Appellate Law

Font Size: + −

Defining and Identifying Greatness in Appellate Advocacy

Howard J. Bashman | Contact | All Articles
The Legal Intelligencer | May 10, 2011


Howard Bashman

Upon Further Review

On an e-mail discussion list for professors of constitutional law that I subscribe to, someone recently raised the topic of who would qualify as the greatest U.S. Supreme Court advocates of all time. That discussion soon gave rise to an important subsidiary question: What constitutes greatness in appellate advocacy? In response to that question, someone on the discussion list responded facetiously that the advocate who achieved the greatest number of victories not justified by governing law and the facts of the case should be regarded as the greatest appellate advocate.

Although every appellate litigant desires to achieve victory on appeal, in my view achieving victory on appeal does not necessarily correlate to greatness in appellate advocacy. To begin with, every appeal will produce a victory for one side or the other, or a partial victory for both of the opposing parties. Merely because an attorney happens to be on the winning side of appeals far more often than on the losing side of appeals does not mean that the attorney is a great appellate advocate. Rather, it may indicate that perhaps the attorney only agrees to represent parties who won in the trial court.

RELATED ITEMS

- You Call ***That*** a Trial? A Costly Superior Court Waiver Ruling
- What Are Your Chances of Winning on Appeal?

Furthermore, and rightfully so, appellate judges do not and should not decide the outcome of appeals based on which side has the better appellate advocate. Rather, judges are supposed to decide appeals based on the governing law and the facts of each case. Merely because one side has a more talented lawyer than the other side does not mean that the side with the more talented lawyer will win or should win even though the facts and applicable law compel a victory for the party represented by the less talented appellate advocate.

Thus, on the one hand, victory on appeal is too commonplace of an occurrence to use as a measurement of talented appellate advocacy. And, on the other hand, the outcome on appeal is not necessarily a reflection of the relative talent of the appellate advocates. For these reasons, it is necessary to delve deeper in the search for relevant criteria to evaluate greatness in appellate advocacy.

In my view, the criteria for evaluating the talent of an appellate advocate differ depending on whether the attorney is representing the party that lost in the trial court or the party that won in the trial court. Two of the most critical responsibilities when serving as counsel for appellant are identifying which issues are available to be raised on appeal and then determining which of those issues actually will be raised on appeal.

Of course, one cannot begin to consider which issues should be raised on appeal until after one has evaluated which issues can be raised on appeal. Deciding what issues should be raised on appeal involves considering a combination of the relative strength of the available issues, the importance of the various issues to the client's

interests, and avoiding raising too many issues overall or any issues lacking a realistic likelihood of success.

Every case presents unique considerations regarding what issues can and should be raised on appeal. Yet the manner in which an attorney for appellant conducts that evaluation and the ultimate result of that inquiry are quite relevant in evaluating greatness in appellate advocacy. Nevertheless, deciding what issues to raise on appeal, by itself, does not determine the outcome of an appeal. Rather, it is the arguments advanced in the brief for appellant and the reply brief for appellant in support of those issues that will determine the outcome of the appeal.

It is not difficult to imagine two alternate briefs for appellant, prepared for filing in the same case, arguing identical issues. One of the briefs advances a persuasive, measured, calm and convincing argument that is well-supported by relevant authority and that convincingly distinguishes any potentially unhelpful case law. The other brief is conclusory and argumentative, full of personal attacks on the trial judge and opposing counsel, replete with careless typographical errors and citation errors, and containing multiple string citations for inconsequential legal points but few if any citations of authority for legal propositions that could prove dispositive to the outcome of the appeal.

The point here is that beyond choosing the best issues to argue on appeal, the brief for appellant must be presented in a manner that will cause the judges who are assigned to decide the appeal to conclude that the appellant deserves to win based on the facts of the case and the applicable law. And, in the course of doing so, the brief for appellant and the reply brief for appellant will need to convince the appellate court that the trial judge reached the wrong result and that the arguments for affirmance advanced in the brief for appellee lack merit.

Although the attorney who is representing the appellee has the built-in advantage of representing the party in whose favor a judge has already ruled, there are still relevant criteria that should be considered in evaluating excellence in the performance of counsel for the appellee. While counsel for the appellee has no control over what issues the losing party chooses to raise on appeal, counsel for appellee has the ability to reframe those issues in a manner more favorable to the appellee and also to raise additional issues implicating the appellant's waiver of those issues or the appellate court's lack of jurisdiction to decide the case.

Sometimes the grounds on which the trial court relied in ruling in favor of the appellee are not necessarily the strongest available grounds, and thus counsel for appellee must evaluate the extent to which the brief for appellee will seek to defend the basis for the trial court's ruling or will offer alternate arguments in favor of affirmance. In addition, counsel for appellee may be able to preserve his client's victory by convincing the appellate court that the grounds for reversal being argued on appeal were waived in the trial court or on appeal. Some appellate courts have ruled that an appellee's failure to argue waiver may excuse the waiver and thereby allow the appellate court to decide on the merits issues that otherwise would be disregarded as having been waived.

Because the appellant usually has the right to file the final appellate brief and also has the right to address the judges last in rebuttal at oral argument, counsel for appellee ordinarily must also anticipate the arguments that the appellant might make in any reply brief or during rebuttal oral argument. And, finally, to be most effective, the brief for appellee and the oral argument that counsel for appellee presents must be crafted to be as convincing as possible to the judges assigned to decide the case.

To summarize, excellence in appellate advocacy cannot be determined based on the number of wins on appeal or based on the number of unjustified wins. Rather, issue selection and the quality and persuasiveness of the arguments being advanced for affirmance or reversal are the most relevant criteria for evaluating the excellence of an appellate advocate. Although having an excellent appellate advocate will not guarantee victory in every case, nor should it, a high-quality appellate advocate should produce better results over the long run in the cases on which he works than an advocate of lesser skill or effectiveness. •

Howard J. Bashman *operates his own appellate litigation boutique in Willow Grove, Pa., and can be reached by telephone at 215-830-1458 and via e-mail at* ***hjb@hjbashman.com****. You can access his appellate Web log at* ***http://howappealing.law.com****.*