *But see id.* at 114.

B. Producing a Brief

1. Typography

Responders expressed no strong preference between ten-character-per-inch and thirteen–point-variable pitch type (3.73 for proportional), but narrative comments suggest that they want larger type. They strongly prefer double-line spacing over 1.5-line spacing. (2.76.) These responses suggest that bench-bar relations could be improved by adopting the federal word count control over length of briefs,[28] so that lawyers can use larger type without having to cut substance from their briefs.

Responders prefer briefs that use no italics, bold, underlining, or capitalization for emphasis. (3.27.) Although many responders have no preferences, those who care prefer italics to underlining for citations (3.29) and for emphasis (3.32).

Responders strongly dislike capitalizing entire names of parties. (5.7.) While many do not care, those who notice want the major section headings of a brief to be in capital letters. (3.44.) Responders had no significant preference for or against capitals in level-one outline headings. (3.74.)

Creative typography has risks and benefits. Responders expressed weak support for bullet points (2.96) and visual aids such as charts and diagrams (3.24). Narrative comments cautioned that creative typography and visual aids must be clear and well-executed. Advocates should use these devices sparingly and with excellence.

Responders expressed weak preferences for traditional step-indented outline structure (2.94), bold rather than underlined headings (2.94), single-spaced headings (3.56), and ragged right over full justification (3.58). Only a few are distracted by the quirk of indenting paragraphs more than the standard five spaces. (3.88.)

28. *See* Fed. R. App. P. 32(a)(7) (West 2001). California did in fact adopt word-count controls after the survey was completed. *See* Cal. Ct. R. 14(c) (West 2002).

2. *Binding*

None of the standard technologies for brief binding please the responders. Each type was presented to responders with the phrase "I like." Staples and tape flunked. (5.28.) Spiral binding has some friends but many strong enemies. (4.2.) The prevalent velobinding has few friends and lukewarm detractors. (4.67.) Overall, comb binding had the best numbers, but they are not very good. (3.79.)

Responders want a binding system that allows a brief or record to lie flat on a desk, stays open to the chosen page, holds together, does not injure users, and does not tangle with other documents. Velobinding fails the first two criteria, comb binding can violate the third and fifth, and spiral binding fails the fourth and fifth.

3. *Adding the Appendix*

Lawyers often file a rule 5.1 appendix with their briefs. The binding preferences apply to them. Our responders do not favor the lawyer-prepared joint appendix (4.64) or separate appendices (4.67). The responders prefer to have documentary exhibits included in the appendix. (2.18.) This should support a preference for the appendix method. We suspect that binding, accuracy, and omission problems explain why responders are not satisfied with lawyer-prepared appendices. Support for this conclusion lies in the strong agreement that counsel negatively affects the credibility of an appeal by appearing not to make a good faith effort to include all relevant documents in an appellant's appendix. (1.88.)

C. Avoiding Common Errors in a Brief

One section of the survey asked responders the frequency of certain errors in briefs. Responses were broken down into categories of general civil, criminal, and juvenile dependency. We report only the first two here because juvenile dependency is a very specialized practice affected by local rules and procedures. The numbers are mean calculated percentages.

Briefing Error	Civil	Criminal
Too long for complexity of issues	34	30
Fact statements violate standard of review	32	25
Record misstated	29	16
Bad grammar and punctuation	24	26
Not edited or proofread	22	16
Case authority does not stand for proposition argued	18	16
Personal attacks on opposing counsel	13	7
Personal attacks on trial court	9	7

These responses indicate a high level of dissatisfaction. Substantial numbers of appellate briefs apparently interfere with their own messages and fail to serve the interests of the advocates' clients. Comparatively, the court's comments evince a general assessment that the quality of briefing is better in criminal matters than in civil ones. This may reflect the fact that in Division One, both sides of criminal appeals are almost always handled by experienced appellate practitioners, while many civil appeals are handled by practitioners with little or no previous appellate practice.

D. Oral Argument

Only justices answered survey questions about oral argument. They provided useful insights on the value and mechanics of argument in a hot court that has not conferred and reached a tentative result.

A significant number of justices agreed that argument helps shape a good decision, even if it does not affect the disposition. (2.44.) The court weakly divided on whether justices make up their minds on important points during argument. (4.22.)

Counsel should prepare to present an argument narrowly focused on critical issues. (1.22.) Justices are bothered by arguments that only reiterate the briefs. (1.56.)

In California courts, argument must start by making one's appearance for the record. Traditionally, counsel say "may it please the court," state their name, and state the party they represent. Then they begin the argument. This beginning is safe with all nine justices. (2.44.) Some lawyers are trying less

formal approaches, such as beginning with "good morning." This approach has two lukewarm friends, two hot detractors, and an indifferent consensus. (4.22.) Other advocates would like to use a minimalist approach—name, party, and direct launch to the merits. Although two justices like this, three do not. (3.56.)

In addition to preferences in openings, other responses indicate that the court expects and appreciates traditional formality. As a group, they want to be called "the panel" or "the court"; they are repelled by "you guys." (Narrative comments.) Two acknowledge that the contemporary "your honors" grates on their ears, although the consensus is indifference. (4.33.) Individually, three prefer to be addressed as "Justice [Name]" in argument, one as "your honor," and three either by name or as "your honor." They expect counsel to abide by time limits unless invited to continue. (1.89.) They want advocates to cease arguing when they have made their points, even if time remains. (1.33.) And they expect candid and responsive answers to their questions, even if the answer is "I don't know." (1.22.)

VIII. MYTHOLOGY, PART II

The survey partially validates the myth of the philosopher king, identifies some of its limits, and partially validates the myth of the champion. It suggests the question the would-be champion should ask: How can I persuade people whose myth is that they cannot be persuaded by anything except logic and that they would find the same path to decision regardless of my assistance?

Survey responses illustrate the myth of the philosopher king. Correct use of the standard of review goes to the heart of integrity in appellate decisions. A majority of responders strongly disagree with the statement that they assume an appellant's description of the standard of review is right unless they know otherwise or the respondent objects. They will not default to defective advocacy. Responders often wrote narratives after questions, stating that the question's point of style would never affect the outcome of a case. One responder expressed the essence of the myth in a narrative at the end of the survey: "Briefs and oral argument that rely on emotion are not helpful in

decision making. Such arguments are distracting and counter productive. Our job is to make reasoned decisions; briefs that assist the court in this process are most helpful to me." At the seminar, one justice capped the denial of the myth of the champion: " 'Tactical' is not a word that should be used at the appellate level at all."[29]

The myth of the philosopher king cannot be entirely true. The appellate decisionmaking process is human, not archetypal. The court may sometimes fail to think of an important idea that the advocates omitted. And even if an idea is on the table, it is not a pure abstraction, and its weight depends on the context in which the judge considers it. In difficult cases, the connections an advocate makes between subtleties of logic and public policy may contribute importantly to the contextual reasoning and evaluation leading to the result or to the law developed in a precedential opinion.

The survey indicates that the quality of the advocate's delivery can make a difference, too. Bad briefing can induce states of mind that increase the risk of human error. The most powerful illustration from our survey is responses about defects that undermine the credibility of a brief. Playing games with the content of a rule 5.1 appendix has powerful negative consequences. An important number of responders wonder whether cited authority stands for the argued proposition simply because the advocate omitted a pinpoint citation. Even failure to follow a coherent citation style can affect credibility. A human reader whose first contact with an idea comes from a devalued source may not give that idea the weight it deserves in the abstract.

Annoying, boring, or confusing a reader differs from undermining one's own credibility, but we cannot rule out those faults as incubators of mistakes. Tapping the resources of three judges and the court's staff, the appellate process has an inherent quality-assurance program. If the advocate buries an important point in a footnote that one reader skips or skims, another reader is very likely to unearth the idea. If one reader's comprehension is impaired by annoyance or confusion arising from bad advocacy, another is very likely to consider the issues with ideal

29. Remarks of California Court of Appeal Justice Patricia D. Benke, on oral argument.

abstraction. Still, the fact that judicial and staff attorney responders acknowledge "it bothers me when" they encounter certain defects illustrates the risk of error. The advocate who has annoyed or distracted the appellate court readers has forfeited control over the delivery of the client's message and the guarantee that his or her points will be fully comprehended.

The myth of the champion is also not entirely true—passionate entreaty will not cause a court to overrule settled precedent. But the differences between the archetypal judge and the surveyed responders identify the field on which the champion plays. The advocate must work to help the court to avoid the human errors of omitting, overlooking, and undervaluing concepts that are important to the decision. The advocate must both design a cogent analytical blueprint and present the analysis in a way that minimizes risks that its cogency could be missed. Defective advocacy can contribute to a wrong result, and effective advocacy carries the possibility of preventing a wrong result.

A lawyer who confuses mythologies may make important errors. We asked our seminar committee members to respond to the survey while the court was making its responses. We do not suggest that the fourteen responses are statistically important, and, for the most part, the practitioners' views were very similar to those of the court personnel. A few major disagreements reflect differences in mythology. Two-thirds of practitioners assume the appellant correctly states the standard of review if the respondent does not argue the standard. The same proportion skims blocked quotations. Unanimously, they discredit a brief that does not follow any recognized style manual. These responses indicate that practitioners are more willing than are court personnel to allow the quality of advocacy to determine the outcome. An appellate practitioner who expects to profit from an opponent's error or omission may fail to make points that are important to a court searching through mistakes for correctness.

The consequences of good and bad advocacy probably vary with the difficulty of cases. Judges of intermediate appellate courts often report that a high number of their cases are clear and easy to decide. The chance of human error in those cases is small. But whenever the philosopher king would have difficulty

finding the path to the right answer, "error" in the real human world may be impossible to perceive, and advocacy may have potent force. In those cases, our survey counsels that every bit of the advocate's skill and perseverance makes a difference.

IX. THE ESSENTIAL PRINCIPLES

Analyzing our survey led us to distill five principles of advocacy that probably apply in any intermediate appellate court, state or federal.

1. Clarity, simplicity, and analytical integrity in the organizing and writing of an appellate brief are the most important qualities of appellate advocacy.

2. The advocate's next highest goal should be to achieve transparency. In principle, that means doing nothing to annoy or distract the reader. In practice, that means not only writing well in a general sense, but also following styles and conventions that are familiar and comfortable to the court. For example, in the California Court of Appeal, the advocate should follow the *California Style Manual.* The brief will read the way that the judges and staff attorneys write, and they will be comfortable with it. Part of the art of transparency is concealing how the finer points of advocacy are employed, lest the reader think he or she is being "sold."

3. Clarity and transparency in a brief always require helping the reader orient to the case at the beginning. Although local styles may vary, a brief must state at the beginning the procedural context of the case, the issues to be decided, and the identities of the key players. Early in the brief the advocate also must show a palatable way of deciding the issues, but an introduction need not argue.

4. The transparency principle applies to oral argument.

5. The advocate must pursue excellence in all cases for two reasons. First, by presumptuously slacking off in an apparently easy case, the advocate creates the conditions in which human error can occur. Second, although a good reputation and no reputation are sound platforms from which to advocate, a bad reputation calls out from the cover of a brief.

The transparency principle also cautions advocates to evaluate detailed advice about appellate practice critically and

contextually. We would be out of line urging practitioners in the appellate courts of the federal system or other states to follow the *California Style Manual.* Yet books and articles about appellate practice often state preferences of the writer or of courts in which the writer practices as if they applied universally. "Follow *The Bluebook* exactly" would be bad advice to an advocate writing to Division One of California's Fourth Appellate District.

Finally, we believe our work shows that bench and bar can conduct this kind of analysis and emerge with a useful product and intact mythologies. More work of this kind can help separate local and universal preferences and can help advocates present more valuable work product to the courts in which they practice.[30] We therefore urge that other courts pursue similar studies with either academic or bar association support.

APPENDIX

The appendix that follows presents the survey data in table form. Survey statements are listed in the order of their discussion in the text of the article. The Agree column presents the number (N) of responses that checked preference boxes 1, 2, and 3, indicating, respectively, strong, moderate, and weak agreement. It also presents the mean value (M) of those responses. The NP column presents the number of responses that checked preference box 4, indicating no preference. The Disagree column presents the number (N) and mean value (M) of responses that checked preference boxes 5, 6, and 7, indicating, respectively, weak, moderate, and strong disagreement.

30. One author received and published fifty-eight judicial responses to a one-question survey about basic models of brief writing. Bryan A. Garner, *Judges on Briefing: A National Survey* (West 2001).

Statement	Agree		NP	Disagree	
	N	M		N	M
Introduction to brief should provide procedural context	31	1.42	2	1	5
Introduction to brief should identify dispositive issues	32	1.5	0	1	6
Introduction to brief should identify key parties (only)	28	1.43	2	4	5.25
Introduction to brief should set the factual context	26	1.62	2	4	5.75
Introduction to brief should argue the merits	15	1.93	3	15	6.27
Conclusion to appellant's brief should state exact relief	30	1.3	4	0	0
Conclusion to respondent's brief should state exact relief	30	1.43	3	1	5
Conclusion to brief should sum up the merits	17	2.12	7	10	5.5
Brief with introduction should also contain issue statement	11	2	11	12	6.17
A long brief should have a summary of argument	22	2.13	6	5	5.4
Appellant should state standard of review for each issue	30	1.4	2	2	5.5
I assume appellant's standard of review is right if respondent does not object	8	1.62	3	22	6.45
Organize by stating most persuasive argument first	26	1.81	5	2	6.5
Okay to organize arguments chronologically	5	2	12	14	5.93
I tend to skim blocked quotes over six or seven lines	17	2.06	1	16	6.5
I prefer short quotations or paraphrased text	24	1.83	4	6	6.33
Provide entire relevant statute in a footnote	20	1.9	8	6	5.67

Statement	Agree		NP	Disagree	
	N	M		N	M
String cites are unhelpful	21	1.76	7	6	5.3
Use short bracketed summaries between cites	15	1.6	7	3	5.67
Citations should always include a specific page	33	1.24	0	1	5
I doubt integrity of citation if it lacks a pinpoint cite	21	2.1	6	7	6
Use California Style Manual format	27	1.59	4	3	6.67
Unrecognizable citation style impairs credibility	20	2.25	8	5	6.2
Do not make substantive arguments in footnotes	32	1.19	1	1	5
Use footnotes sparingly	28	1.71	2	4	5.5
Put all citations in footnotes	2	2	7	25	6.64
I am annoyed by immaterial dates, etc., in fact statement	30	1.4	3	1	7
Place a record reference after every sentence stating a fact	27	1.67	5	1	7
Okay to put references, if few, at end of paragraph	15	1.87	4	15	6.53
Use volume and page numbers in record references	25	1.56	6	3	6
Long sentences confusing even if grammatically correct	31	1.77	3	0	0
I am bothered by legalese and old pleading language	23	2.04	9	2	5
I am bothered by excessive use of passive voice	21	2.05	9	4	5.5
I am bothered by adverbs like "clearly" in place of logic or authority	24	2.04	7	3	5.3
I am bothered by arguments over six to seven pages without subheadings	20	2.25	10	4	5.5

Statement	Agree		NP	Disagree	
	N	M		N	M
I am bothered by throat-clearing phrases	18	1.67	9	7	5.28
I am bothered by writing in first-person plural	14	2.36	15	4	5.25
Generally use shortened names rather than acronyms	20	1.8	10	4	5.5
Use larger proportional type rather than Courier	8	2.25	17	6	6.16
Use double spacing rather than 1.5	21	1.95	10	2	5
Use no typographic emphasis	17	1.88	9	7	5.7
Use italics, not underline, for citations	14	1.93	17	3	5.67
Use italics, not underline, for emphasis	15	2.07	15	4	5.5
Capitalize party names	1	3	9	24	6.46
Capitalize major section headings	14	2.5	19	1	6
Capitalize level-one outline headings	10	2.4	20	4	5.75
I like bullet points	24	2.5	3	2	7
I like visual aids like charts and diagrams	22	2.36	6	6	5.67
I like a traditional step-indented outline structure	11	2.36	20	2	5.5
I like headings in bold rather than underline	12	2.5	19	2	5.5
I like single-spaced headings	13	2.46	16	3	6
I like ragged-right rather than full justification	10	2.4	22	1	6
I am distracted by deeply indented paragraphs	9	2.22	18	7	5.71
I like staple-and-tape binding	1	3	14	17	6.47
I like spiral binding	10	2.1	13	11	6.36
I like velo binding	5	2.2	12	16	5.94
I like comb binding	10	2.2	17	7	5.57

Statement	Agree		NP	Disagree	
	N	M		N	M
I prefer a joint appendix to a clerk's record	4	1.75	15	14	6.36
I prefer separate party appendices to a clerk's record	7	2.28	11	15	6.27
Include documentary evidence in the appendix	25	1.4	6	2	6.5
A defective appendix negatively affects credibility	30	1.83	3	0	0
Oral argument helps shape a good decision	7	1.57	0	2	5.5
Justices make up their minds on important points during argument	3	2.33	2	4	5.75
Focus argument narrowly on critical issues	9	1.22	0	0	0
I am bothered by arguments that only reiterate briefs	8	1.25	1	0	0
It's okay to start with "may it please the court"	6	1.67	3	0	0
It's okay to start informally	2	2.5	5	2	6.5
It's okay to launch directly into the merits	2	1.5	4	3	5.67
"Your honors" grates on my ears	2	1.5	3	4	6
I expect counsel to abide by time limits	7	1.57	2	0	0
Stop arguing if you make your points, even if you have more time	9	1.33	0	0	0
I expect a candid response to a question, even if it is "I don't know."	9	1.22	0	0	0