YOUNG LAWYERS SECTION OF THE UTAH STATE BAR

BARRISTER

SEPTEMBER/OCTOBER 1986

SOME COMMON PROBLEMS OF APPELLATE ADVOCACY

Justice Michael D. Zimmerman

This article is the second in a two-part series on appellate advocacy by Justice Michael D. Zimmerman of the Utah Supreme Court.

In the last article, I described the administrative and decisional machinery of the Court as it affects parties to an appeal. I also gave some general suggestions that should be followed in presenting any matter to an appellate court. These suggestions can best be summarized as a commandment, "Know your audience."

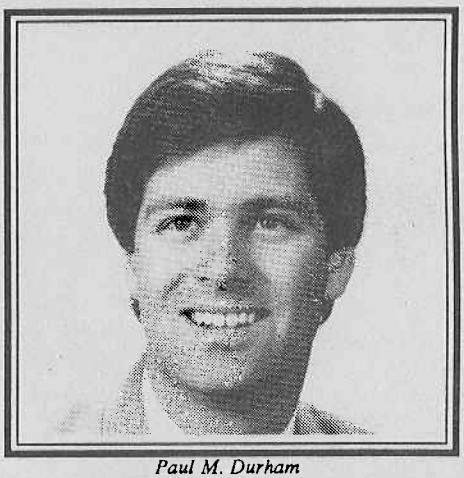
What is written here is not intended to contradict that commandment, but to build upon it. In this article, I will discuss some specific problems often encountered by appellate advocates. This list is certainly not exhaustive, but if you can avoid all these problems you will be ahead of most lawyers appearing before us.

Be Candid

Lack of candor is a most devastating problem for an advocate. No matter how good your mastery of the law and the facts, and no matter how fine your style, if the judges do not trust you, your clients will occasionally suffer. As Judge Winder stated at a recent swearing in of new Bar admittees, a good reputation takes a long time to earn and very little time to lose.

(continued on p. 2)

Utah Supreme Court Justices



Paul M. Durham

PRESIDENT'S REPORT

Paul M. Durham

The Young Lawyers Section of the Utah State Bar is alive and kicking! Three years ago it was languishing at death's door with only four officers and minimal programming. Today it has four officers and a nineteen-person Executive Council with fourteen fully staffed committees addressing concerns such as bridging the gap between law school and law practice, child advocacy, the Bicentennial of the U.S. Constitution and the needs of the elderly, to name a few. A great deal of credit for this revitalization goes to Cecelia Espenoza and John Adams, past president and immediate past president of the Section, whose personal dedication and commitment to the goals of the Section have given national attention to the Utah Young Lawyers Section.

At the Annual Meeting of the American Bar Association in New York City last month, I was privileged to receive, on behalf of the Section, two First Place Awards in the ABA Young Lawyers Award of Achievement Competition. These awards represent national recognition of the outstanding

(continued on p. 10)

CALENDAR OF EVENTS

September		
	22	Hearing on Rules of Professional Conduct (2:00 p.m., Utah Supreme Court)
October		
	1	YLS Executive Council Meeting (noon, Utah State Bar Office)
	7	Swearing in Ceremony for new admittees to the Utah State Bar (12:15 p.m., Capitol Rotunda)
	17-18	Bridge-the-Gap Seminar
	31	*Barrister* Material Contribution Deadline
November		
	5	YLS Executive Council Meeting (noon, Utah State Bar Office)

TABLE OF CONTENTS

Zimmerman

(continued from p. 1)

If an appellate attorney accurately states the trial court's findings, the evidence presented at trial, and the law, and does a generally creditable job, the judge may not remember the attorney's name at all. It might take five good jobs before that lawyer is recalled as someone upon whom the judge can rely.

On the other hand, when an attorney just once in the brief or oral argument misstates the facts or the law and that misstatement comes to the Court's attention (as it almost always will, either through the efforts of opposing counsel or those of the Court), that lawyer's name will almost certainly stick in the judge's mind. From then on, that lawyer's statements of fact and law will be viewed with a jaundiced eye. Stretching the facts or the law is a recipe for instant infamy.

Know The Standard of Review

Another common problem is for an advocate to take an appeal, write a brief and argue the case, all without recognizing what an appellate court will and will not consider on appeal. It is surprising to me how often this happens.

Perhaps we should have the following engraved in stone over the door of the Supreme Court Clerk's office: "Know your standard of review." A number of cases would never be appealed if this commandment were followed, and many which are properly appealed would be better presented.

In this regard, the most common fallacy is to assume that we are a second trial court—that an appeal is like a new trial. We do not retry facts. The standard of appellate review applicable to findings of fact made by a judge sitting alone or by a jury has been stated often and should be well known: where a factual issue was in dispute below, the appellate court presumes that the finder of fact resolved all questions of credibility and drew all inferences in favor of the prevailing party and against the losing party; therefore, we will not overturn a finding of fact unless it lacks any substantial record support.

A party seeking to overturn a finding of fact bears a heavy burden in briefing the matter. We will not search the record for support for the findings made below. Rather, the appellant must marshall all the record evidence in support of any challenged finding and then explain why it does not provide substantial support for that finding.

Accordingly, the parties to an appeal must either take as correct all factual findings of the court below and all evidence supporting those findings and attack the ruling as a matter of law, or they must demonstrate that a pivotal factual finding is without support. It is surprising how often this simple premise is ignored. Attorneys constantly base their fact statements on evidence favorable to their position and ignore the factual findings of the trial judge or jury.

I suppose that lawyers ignore the expressed or implicit findings of trial courts because they want to win so much. I certainly can sympathize. Lawyers think that things really are as their client's evidence demonstrated, so they are greatly tempted to state the facts the way they should have been found.

This is a temptation lawyers will succumb to if they are not conscious of the standard of review. The worst thing that can happen to an attorney at oral argument is to argue the facts and then be asked the embarrassing question, "But didn't the trial judge find just the opposite of that?" Where the evidence was conflicting, there is no satisfactory response to that question.

Taking on bad facts can be tough. If it is tough, it may mean you should not have filed an appeal in the first place. If you cannot live with the facts as the judge or jury found them and cannot show that the findings are without support, perhaps you should forego the appeal and tell your client to just pay the judgment.

(continued on p. 3)

Zimmerman

(continued from p. 2)

Be Sure All The Necessary Materials Are Before The Court

As I mentioned in my previous article, it is common for members of our Court to take the briefs home to prepare for oral argument. At home we do not have the record and we do not have an extensive law library. All we have is what is in the briefs. That is a useful perspective for lawyers to have when considering how to put a brief together, because you should not assume that someone reading your brief will go beyond its four corners.

Most especially, do not assume that the reader will have ready access to the record. We have only one copy, and it is highly unlikely that anyone other than a law clerk will look at it before argument and the initial conference on your case. Your brief should be a reference document in which all things necessary to an understanding of your case and position are presented.

That the Court wants briefs to be intelligible standing alone, without supporting assistance from the record or the law library, is evidenced by Rule 24(f) of our new rules of appellate procedure. We now require that each appellant's brief have an addendum containing any portions of the record necessary to an understanding of the appeal.

For example, if the court below entered findings and conclusions or a memorandum opinion, it must be in the addendum. In addition, if the applicable statutes, rules, and regulations critical to your case are too extensive to be easily set out in your brief, they too should be in the addendum.

Carefully preparing an addendum is not a sterile exercise. For example, a recent case before us turned largely on certain provisions of a highway contract and the regulations of the Department of Transportation relative to bidding. The briefs were sophisticated and scholarly, but none contained the relevant contract documents or the text of the relevant rules. Not only do I not have such rules at home, we do not even have them at the Supreme Court law library. As a result, oral argument was largely wasted because counsel argued over material that was not in the briefs. If you want the judges to know something at oral argument, it had better be in the brief.

As I said in the previous article, your goal should be a brief that can be read through once and understood. Obviously, that goal cannot be achieved if understanding requires digging into the record or searching out a critical code section in the statute books. You want your brief to be *the* reference piece, *the* document to which a judge or law clerk will refer for an understanding of the case and the arguments. Such a brief must be self-contained and include an adequate addendum.

Request Oral Argument

Many attorneys do not request oral argument. The Court sends out notices when your case is calendared for disposition and invites you to ask for oral argument. If you do not request it, we will decide the case without argument. Approximately forty percent of the time, counsel does not ask for oral argument. I do not understand the reason for failing to request oral argument. My advice is to always argue.

Almost thirty percent of our cases are decided without argument through per curiam opinions. Cases that are calendared for possible oral argument have been screened for per curiam treatment and rejected. This means that someone thinks the case is not governed by settled precedent. If the Court does not think that the proper resolution of the case is plain beyond doubt, how can you?

Welcome Questions During Oral Argument

Oral argument is an attorney's one chance to find out what the judges are thinking and to correct any misconceptions they may have. In the trial court, you have an ongoing opportunity to appraise the judge's thought processes and adjust your case accordingly. The trial judge may rule on motions before trial, and you interact with the judge throughout trial.

In an appellate court, you have a written dialogue with your opposing counsel in the briefs, but you have no dialogue with the Court except for whatever occurs during oral argument. At argument you appear before the Court for twenty minutes. When argument is over, you have no more input or control over the decision-making process —you cannot correct misconceptions; you cannot persuade; you cannot do anything to influence that process. Therefore, the thing you want most at oral argument is questions.

Many attorneys think that questions are a nuisance because they interfere with counsel's getting through his or her prepared outline. In a recent oral argument, counsel had a written argument he read like a speech. While he was reading, a member of the Court asked a question. Counsel replied, "I am sorry. I have a lot of material to cover, and I wish you would let me finish my presentation." I suggest that he did not understand that he was there to listen, too.

Failing to welcome questions is the worst thing you can do. A question is a window into the judge's mind, an opportunity to converse with the judge about an issue. Those chances are very rare in appeals; you should welcome every question, even if you must sacrifice your speech. A judge's question may not seem terribly important to you, but it may turn out to be the pivotal issue in the case.

Be anxious to get questions. Some counsel, either at the beginning or end of argument, will ask, "Are there any questions?" This strikes me as a good practice.

Do Not Read Your Argument

This point should be obvious. If the aim of argument is to answer questions, to highlight what you think are your strongest points, then you want to engage the Court, to make contact with the judges. The fastest way to turn oral argument into a sterile exercise is to stand before the Court, look down at the podium and read a speech. The effect on the listener is like a sleeping pill.

(continued on p. 4)

Zimmerman

(continued from p. 3)

Limit Your Assignments of Error

When raising points on appeal there is a great tendancy to throw in every conceivable issue, hoping that one will catch the Court's fancy. An example is the tendency of every criminal appeal to assert that there is insufficient evidence to support the conviction, when most turn on credibility questions.

Be sparing in the issues advanced on appeal. There is not safety in numbers; in fact there is a tendency for your good arguments to get lost among the chaff.

Hard as it is, be selective. Remember that there is a strong presumption against reversing the trial court, so pick only the strongest points for your appeal.

Limit Your Presentation at Oral Argument

Attorneys should remember that only about two to three points can be presented persuasively in twenty minutes. No matter how many points you have raised on appeal, limit your presentation to the two or three most important. When you stand up, tell the Court that the remainder are adequately covered in the brief. This does not indicate weakness, but a recognition that oral argument and the briefs serve different purposes.

If you have only one or two points in your oral presentation, and they can be adequately covered in less than twenty minutes, recognize that fact and sit down. Nothing causes judges' eyes to glaze over faster than for someone with a rather simple point to go on for twenty minutes when five would do. The effect of too much talking is much the same as too many points on appeal: it obscures the merit of your position.

Finally, limit your oral presentation by omitting a long, detailed factual narrative. Remember, the judges have seen the briefs and are familiar with the facts. Describe them sufficiently to orient the Court and remind it of the nature of the matter, then proceed to the merits. Judges can become impatient if you spend ten minutes giving a stale recitation of the facts, telling them what they already know, when they want to hear about the merits.

If specific facts are critical to your appeal, they are best discussed when you deal with the issue to which they pertain. If they are recited at the beginning of your presentation, the judges are not likely to appreciate their relevance.

Put Most Important Material At The Beginning Of Oral Argument

The first few minutes of oral argument are the most important. After that, the judges' minds may start to wander. So put your biggest issue first, while you have everyone's attention. Also, if you save it for last you may run out of time before you get to it.

This is also another reason for cutting your fact statement to the bare essentials. You might even consider first introducing your two or three main points before giving the fact statement. If the judges are first oriented to your issues, they will be better able to relate the facts to those issues.

Conclusion

There are numerous articles on the subject of effective written and oral advocacy. I do not suggest that anything said here cannot be found in any number of sources. However, from watching oral arguments for almost two years now, it is plain that many otherwise capable lawyers have never stepped back and considered what they are trying to accomplish on appeal and how best to reach that goal.

Sometimes in the press of preparing a brief or readying yourself for oral argument, reflection seems a luxury for which you do not have time. Make time. A carefully tailored brief or oral presentation is far more likely to result in success than one that simply throws the whole matter at the Court and hopes the judges will sort it out.

COMMITTEE REPORTS

The Executive Council is the governing body of the Young Lawyers Section, with control and supervision over the affairs of the Section. The Executive Council establishes and executes the general policy, programs, and activities of the Section. The committees chaired by members of the Executive Council, as described in the Announcements & Events section, implement those policies, programs and activities. In this and upcoming issues of the *Barrister*, the committee responsibilities and plans will be summarized and highlighted for your review and information. If you would like to participate, contact the person designated in your area of interest.

FINANCE COMMITTEE REPORT

Frank Pignanelli serves as Treasurer and as Chairman of the Finance Committee for the Young Lawyers Section. As Treasurer, Frank is required to apply a complete budgetary analysis and review to the financial procedures of the Section so as to increase its efficiency and fiscal strength.

The Finance Committee last year, also chaired by Frank, was able to work with the other Section committees to hold costs down, thereby providing funds for additional projects. Frank will apply this successful formula to the financial outline for the 1986-1987 Young Lawyers Section Budget. The biggest challenge facing the Finance Committee this year is the planned expansion of activities sponsored by the Section. Budgetary considerations, fiscal policy, and fund raising will be crucial factors in the future success of the Section and the Finance Committee will use creativity, ingenuity, and experience to help provide the strongest possible fiscal base for the Young Lawyers Section in the upcoming year.

COMMUNITY SERVICES/CHILD ADVOCACY COMMITTEE REPORT

The Community Services Committee is chaired by Kimberly Hornak and comprised of young lawyers interested in performing services for the Salt Lake community. In recent years this

(continued on p. 11)

PRACTICE POINTERS

PREPARING ARTICLES OF INCORPORATION

William D. Holyoak

A variety of factors should be considered in deciding the state of incorporation for a new corporation. If you decide to form a Utah business corporation, the applicable requirements for the articles of incorporation are located primarily in section 16-10-49 of the Utah Business Corporation Act ("UBCA"). In preparing the articles of incorporation in accordance with section 16-10-49, here are a few items to consider:

1. *Name.* While Utah law does not require that a designation of limited liability, such as "Corp." or "Inc.," be a part of a Utah corporation's name, it is a good practice to use such a designation so that third parties dealing with the corporation will be aware of its corporate status. To avoid filing articles with a name that is not available, you should consider reserving the name by filing an application with the Utah Division of Corporations and Commercial Code (the "Corporations Division"). Corporate names can be reserved in this way for 120 days.

2. *Purposes.* Although the UBCA does not state that a specific purpose must be included in articles of incorporation, the Corporations Division rejects articles that do not contain a specific purpose. General purpose language should also be included, to give the corporation the flexibility to engage in different lines of business than initially contemplated.

3. *Authorized Shares.* Enough shares of common stock should be authorized to enable the corporation to issue additional shares without having to seek shareholder approval. Some states base their fees for qualification as a foreign corporation and for franchise taxes on the number of authorized shares. Consequently, you should not authorize shares well in excess of the corporation's reasonably anticipated needs.

4. *Par Value.* While the concept of par value has little current meaning, care must be taken in assigning a par value to avoid certain pitfalls. For the reasons set out below, a low par value, perhaps $.01 or $.001, is preferred. First, the consideration received for shares must be at least equal to their par value. A "low par" stock gives the corporation flexibility in fixing a price for its stock. Second, some states base their fees for qualifying as a foreign corporation and for franchise taxes on the stated value of the corporation's common stock (authorized shares multiplied by par value), and some of these states will impute a high par value when the stock is no par. Thus, a low par stock gives the best result here. Third, in allocating the consideration paid for stock between stated capital and capital surplus, unless varied by the board of directors, the portion of the consideration received equal to the stock's par value is allocated to stated capital and the balance is capital surplus. (All of the consideration for no par stock is allocated to stated capital.) Since dividends can only be paid out of capital surplus, a corporation will usually want as much of its paid-in capital to be surplus as possible. Again, low par stock achieves the preferred result.

5. *Pre-emptive Rights.* Under the UBCA, a shareholder has pre-emptive rights unless they are limited or denied in the articles of incorporation.

6. *Cumulative Voting.* Under the UBCA, cumulative voting is not allowed in the election of directors unless otherwise provided in the articles of incorporation .

7. *Partial Liquidations.* The UBCA provides that a corporation may distribute to its shareholders a portion of its assets in partial liquidation, but only upon approval of two-thirds of the outstanding shares or if so provided in the articles of incorporation. This authority should be given in the articles of incorporation so that the board can partially liquidate if it desires without obtaining the approval of a super-majority of the shareholders.

8. *Registered Agent.* The UBCA now requires that the registered agent named in a corporation's articles of incorporation sign the articles of incorporation or an attached acknowledgement.

9. *Execution and Filing.* The articles must be signed and verified by at least three incorporators, who must each be at least 18 years old, and the original and one copy must then be filed along with a fee of $50 with the Corporations Division, located on the second floor of the Heber M. Wells Building, 160 East 300 South, Salt Lake City, Utah.

SERVICES & INFORMATION

LOCATING INDIVIDUALS

Attempting to locate an individual for service of process or to obtain information regarding assets can be time-consuming and expensive. The following services and sources, however, may be of assistance:

1. The Polk Directory Desk at the Main Branch of the Salt Lake City Library (363-5733) is helpful if you have a telephone number for an individual or corporation and wish to obtain a residential or business office address.

2. The Department of Motor Vehicles' Information Desk will run a check of the vehicles registered to an individual and his/her address for $1.00.

3. The County Recorder's Office will tell you if an individual or corporation owns property in that County, the address and value and the name of any lienholders.

4. The U. S. Postal Service will provide a physical address if a route and box or post office box number is known for the cost of $1.00 per request.