Reconcile the Tension

Appellate Advocacy—Whose World Is It?

By Roger D. Townsend, Amy Warr and Anna Baker

Enlightened clients should desire the same advocacy that the courts desire.

"You say goodbye and I say hello." The Lennon-McCartney lyric seems a good metaphor for the unending differences between what appellate courts desire in appellate advocacy and what appellate parties demand in appellate advocacy. Guess who's caught in the middle? The appellate lawyer. The good appellate lawyer knows what the courts want and how to give it to them. But in the real world—the current world of competitive legal practice and little client loyalty—the need to give clients what clients want can be almost overwhelming.

This article explores this tension in specific areas of appellate advocacy: the issues presented, statement of facts, and argument in briefs; as well as oral argument, rehearing, and petitions for writs of certiorari. It then gives advice on ways to reconcile the tension, but accepts that the tension may always be there.

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"Briefs are written for one audience and one audience only—judges and their law clerks.... You write to persuade a court, and not to impress a client." Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 17 (1996). But the appellate lawyer's job also is to serve the client, who must be satisfied with the brief. A client who is not impressed with a brief is not likely to hire that lawyer again. The first place the tension arises is in the selection of issues to be appealed.

Issues Presented

Clients often wish to include as many issues as possible because they feel that by doing so they maximize their potential of winning on at least one of several arguments. In other words, throw enough stuff against the wall and perhaps something will stick. Appellate judges, however, appreciate appellate lawyers who know what the best arguments are and limit those on appeal.

Accordingly, one cannot overestimate the importance of carefully selecting the issues for appeal. The issues frame the appeal and provide a quick first impression about the brief and the appeal. Thus, one of the most important functions of appellate lawyers is to eliminate weak arguments that harm the appeal. A smattering of poorly chosen

issues signals either laziness or incompetence: "Scattershot argument is ineffective. It gives the impression of weakness and desperation, and it insults the intelligence of the court. If you're not going to win on your stronger arguments, you surely won't win on your weaker ones. It is the skill of the lawyer to know which is which." Antonin Scalia & Bryan Garner, *Making Your Case: The Art of Persuading Judges* 22 (2008).

Although this advice is true, the real "skill of the lawyer" today is to convince the client to abandon weak issues. Judge Aldisert contends that "[i]t is the lawyer, and not the client, who has the ultimate responsibility for deciding what issues will be discussed on appeal." Aldisert at 114. That is true for frivolous arguments, since the lawyer signing the brief may be subjected to sanctions. But it is ultimately the client's case, not the lawyer's. For weak arguments, the best the lawyer can do is to explain why they should be dropped. If the client insists on pressing ahead with them, then the lawyer either will have to go along or will need to withdraw from the case. Only someone who has not practiced law in today's competitive environment will lightly recommend withdrawal. Aside from losing that particular piece of business and client, the lawyer is likely to lose other business from word-of-mouth comments that the lawyer is "difficult to work with." Since most corporate counsel choose counsel based on recommendations from other corporate counsel, this could devastate one's entire appellate practice.

Thus, appellate lawyers will have to make clear to clients, as well as to trial counsel, the importance of limiting the issues on appeal, while recognizing clients' reluctance to release certain issues. Appellate lawyers should advise clients that weak issues actually weaken strong issues: "Bear in mind that a weak argument does more than merely dilute your brief. It speaks poorly of your judgment and thus reduces confidence in your other points. As the saying goes, it is like the 13th stroke of a clock: not only wrong in itself, but casting doubt on all that preceded it." Scalia & Garner at 21–22; *see* Aldisert at 115.

Presenting an abundance of issues demonstrates an unwillingness to do the hard work up front to carefully select the proper issues for appeal. "Don't let that happen. Arm-wrestle, if necessary, to see whose brainchild gets cut. And don't let the client dictate your choice; you are being paid for your judgment." Scalia & Garner at 23. Like clapping with only one hand, that's easier said than done. In today's world, there is a real risk that the client will stop paying for that judgment and fire the appellate lawyer because it disagrees with the lawyer's advice.

Statement of Facts

The statement of facts is another part of the brief where the appellate lawyer can get caught in the middle of the tension between what clients want and what courts want. Extremely few clients ever believe that they fairly lost a case. Clients usually want to shout about the unfairness of the result and demonstrate that they have been singled out for the worst miscarriage of justice since the Salem witch trials. Part of their desire stems from their correct intuition that "judges may form their first, and probably their most lasting, impression of your side of the case from reading your statement of facts." Aldisert at 152. Yet, from the appellate courts' perspective, less is more. Show, don't tell. In other words, let the facts speak for themselves, without editorializing or overdramatizing them.

Furthermore, appellate lawyers should "[b]e careful… about introducing sympathetic facts that are legally irrelevant." Scalia & Garner at 94. "The judges… will see through this naked play for favoritism and will think less of you because obviously you think less of them." *Id.* at 94–95. Because credibility is a major element of persuasion, this will actually harm your client's position. Therefore, appellate lawyers must always control the content and tone of the statement of facts, because an overly argumentative statement can turn off judicial readers.

Clients also sometimes want the statement of facts to reflect their view of what really happened, rather than what the trier of fact found. But the standards of appellate review require appellate courts to view the facts found at trial "in a kind of jurisprudential concrete." Aldisert at 160. When an appellate brief attempts to "reargue" those facts, that party "immediately lose[s] substantial credibility." *Id.* Yet credibility is paramount:

> To gain the judge's attention, you must immediately establish your credibility as a brief writer. Without credibility you may possibly gain the judge's attention, but you will never maintain it. Unless you maintain it, you will never get the judge to accept your conclusion. And unless you persuade the judge to accept your conclusion, the brief is not worth the paper it's written on.

Id. at 22. It can be difficult to explain to a client the established nature of facts on appeal, but appellate counsel must do so.

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Appellate lawyers must ensure that the statement of facts is straightforward, accurate, and not misleading—either overtly or by omission. Failure to include "bad" facts can disastrously affect the appeal. "Omitting a fact crucial to your case is a critical mistake. An even worse one is misstating a fact. Nothing is easier for the other side to point out, and nothing can so significantly damage your credibility." Scalia & Garner at 93. Therefore, clients must further understand that a "fair statement of the facts includes relevant facts adverse to your case. They will come out anyway, and if you omit them you simply give opposing counsel an opportunity to show the court that you're untrustworthy." *Id.* at 95. By omitting a bad fact, parties also lose the opportunity to present that fact in a favorable light. This can be crucial for influencing the judges' first impression. *See* Aldisert at 152. And unless you can ultimately deal with the bad fact, you will lose the appeal. You might as well face the problem early or settle.

Argument

Be Calm

Most clients want to tell their stories with emotion. Yet, it is always a mistake to vent anger or disappointment in the appellate brief, no matter how legitimate those feelings may be. *See* Aldisert at 115. Appellate

judges prefer a dispassionate application of the law to the facts. The tension between these two desires is most evident when it comes to the argument section of the brief.

Appellate lawyers know that they must resist the temptation to appeal to the judges' emotions: "It is often said that a 'jury argument' will not play well to a judge. Indeed,

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it almost never will. The reason is rooted in the nature of what we typically think of as 'jury argument'—a blatant appeal to sympathy or other emotions, as opposed to a logical application of the law to the facts. Before judges, such an appeal should be avoided." Scalia & Garner at 31. And again, playing to the judges' emotions is not just ineffective but may actually be harmful:

> Appealing to judges' emotions is misguided because it fundamentally mistakes their motivation. Good judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions. And bad judges want to be regarded as good judges. So either way, overt appeal to emotion is likely to be regarded as an insult.

Id. at 32. And, it is likely to weaken your client's case.

Nevertheless, appellate lawyers can and should invoke the judiciary's sense of justice:

> There is a distinction between appeal to emotion and appeal to the judge's sense of justice—which, as we have said, is essential... And there is also a distinction between an overt appeal to emotion and the setting forth of facts that may engage the judge's emotions uninvited. You may safely work into your statement of facts that your client is an elderly widow seeking to retain her lifelong home. But don't make an overt, passionate attempt to play upon the judicial heartstring. It can have a nasty backlash.

Id.

Handle Authorities with Care

Tensions may also arise between clients and their attorneys when it comes to what authorities—and how many—to cite in the brief. Clients may want to cite opinions having little persuasive authority. Clients may read an unpublished opinion, or one from a non-controlling jurisdiction, that says all the right things. But the appellate lawyer must determine whether citing that authority will help or harm the case. Including weak authorities indicates that lawyers are careless or even incompetent. When the appellate lawyer is well-respected by the court, then it may even suggest that the client's position is terribly, perhaps hopelessly, weak.

Clients may need to be reminded of the general hierarchy of authority in case law. The most important cases are precedents rendered by the highest court in your jurisdiction and then by the court that you are in. Scalia & Garner at 52. With respect to persuasive authority,

> there is a hierarchy of persuasiveness that far too many advocates ignore. The most persuasive nongoverning case authorities are the dicta of governing courts (quote them, but be sure to identify them as dicta) and the holdings of governing courts in analogous cases. Next are the holdings of courts of appeals coordinate to the court of appeals whose law governs your case; next, the holdings of trial courts coordinate to your court; finally (and rarely worth pursuing), the holdings of courts inferior to your court and the courts of other jurisdictions.

Id. at 53.

Clients may also want to cite every case supporting their position. (Lawyers may be tempted to do this as well, perhaps thinking that doing so will help justify the large bills for research that have been sent to the client.) But many warn against overdoing it when it comes to citation of authority:

> You're not writing a treatise, a law-review article, or a comprehensive *Corpus Juris* annotation. You are trying to persuade one court in one jurisdiction. And what you're trying to persuade it of is not your... skill and tenacity at legal research. You will win no points, therefore, for digging out and including in your brief every relevant case. On the contrary, the glut of authority will only be distracting. What counts is not how many authorities you cite, but how well you use them.

Id. at 125–26.

Be Brief

Clients usually want to tell their side of the story, again and again. Appellate lawyers, however, recognize the importance of brevity: "Judges often associate the brevity of the brief with the quality of the lawyer." Scalia & Garner at 98. Appellate lawyers, therefore, must convince their clients of the supreme importance of editing and re-editing, so that the final brief presents only the best arguments precisely and efficiently. "[T]he written brief can be an effective instrument of persuasion only if it is concise, clear, accurate and logical. Only if it is readable." Aldisert at 25.

Oral Argument

To clients, oral argument assumes an almost mystical importance. As the most dramatic part of the appellate process, it represents their chance to have their advocates speak directly to the decision-makers without the filter of briefs or law clerks. And to the courts, it is a chance to clarify and further explore the parties' positions. David C. Frederick, *The Art of Oral Advocacy* 5–6 (2003); Aldisert at 29–30.

One question arises among clients, trial attorneys, and appellate attorneys all the time: Who should argue? From the court's perspective, the answer is clear: the person most familiar with the case *as presented on appeal*, assuming that person has good oral advocacy skills. Scalia & Garner at 147. Usually the most knowledgeable person is the brief-writer. Knowing that, why doesn't everyone assume that the brief-writer will handle the oral argument? Partly, this is caused by a misperception among some clients—and even some trial attorneys—that oral argument is the most important part of the appeal. It isn't; instead, the brief is. *See* Aldisert at 293–94. Although many judges view oral argument as helpful, many find it generally a waste of time, and most have dispensed with it altogether

in the majority of cases. No one would ever suggest dispensing with briefs. Choosing who will actually write the brief is usually more important because most courts decide most appeals on the briefs—without oral argument.

Despite the court's preference for argument by the most knowledgeable attorney, that person is sometimes passed over in favor of (1) a more prominent attorney, or (2) the trial attorney in the case. A client might want a senior partner to argue because it could convey importance and prestige. But that strategy can backfire. "The client may think the senior partner is doing a fine job, but the court knows better. And though the firm may please its client for the day by having its Big Name appear, over the long run that practice will cause the firm to lose more cases... and clients." Scalia & Garner at 147.

Clients sometimes want the attorney who tried the case to argue because, initially at least, he or she is more familiar with the facts and the course of proceedings. "[B]ear in mind that appellate advocacy and trial advocacy are different specialties. Some lawyers are good at both, just as some athletes excel in several sports. But skill in the one does not ensure skill in the other." Scalia & Garner at 147–48; *see* Aldisert at 3–6. Clients also sometimes prefer trial attorneys over appellate attorneys because they perceive the former as being more emotional in advocating the client's position. But remember that the ideal oral argument is a thoughtful discussion among colleagues, not a lecture or a performance. *See* Scalia & Garner at 179–80; Frederick at 5. "Oral argument fundamentally is a substantive exercise. There is no room for fluff, puffing, or rhetoric," Frederick at 169, or "impassioned speech." Frederick at 187. As Supreme Court Justice Ruth Bader Ginsberg has written, "[o]ral argument, at its best, is an exchange of ideas about the case, a dialogue or discussion between court and counsel." *Id.* at 5.

Sometimes clients and attorneys reach a Solomon-like solution and decide to divide the argument between two or more attorneys. While this might appear to satisfy the competing concerns, the courts do not like it. "Generally speaking, dividing the limited argument time between cocounsel produces two mediocre arguments instead of one excellent one." Scalia & Garner at 148. Thus, attorneys and clients should make the tough decision in favor of one person, then work together to prepare that advocate as well as possible. "You disserve your client if you don't let the more capable and experienced lawyer do the whole job. If you cannot agree on which of the two of you that is, flip a coin." *Id.* at 148.

Rehearing

Upon receiving word of a loss, the first response many clients have is to seek rehearing. (And the first response far too many lawyers have is to blame the court.) Despite those temptations, good appellate lawyers know that rehearing rarely is granted and that most requests waste their clients' money and the courts' time.

If a petition for rehearing is filed, it must avoid the common mistake of adopting a disrespectful tone. "You're trying to help the court, on further reflection, get it right—not complaining about the court's getting it wrong." Scalia & Garner at 204. Disrespectful language will all but ensure that the court tunes out your arguments and does *not* change its mind. *See* Aldisert at 269. Nor should counsel simply repackage and refile the previous, unsuccessful brief. If it did not work before, it is unlikely to work now.

Rather, possibly with help from a lawyer who is a stranger to the case, appellate counsel should critically analyze the arguments anew, searching for any weaknesses that could be bolstered. The court's opinion should be scrutinized for any points that the court may have "overlooked or misapprehended." Scalia & Garner at 203 (quoting Fed. R. Civ. P. 40). A laser focus on one or two points of this type is the best strategy for beating the odds with a motion for rehearing. *See id.*

Certiorari

Finally, if you lose in a federal appeals court or state court of last resort on a question of *federal* law (without an independent and adequate state ground), a petition for writ of certiorari to the United States Supreme Court becomes a theoretical possibility. The chances of obtaining review are very slim because the Supreme Court is interested in a small subset of cases: those presenting an important issue of federal law on which appellate courts have issued conflicting decisions. Eugene Gressman, *et al.*, *Supreme Court Practice* 241, 249 (9th ed. 2007). Thus, unlike many state courts of last resort, the Supreme Court generally does not consider questions of first impression. Rather, the Court prefers to decide issues only after they have "percolated" through the lower courts. A certiorari petition should focus primarily—and possibly exclusively—on establishing the necessary conflict. Gressman at 477.

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If certiorari is granted, a merits brief will explore whether the lower courts erred and what the proper resolution might be. Thus, a certiorari petition cannot consist of a recycled version of the briefing in the lower courts. In most cases, appellate lawyers must perform additional research and entirely new briefing to identify and demonstrate a conflict. In addition, briefs to the Supreme Court must be professionally printed in booklet form, further adding to the cost of seeking Supreme Court review. Clients should be aware of these costs, the stringent jurisdictional limitations, and the slim chances of obtaining discretionary review before committing to file a certiorari petition.

Conclusion

How does the appellate lawyer mediate this tension between what the courts want and what clients may want? The best advice is to keep the client focused on the goal of the appeal. Is the purpose of the appeal to blow off steam? Is it to try to convince management that the client was right in proceeding to trial, but that the judge or jury went haywire? Is it simply, and impermissibly, for delay? Or is it to try to win the appeal—or

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at least to settle on favorable terms by making a win more likely?

If the ultimate goal is the last, as it always should be, then providing the appellate advocacy desired by the courts is what enlightened clients also should desire. If clients learn from appellate lawyers what appellate courts want, but then run to other lawyers who are willing to violate those precepts, clients are making a mistake not only by hiring ineffective lawyers, but also by decreasing the odds of winning their appeals. In short, giving clients what the courts want is in the clients' best interest. Consequently, it is what clients should want, too. FD