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Ups and Downs of Arguing Cases of Apparent First Impression

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Upon Further Review

Appellate lawyers cannot help but experience an extra degree of excitement when an appeal on which they are working presents a question of first impression. All cases may be unique in some respect, but a true case of first impression appears infrequently. My favorite subcategory of first impression cases involves a federal question that other appellate courts have divided over, in which the issue has not yet been addressed or resolved by the court where the appeal is pending. And the best type of first impression case involves an issue that is deserving of U.S. Supreme Court review — perhaps in the very case on which I am working.

I have been fortunate to work on two cases in which the U.S. Supreme Court has granted review on the merits and to sit second chair at counsel table two times in that most grand chamber of a courtroom. But it would be a wonderful experience to return once again, to deliver my first oral argument to the nine justices. That possibility is certainly among the reasons why working on a truly certiorari-worthy case of first impression tends to be so much fun.

Unfortunately, sometimes reality has a rude way of interfering with the scenario that I have just sketched. The first time that happened was approximately 10 years ago, before I left my position heading a large law firm's appellate section to open my own solo appellate practice. One day, the phone rang, and it was the U.S. Court of Appeals for the Third Circuit calling. I had previously accepted various pro bono appellate counsel appointments from the Third Circuit, which had kindly taken to asking for my assistance only in cases that were especially interesting for one reason or another. This particular call asked if I would be

interested in serving as appellate counsel for a Pennsylvania state prison inmate whose appeal involved an issue on which other federal appellate courts had divided without any resolution from the U.S. Supreme Court thus far.

All of that, of course, was music to my ears, so I quickly said yes and proceeded to learn all about my new pro bono client's case and the law governing the specific issue presented that had given rise to the circuit split involved. I recall thinking that the opening brief on appeal that I was about to file on behalf of my client, who was on the losing side in the federal district court, set forth a very strong and persuasive argument for why the circuit split should be resolved in favor of the prisoner and not in favor of the prison system, which was the party being sued.

Two entirely unforeseen surprises arose in the months after I filed that brief for appellant. The first arrived when the state of Pennsylvania filed its brief for appellee, which confessed error and agreed that my client deserved to win on appeal. Lawyers hear all the time that government attorneys have a duty to see that justice is done, which transcends merely trying to win every case, and at least in this one case I can tell you that the government lawyers took that duty very seriously. The confession of error by the opposing party was of course a very good development for my client, but it seemed to greatly diminish the likelihood that this case would reach the U.S. Supreme Court, given that the state was no longer seeking affirmance of the district court's ruling against my client.

Of course, there remained the possibility that the Third Circuit might reject the state's confession of error and could still rule against my client, thereby placing the case in the only posture capable of attaining U.S. Supreme Court review now that the state had agreed the district court's ruling was wrong. To be sure, it would be embarrassing to be on the losing end of an appeal in which the opposing parties agreed that my client deserved to win. But attorneys seeking to appear before the U.S. Supreme Court have embarrassed themselves far worse than that in trying to obtain clients with cases before that court, I'm told, so it was a cost I was willing to endure to achieve ultimate victory in the nation's highest court.

The second unforeseen surprise, which came between the time that briefing in my client's appeal was complete and the case was assigned a potential oral argument date, destroyed any possibility that my client's case could end up at the U.S. Supreme Court. The development that sealed my pro bono client's victory in his appeal was the issuance of a published opinion by a separate Third Circuit panel in a separate appeal that was slightly ahead of my client's case in the race to decision. The opinion issued in that other case ruled in favor of the prisoner on the very same issue involved in my client's case. Under Third Circuit procedure, a later three-judge panel is bound by the published opinion of an earlier three-judge panel, and thus the published opinion that was issued in this other case presenting the same issue sealed my client's victory in his own case, thereby ensuring no possibility of U.S. Supreme Court review.

The reason this all came to mind for me some 10 years later is that recently I have had the pleasure of working on an appeal that raises not one but two different issues of first impression that are the subject of circuit splits possibly deserving of U.S. Supreme Court review. Indeed, the trial judge's opinion itself expressly announces that fact. And, when I prepared and filed my client's appellate briefs, the Third Circuit had not expressly resolved either of the circuit splits.

But, wouldn't you know it, once again there was this pesky other case, which neither I nor my client had known about, that ended up being appealed to the Third Circuit months before my client's case. This other case, it just so happens, presented both of the questions of first impression involved in my client's appeal. And the other day, the Third Circuit issued a decision that resolved one of those two issues in a way that is not particularly helpful to my client's still-pending appeal. Now all hope is not lost. The facts of this other case are quite different from the facts of my client's case. And the losing party in this other case still has the opportunity to seek either panel rehearing or rehearing en banc from the Third Circuit. Moreover, it does not seem likely that this other case involves enough at stake for the losing party to seek U.S. Supreme Court review, whereas my client's case most definitely does.

What is frustrating, however, is that in this era of online filing and online oral arguments, I can access the appellate briefs that were filed in the case just decided. They reveal that some of the arguments I thought

were good arguments for why the circuit split should be resolved in my client's favor were not raised in the briefing of that other case.

Thus, a combination of bad timing and bad luck may (or may not) prevent my client from having the Third Circuit decide my client's appeal in his favor, even though the Third Circuit may have ruled the opposite way had it been confronted in the first instance with the arguments that we had made (which are currently found in briefs sitting on a shelf at the Third Circuit, where my client's appeal awaits assignment to a specific three-judge Third Circuit panel). But, looking on the bright side, if necessary, maybe the Third Circuit will find this circuit split worthy of full court en banc review in my client's case, or maybe this will be the case where I get back to the U.S. Supreme Court, but now in a speaking role. •

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