



**STATE & FEDERAL APPELLATE PRACTICE:
1920 TO PRESENT**

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- Graduated *summa cum laude* from Willamette University College of Law, where he was Managing Editor of the Willamette Law Review and graduated second in his class
- Focuses his practice on civil appeals in state and federal courts
- Authors an appellate blog: <https://www.carneylaw.com/cosgroveappellateblog/>
- Honorary Member of the King County Bar Association Appellate Section's Executive Committee and a member of the Washington Defense Trial Lawyers Amicus Committee
- Committed to pro bono service

Roadmap for Today's Presentation

- Historical overview of appellate practice as it originated in the English common law courts
- Modern development of American appellate practice in the 19th century to the present
- Relationship between state and federal appellate courts
- Appellate practice in Washington state courts
- Impact of digital technology of formatting appellate briefs



Genesis of American Appellate Practice: English Common Law

- Oral tradition: favoring speech over writing (speech-centered legal process)
- English appellate practice: submission of the case on appeal was done orally
 - Judges learned about a case at oral argument and issued decisions orally from the bench
- United Kingdom: no written constitution
- Oral advocacy is the heart of the English appellate system – public accountability
- To this day, English appellate practice remains mainly oral

America's Early Rejection (in part) of the English Oral Tradition

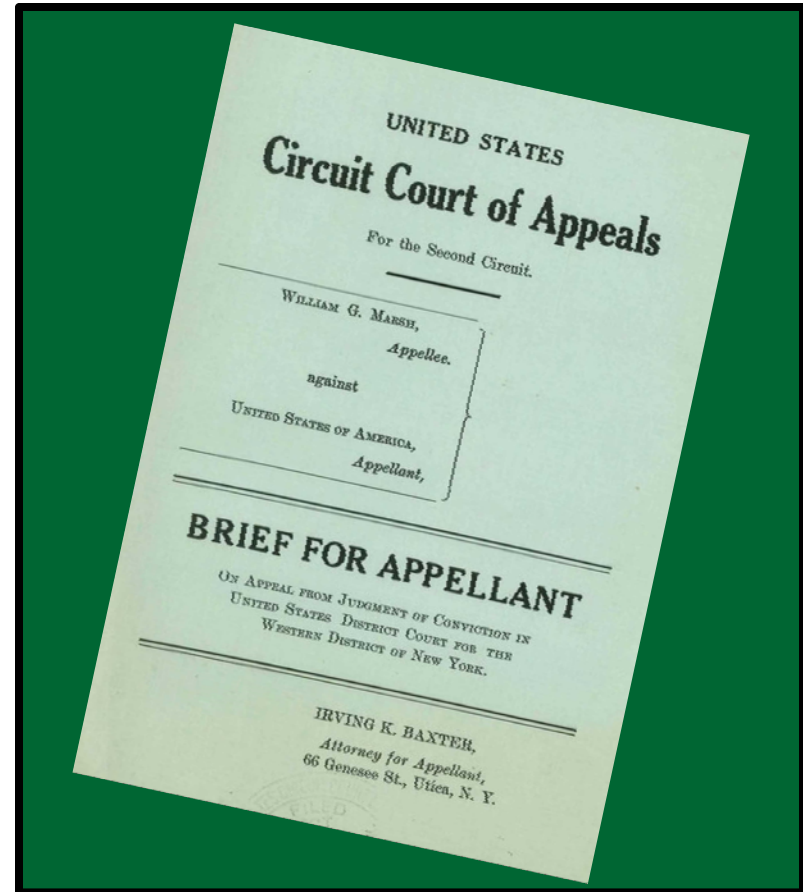
- American courts early on rejected the oral tradition and developed writing-centered legal tradition
- 1795 – Supreme Court adopts its first writing requirement: attorneys must submit a statement of material points of argument
- Nineteenth century: de-emphasis of oral argument in state courts and written opinions become standard practice
- 1821: Supreme Court requires a printed brief or abstract containing the substance of all the material pleadings, facts, and documents (6-10 pages)
- 1858: Supreme Court limits oral argument to two attorneys and maximum of two hours per attorney
- 1871: oral argument limited to two hours total per side

Why did America Reject the English Oral Tradition?

- Early 20th century: federal courts begin disposing of cases without oral argument
- Writing-focused legal process
- Why?
 - Few early American lawyers trained in oral tradition of English courts
 - New nation wanted to build a body of binding precedent
 - Distrust of government and legislatures = need for judges to explain their rulings
 - Efficiency

American Hallmark: Focus on Written Appellate Advocacy

- In 2007, 31,000 appeals on the merits in the federal circuits and nearly 23,000 were decided without argument
- Ninth Circuit: oral argument is generally 10 to 20 minutes
- Downside to a written approach: time-consuming and costly

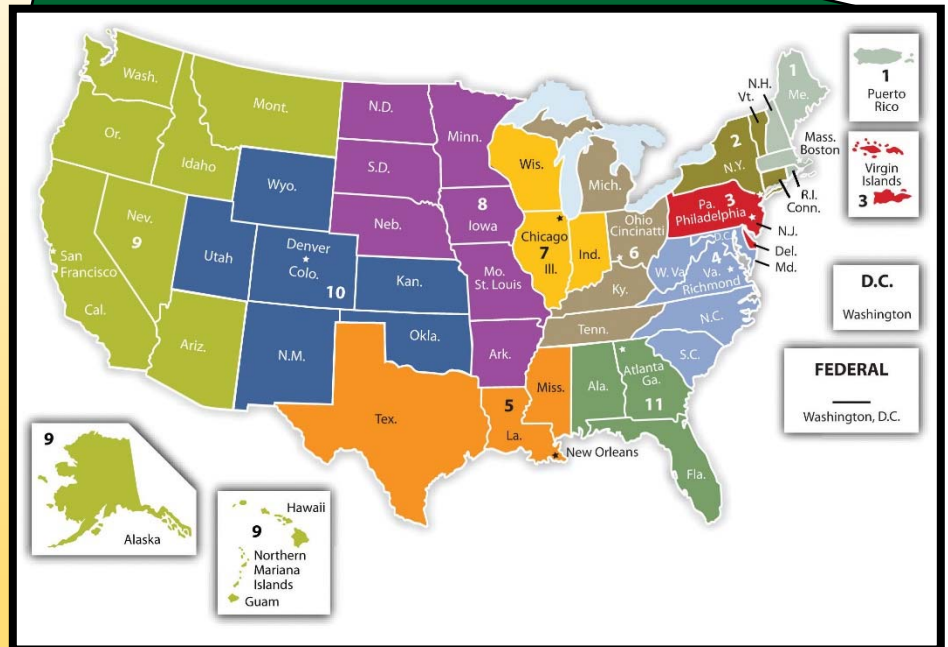


Rule 34: Federal Rule of Appellate Procedure

- Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:
 - (A) the appeal is frivolous;
 - (B) the dispositive issue or issues have been authoritatively decided; or
 - (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

Federal Appellate Courts

- By the 1920s, there were 12 federal circuit courts (including the D.C. Circuit and the Federal Circuit)
- The thirteen federal circuits today have 179 judgeships (11th Circuit created in 1981)
- Federal appellate court judges and justices are appointed by the president for life tenure
- The Federal Rules of Appellate Procedure were adopted by the Supreme Court in 1967



The Ninth Circuit

- Largest of the 13 federal circuit courts
- Holds almost 50 judgeships (active and senior status)
- Has the highest percentage of rulings reversed or vacated by the Supreme Court



History of the Washington State Supreme Court

- Established in 1848 as a territorial supreme court with three justices
- Nine justices now sit on the Court as of 1909
- Between 1909 and 1969: most cases heard by a department of the court, each composed of the Chief Justice and four associate Justices
- Since creation of the Court of Appeals in 1969, all cases heard *en banc* (full court)



Temple of Justice

Washington State Supreme Court

- Discretionary (permissive) jurisdiction
 - Acceptance of review of lower court decisions = discretionary
 - Vehicle to seek review in most cases: “Petition for Review”
- Some types of cases from the superior court may be appealed directly to the supreme court (RAP 4.2):
 - *E.g.*, authorized by statute; law unconstitutional; conflict among decisions of the court of appeals or an inconsistency in Supreme Court decisions; or the issue is of broad public interest and requires a prompt and ultimate determination.
 - Death-penalty cases: automatically reviewed
 - Supreme Court has original jurisdiction of petitions against state officers
- Publishes about 150 judicial opinions per year
- Oral argument is generally 20 minutes per side

Washington State Court of Appeals

- Established in 1969 with three divisions based in Seattle, Tacoma, and Spokane
- 22 judges currently sit on the Washington Court of Appeals, divided into three geographic divisions
- Panels of three judges hear each appeal
- Appeal as a matter of right – mandatory jurisdiction
- Hears criminal, civil, and administrative law appeals



Women & the Appellate Courts

- Number of women serving the federal appellate bench in 1920: 0
- As of 2016, about one third of the active judges sitting on the thirteen federal circuit courts are female
- Sandra Day O'Connor was the first woman appointed to the Supreme Court in 1981
- Carolyn Dimmick was Washington's first female supreme court justice in 1981
- Today, six of the nine supreme court justices in Washington are women, and six of the twenty-two state courts of appeals judges are women

State Court Appellate Practice

■ General Orders

- Pay attention to each appellate court's "general orders" for specialized rules and modifications to the Rules of Appellate Procedure (RAPs)
- https://www.courts.wa.gov/appellate_trial_courts/

■ Types of Appealable Decisions

- *E.g.*, final judgment; summary judgment
- Two types of appeals:
 - review as a matter of right (appeal)
 - review by permission (discretionary review)
 - Discretionary review of an interlocutory decision: less common and subject to specialized rules and standards (RAP 2.3)

Record on Review (RAP 9.1)

Report of
Proceedings

Clerk's Papers

Exhibits

Important State-Court Appellate Filing Deadlines

- **Notice of Appeal**
 - 30 days to file a Notice of Appeal from entry of an appealable decision
 - Strict appeal deadline and a jurisdictional requirement
 - Filed in trial court and revokes trial court's jurisdiction

- **Contents of Notice of Appeal (RAP 5.3)**
 - Pleading entitled: "Notice of Appeal"
 - Specify the party/parties seeking review
 - Designate the decision(s) sought for review
 - Name appellate court to which review is taken
 - Attach a copy of the signed order/judgment

Important State-Court Appellate Filing Deadlines

- **Perfection Letter**
 - Upon filing Notice of Appeal, a perfection letter soon follows, outlining all appellate filing deadlines

 - **Practice tip:** do not calendar appellate deadlines from the perfection letter
 - Calendar the first few deadlines (designation of clerk's papers and statement of arrangements)
 - Purpose: if you file a motion for extension for any deadline, it will throw off all later deadlines

Important State-Court Appellate Filing Deadlines

- **Designation of Clerk's Papers** (RAP 9.6)
 - ❑ must file within 30 days after Notice of Appeal is filed
 - ❑ filed in the trial court, a copy of which must also be filed in appellate court
 - ❑ may supplement the clerk's papers up until the filing of the party's last brief
 - ❑ **Practice tip:** only designate those clerk's papers and exhibits "needed to review the issues presented to the appellate court (RAP 9.6(a))
 - ❑ **Practice tip:** don't designate duplicative parts of the record
 - ❑ Respondent must pay for a copy of a numbered set of clerk's papers
 - ❑ Clerk's papers must include certain pleadings, including:
 - Notice of Appeal
 - Complaint
 - Any written order/ruling not attached to Notice of Appeal that the party wants reviewed
 - Any written opinion, findings of fact, or conclusions of law

No “Horizontal Stare Decisis” in Washington: *Matter of Arnold*

- *Matter of Arnold*, ___ Wn.2d ___, 410 P.3d 1133 (2018): there is no horizontal stare decisis in Washington
- Each division of the court of appeals should respect decisions of another division, but should not apply stare decisis to that prior decision
- All conflicts between divisions on legal issues: resolved by the state supreme court
- Decisions from other divisions should be treated as persuasive rather than binding
- State supreme court resolves court-of-appeals conflicts within the court of appeals

Statement of Arrangements

- **Statement of Arrangements** (RAP 9.2)
 - Must file within 30 days after Notice of Appeal is filed
 - **Practice tip:** determine if hearing or trial was transcribed by court reporter or audio log
 - Only arrange for transcription of those portions of the verbatim report of proceedings necessary for issues raised on appeal
 - Any other party wishing to add to the verbatim report of proceedings should file and serve within 10 days a statement of arrangements on all other parties and the court reporter or authorized transcriptionist
 - That party may pay for the additional parts of the report of proceedings or apply for an order in the trial court requiring the party seeking review to pay for the additional parts

Report of Proceedings (RAP 9.5)

- Must file within 60 days after Statement of Arrangements is filed
- **Practice tip:** if seeking to maximize the full 60 days, arrange with the court reporter or authorized transcriptionist to file the report of proceedings on the 60th day

Appellate Briefs

- Opening Brief: must file within 45 days after Report of Proceedings is filed (RAP 10.2)
 - If no report of proceedings, brief must be filed within 45 days after designation of clerk's papers and exhibits are filed in trial court
- Response Brief: must file within 30 days after service of Opening Brief
- Reply Brief (optional): must file within 30 days after service of Response Brief
- RAPs provide detailed rules on formatting appellate briefs

Filings in State Appellate Courts

- “Portal” available for all divisions and the Supreme Court
- Streamlined process for all appellate filings
- Every party who signs up for the portal receives service of appellate filings

Oral Argument in the Washington State Court of Appeals

- 10 minutes per side at Division one. 15 minutes per side at Divisions Two and Three
 - Parties can ask for more time in exceptional cases
- Most cases decided without oral argument (about a 60/40 split)
- Most cases screened by a staff attorney to determine if oral argument warranted
- Cases screened once Respondent's Brief is filed
- Generally takes 3-6 months from filing of Respondent's Brief to set cases for a calendar

Mandate – written notification of an appellate decision terminating review

- Issued 30 days after the decision is filed – if no reconsideration or motion to publish is filed and no petition for review to the supreme court is filed (RAP 12.5)
- Mandate restores trial court jurisdiction
- Issuance of a mandate precludes appellate court from changing or modifying its decision

Impact of Digital Technology of Formatting Appellate Briefs

- Most lawyers and judges are reading briefs electronically
- Studies show we read differently on a screen
 - “F pattern”
 - Spatial perception
- “Readability” tips for writing to a digital audience:
 - *E.g.*, vary the length of sentences and paragraphs, use headings and subheadings, use white space, avoid footnotes

Questions?



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