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Appellate Law

Credibility's Power: Appellate Lawyers Should Be Forthright In Addressing Their Cases' Weaknesses

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Upon Further Review

Back when new installments of the "20 Questions for the Appellate Judge" feature were appearing monthly at my "How Appealing" Web log, the federal and state judges who I was interviewing would frequently complain about appellate advocates who were unwilling to directly respond to questions at oral argument that focused on the weaknesses of their clients' cases.

From the perspective of the judges, an appellate advocate who was unwilling or unable to address and perhaps even neutralize apparent weaknesses in his or her client's case probably lacks the ability to assuage the judges' concerns about those weaknesses. Thus, far from helping their client's case by engaging in a game of dodge ball with the judges, the advocate is instead sending the signal that no response helpful to the client's position exists.

Of course, by the time an appeal reaches oral argument, the judges assigned to decide the case may already have developed firm views about the case and how the appeal should be decided. Those pre-argument views will be based on the appellate judges' examination of the briefs filed on appeal, the trial judge's opinions, and important portions of the record developed in the trial court.

The manner in which a party's appellate briefs depict the facts of the case, what happened before the trial court, and the applicable law will play perhaps the most important role in establishing that party's, and the advocate for that party's, credibility before the appellate court. In the same way that the lawyer who evades difficult questions at oral argument is likely to be viewed by the judges as evasive, a party whose appellate brief resorts to misrepresenting the facts and the law is unlikely to convey to the appellate judges that the party has a strong likelihood of prevailing on appeal.

These pieces of advice may seem so self-evident that you might be wondering why I would devote a column to this subject. But I have encountered in my own law practice repeated instances of appellate briefs submitted by highly respected law firms that have misrepresented case law or the earlier ruling of a court in that very case. The good news is that, thus far, those tactics have failed to succeed. But what astonishes me is that respected advocates would risk the permanent tarnishment of their reputations simply because they or their clients are unwilling to accept defeat.

I don't recall how or when I arrived at the term, but I now like to describe an attorney's willingness to distort the facts or the law in a calculated effort to overturn that attorney's earlier defeat in the case as characteristic of the "crybaby school of appellate advocacy." The approach strikes me as entirely counterproductive, because if an advocate is willing to sacrifice his or her credibility to overturn an earlier loss in that very case, then the advocate's effectiveness in the next appeal that he or she handles before those same judges will remain compromised.

In my experience, if you handle any volume of appeals, you will encounter the same judges from time to time, and

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perhaps even frequently. Although those judges may not agree with you in every single case, it is invaluable that they know they can trust the manner in which your appellate brief sets forth the facts of the case and describes the applicable case law.

Moreover, an advocate's credibility is of value in any court, and not only before those courts where you are a repeat customer. Recently, I presented an oral argument in federal district court on the issue of the amount of a cost bond that objectors to a class action settlement should be required to post. Class counsel was asking the trial court to require objectors to post cost bonds totaling more than $350,000. The objectors, by contrast, were opposed to any bond but also sought to keep the amount of any bond as small as reasonably possible.

An appellate costs bond is ordinarily intended to provide a source of payment for the out-of-pocket costs that the beneficiary of the bond would be entitled to recover if that party prevails on appeal. Appellate costs are ordinarily limited to the costs of photocopying the appellate briefs and the appendix, although they can also include the cost of obtaining a supersedeas bond to stay execution of the judgment pending appeal. The key issue that would determine the size of the costs bond in this particular case was whether the costs bond should include money to pay class counsel's attorney fees if class counsel prevailed on appeal.

Under the applicable circuit case law, a district court may include attorney fees in setting the amount of a costs bond if the party for whose benefit the bond is being posted is entitled to recover attorney fees if that party prevails on appeal. Class counsel was arguing that since the case arose under federal antitrust and racketeering laws, and under the ERISA statute, the cost bond should include attorney fees, because those statutes allow the prevailing plaintiff to recover attorney fees.

Counsel for another objector/appellant argued first in response to class counsel's presentation, and that objector's attorney incorrectly maintained that the circuit case law did not authorize the inclusion of attorney fees in a costs bond. When my turn to argue arrived, I began by explaining that the circuit sometimes does allow attorney fees to be included in a costs bond, but not in the circumstances presented in this case.

For example, in a copyright case in which a copyright infringer has been found liable in a suit brought by the copyright owner, the circuit case law allows the costs bond to include attorney fees. In that sort of a case, the copyright owner's attorney fees for responding to the appeal are included within the costs on appeal that are recoverable under federal law if the judgment is affirmed. By contrast, I explained, under federal antitrust and racketeering laws, and under ERISA, attorney fees can be recovered by a prevailing plaintiff, but only against a party that has violated the antitrust, racketeering or ERISA laws.

Because there is no contention that a class member who is objecting to the settlement has violated any of those laws, class counsel's projected appellate attorney fees cannot and should not be included in any costs bond, I argued. The district court ultimately agreed, rejecting class counsel's effort to have the costs bond include attorney fees.

Perhaps somewhere along the line the goal of being a zealous advocate for one's clients has been misconstrued to prohibit acknowledging any unhelpful aspects of the facts and law applicable to a client's case. In actuality, however, a lawyer is not faced with a decision between choosing to advance the client's cause and retaining the lawyer's credibility to the tribunal. This is because having a lawyer with credibility is of the utmost value to the client. Although it may be frustrating to appear against lawyers who have not yet taken that lesson to heart, the good news is that the approach of misrepresenting the facts or the law seldom if ever succeeds. •

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