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# Professionalism on Appeal: The Good, the Bad and the Ugly

In 1995, the Philadelphia-based U.S. Court of Appeals for the Third Circuit promulgated Local Appellate Rule 28.1(d), which states in full: "The court expects counsel to exercise appropriate professional behavior in all briefs and to refrain from making ad hominem attacks on opposing counsel or parties."

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2012-11-13 12:00:00 AM

**Upon Further Review**

In 1995, the Philadelphia-based U.S. Court of Appeals for the Third Circuit promulgated Local Appellate Rule 28.1(d), which states in full: "The court expects counsel to exercise appropriate professional behavior in all briefs and to refrain from making ad hominem attacks on opposing counsel or parties." Exhibiting professionalism on appeal may seem like good policy, but apparently it can be quite difficult advice to follow in practice.

It is hardly an overstatement to observe that in many cases I encounter as they reach the appellate stage, the parties themselves — and often their trial court attorneys — have concluded that the trial judge must be biased or corrupt (if he has ruled in favor of the opposing party) or particularly brilliant and fair (if the client has won below). Where a case has gone to trial, often the losing attorneys have a lengthy list of grievances in the form of adverse rulings that individually and certainly collectively demonstrate the trial judge's ineptness. Moreover, the attorneys for the opposing parties often develop or exacerbate animosities in the process of litigating a case on the road to producing a final, appealable decision.

Some of the most effective trial lawyers cannot help but to become emotionally and intellectually invested in their clients' cases. A corollary observation that I sometimes tell an appellate client or trial counsel when they express that they like the first draft of an appellate brief that I have prepared is: "If we can't convince ourselves that we deserve to win, then who can we convince?"

But although believing in the correctness and justness of a client's position may be necessary ingredients to emerging victorious on appeal, they are far from sufficient conditions. Indeed, expressing animosity toward opposing counsel on appeal, or toward the trial judge, usually proves to be counterproductive rather than an effective strategy for victory.

It is perhaps for this reason, among many others, that involving someone who can bring a fresh perspective to the

case when it reaches the appellate level can be so very valuable. Believing that the trial judge is a moron, that opposing counsel is deceptive bordering on unethical, or having a list of the 20 to 30 ways that the trial court's rulings during trial or afterward demonstrate that the trial judge was not predisposed to fairly considering the client's evidence or arguments may fairly describe how the losing attorneys will feel in a large number of cases that have produced an adverse judgment, but rarely if ever will those contentions translate directly into a winning appeal.

Earlier this year, I wrote and filed a brief for appellee in the Superior Court of Pennsylvania seeking the affirmance of a ruling from the Philadelphia Court of Common Pleas. Ironically, the trial judge who issued that ruling was someone whose decisions other clients of mine had obtained the reversal of in a series of earlier appeals. Indeed, in thinking about whether to work on the case, I was momentarily concerned that I had obtained the reversal of this particular judge's rulings so many times before that I might be incapable of achieving the affirmance of this one.

The brief for appellant that opposing counsel filed in that case exhibited a notable degree of emotional dissatisfaction with the trial judge and his rulings at issue on appeal. Consequently, in the introduction section of the brief for appellee that I filed for my client in that case, I observed that the "brief for appellant reveals a hostile and inappropriate disrespect for the trial judge's adjudication of this case" and then proceeded to give various examples.

In a development that I had not previously experienced, about four weeks before oral argument on appeal, opposing counsel filed a motion in the Superior Court requesting permission to file a newly edited brief for appellant that purported to omit those passages contained in that party's original opening brief that exhibited an inappropriately disrespectful tone toward the trial court. Before my client had filed any response to that motion, the Superior Court issued an order denying the motion. The appellate court's order stated, before concluding, that "appellant should have considered the tone of the initial brief before he filed it." The Pennsylvania Superior Court ended up ruling unanimously in favor of my client in that case, affirming the trial court's judgment.

The issue of professionalism on appeal returned to my mind again just the other day, when I was reading a brief for appellee that opposing counsel recently filed in a Third Circuit appeal on which I am working. The brief for appellee seemed to contain paragraph after paragraph, and page after page, of vituperative commentary about my client's lead trial counsel and his supposed behavior in other similar cases. At the end of the day, however, none of that has any bearing on the particular legal issue now pending before the Third Circuit in that appeal. Thus, perhaps the Third Circuit may eventually be wondering whether that brief complies with the Third Circuit's local rule directing counsel to refrain from ad hominem attacks.

On the other hand, perhaps once we have reached the stage where a federal appellate court must warn counsel to refrain from making ad hominem attacks against opposing counsel and the opposing party, the legal profession has descended to depths from which it may be impossible to recover. If one values catharsis over victory, the approach of harshly attacking opposing counsel, the opposing party, or the trial judge may make perfect sense. Fortunately, my clients don't hire me to help them vent their spleens. Rather, they hire me because they want to win or, perhaps more accurately, in the hope of increasing their chances of victory as much as possible.

In my experience, appellate judges typically have a degree of emotional detachment from the cases they are assigned to review and decide. And they expect, or at least appreciate, when the attorneys presenting the appeal also have a degree of emotional detachment. That is not to say that attorneys should not want to win or should not believe the correctness of their arguments; rather, it is merely to observe that the appellate process ordinarily benefits from a clarity of thought and a narrowness of focus that someone still licking the wounds of a brutal trial court battle may have difficulty bringing to bear.

The final thing to remember is that winning on appeal is the ultimate revenge. Writing a brief that is scathingly critical of opposing counsel, the opposing party or the trial court judge may make a lawyer feel better for a while. But, based on my 20-plus years of appellate experience, actually winning the appeal and obtaining the reversal of a trial court's adverse ruling will make the lawyer who originally lost in the trial court feel better for much longer.

Fortunately, in my experience, the choice is not between behaving professionally on appeal or being an effective appellate advocate. Rather, the two go hand-in-hand. As a result, those who elect to present appellate arguments in an unprofessional manner will often learn the lesson of this month's column the hard way. •

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