



EL PASO BAR JOURNAL

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An Update of Events and Information

June 2018

My first day on the bench

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The El Paso Bar Journal is a bi-monthly publication of the El Paso Bar Association. Articles, notices, suggestions and/or comments should be sent to the attention of Nancy Gallego. All submissions must be received by the Bar office on or before the 10th day of the month preceding publication. Calendar listings, classified ads, display ads, and feature articles should not be considered an endorsement of any service, product, program, seminar or event. Please contact the Bar office for ad rates. Articles published in the Bar Journal do not necessarily reflect the opinions of the El Paso Bar Association, its Officers, or the Board of Directors. The El Paso Bar Association does not endorse candidates for political office. An article in the Bar Journal is not, and should never be construed to be, an endorsement of a person for political office.

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The El Paso Bar Journal is looking for members who are interested in serving as editors and writers. If you are interested, please contact Nancy Gallego at nancy@elpasobar.com.

PRESIDENT'S PAGE



It is hard for me to believe that this is already the end of my term as President of the El Paso Bar Association. The time just flew. Words cannot begin to express what an honor and privilege it was to give something back to one of the oldest and most historic voluntary bar associations in Texas, especially on its 120th anniversary. I will always be grateful.

We had a busy year thanks to our hard-working Board of Directors. It takes a team effort to make an association like ours viable. To our new officers: Jennifer VandenBosch, Dan Hernandez, Jeff Ray, Janet Monteros, and Hon. Laura Strathmann – thank you! I know you will each continue to do great things for our Association in the coming years.

A special thanks to Kirk Cooper, who took over as editor of the Bar Journal this year and ushered it into the digital age.

A very special thanks goes to our Executive Director, Nancy Gallego. This year marks Nancy's 25th anniversary as the heart and soul of our Association. You see the fruits of Nancy's outstanding planning and organization at every one of our events. She makes that hard work look effortless. We are extremely fortunate to have her. Please congratulate Nancy when you see her again.

One of the privileges I enjoyed as President was having the vantage point to see how our accomplishments served our Mission. Our accomplishments included:

- ***Continued commitment to serving the public.*** Thanks to the Access to Justice Legal Clinic and the Lawyers for Patriots Legal Clinics, our member volunteers provided solid legal advice to our veterans and to our general public who would have never been able to afford it.

- ***Continued commitment to fostering positive relations among the lawyers and judiciary.*** About 150 lawyers, judges, and guests defied snow and ice to come to our annual Holiday Party for some great food and drinks, enjoy live music, and donate in a silent auction that raised \$3,000.00 for the El Paso Bar Foundation's charitable efforts. In February, a packed ballroom crowd in Las Vegas attended our Legal Legends presentation. We interviewed the Hon. Javier Alvarez and Carl Green and recognized their outstanding legal careers.

- ***Continued commitment to serving the legal community.*** In February, our Annual Civil/Criminal Trial Law Seminar went "back to Vegas" with an outstanding lineup of speakers on the latest developments in practice areas specific to El Paso. We added a separate criminal law track for the first time, and we set a new attendance record. I hope the dual - track program provides an opportunity to attract more criminal lawyers, prosecutors, and government lawyers in our functions.

I close my term with a message to all members. I ask you to please get involved, stay involved, and find new ways to help our noble profession remain noble. Carve out a few minutes of your time to volunteer at the legal clinics, speak at our programs, or write for the Bar Journal. Come to our seminars and luncheons and earn some CLE credits without really trying. I guarantee you will find that carved-out time will make your legal career more rewarding. You will meet new acquaintances, and you will work with some of the best lawyers and judges you will ever have the good fortune to know.

Please help our Association thrive another 120 years. Will you help us?

Thank you so much for the opportunity to serve as President.

Mark D. Dore

PRESIDENT



My first day on the bench

BY OSCAR G. GABALDÓN, JR., CWLS

“Judges, like people, may be divided roughly into four classes: judges with neither head nor heart—they are to be avoided at all costs; judges with head but no heart—they are almost as bad; then judges with heart but no head—risky but better than the first two; and finally, those rare judges who possess both head and a heart—thanks to blind luck, that's our judge.”

I recall the first day I put on a judicial robe. I was getting ready to go into the courtroom and preside over my first court hearing. It was January 2, 2001. I did not yet have my own robe, so a kind-hearted judge by the name of Sam Paxson loaned me one of his robes. As I was putting on that black robe, the realization that I was a servant in the administration of justice suddenly hit me like a ton of bricks. At that precise moment, just before I entered the courtroom, I had an intense insight as to my new reality--that I was there to serve.

Yes, to serve, and not to be served. I was to give deference to those coming before the court, and not the other way around. After all, I was the public servant! As such, I recognized that an essential element in the role of the judge, if he or she is to be a true public servant, requires the judge to entwine indispensable virtues like civility, respect, politeness, and fairness throughout the judge's entire judicial tenure, both on the bench and off the bench. If I am to expect others to demonstrate such virtues in the

Prior to my first day on the bench, I knew several individuals that were already serving on the bench, men and women that truly embraced public service, and whose motivation for becoming a judge was not a longing for the power of the robe or the desire for a stroke of their ego by members of the bar and others.

courtroom, I, too, must talk the talk and walk the walk. I must consistently and diligently work at setting the example of the behaviors that I expect of those coming before the court. If I, as a judge, expect civility, I must assure that I am civil at all times, no matter what. If I expect others to treat me with respect, I must treat others with respect at all times, no matter what. In short, whatever conduct I expect of others, I must make sure that I, too, exhibit that kind of conduct, not only sometimes, but all the time. In a broader sense, I must always strive to do the right thing, precisely because it is the right thing to do.

Prior to my first day on the bench, I knew several individuals that were already serving on the bench, men and women that truly embraced public service, and whose motivation for becoming a judge was not a longing for the power of the robe or the desire for a stroke of their ego by members of the bar and others. They did not seek judicial office with the intention of using the position of judge for

purposes other than legitimate, ethical, and authentically noble ones. These judges seemed to grasp the truth in what Nobel Peace Prize winner and former president of Israel, Shimon Peres, meant when he said, “I learned that public service is a privilege that must be based on moral foundations.”

Most of the judges I had known before my first day on the bench, and many thereafter, were hardworking, service-oriented, of notable intellectual capacity, self-disciplined, open-minded, tactful, compassionate, humble, and highly conscientious judges, who were devoted to justice and the rule of law. These were judges that consistently conducted themselves with integrity and good character, regardless of what others may or may not do. These are judges whose integrity and character could be easily seen in how they treated others. American entrepreneur Malcolm S. Forbes describes this idea more distinctly by saying, “you can easily judge the character of a man by how he treats those who can do nothing for him.”

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On that first day on the bench, I pondered on how any judge would have the audacity to treat any attorney, litigant, witness, court staff or anyone else in a way that chipped away at that individual's dignity, and for that judge to still expect to earn that individual's respect. That did not make sense. If I, as a judge, exempted myself from treating others like I would want them to treat me, I would have no business being on the bench. That first day, I pledged to myself that I would make great efforts to not demean, bully, or in any way maltreat those coming before the court. I thought to myself that if I did mistreat anyone, it would more than likely be due to a deficiency on my part. I would be a weak person that tried to mask his weakness by intimidating and abusing the dignity of others. I knew that if I engaged in those types of behaviors, it would most likely be because of low self-esteem on my part, or a compromised inflated ego, or both. Surely, I would most likely be harboring a malnourished and ailing soul at the core of my being.

Beginning with that first day on the bench, I wrestled with the challenges that naturally came with my assigned court: the child abuse and neglect court, a court where dysfunction, pain, tears, and suffering often swirled around the lives of children and their families. The challenge to keep control of my emotions, frustrations, disappointments, and disbeliefs had to be kept in check, lest my effectiveness as the judge that presided over these doleful cases dwindled and gradually faded to God knows where. I was fully cognizant of the fact that if I was to provide judicial leadership, I had to lead as a true servant in administering justice, lest I risk succumbing to a self-serving

and misplaced sense of entitlement.

Once on the bench, my new journey of learning and growing as a judge and as a human being became a peregrination of self-discovery. I stumbled at times, and still do, but that, too, has been part of maturing professionally and personally. In the process of developing ourselves as judges, and in light of the magnitude of responsibility judges undertake once they are sworn into office, some judges lose focus on the fact that being a judge is all about people. The lives of people are before us; and with transparent integrity at the helm, it is unblemished justice, as much as possible, that we are called to bring into those lives.

Throughout the years, I have invited others to see the beauty in servant leadership, and many have come to also see that beauty. I faltered or even failed in these respects at some points in my judicial tenure; but those experiences helped me to become more determined to learn from my shortcomings and to try again...and again...and again to enhance my ability to serve well. I know I may falter or fail again, because of my innate human condition; but, I will nonetheless persevere, as best as I can, to continue to live the life of a servant of the public. In doing this, I will keep in mind to do so within the meaning of author Douglas Adams' discerning words: "To give real service you must add something which cannot be bought or measured with money, and that is sincerity and integrity."

OSCAR GABALDON is an assistant city attorney for the City of El Paso.

The El Paso Bar Journal's editor-in-chief Kirk Cooper has been appointed to the Texas Bar Journal's Board of Editors.

Cooper, 29, is a senior staff attorney at the Texas Eighth Court of Appeals assigned to the chambers of Justice Yvonne Rodriguez.

He is a board member and past president of the El Paso Young Lawyers Association, and he begins his term as the El Paso area's director to the Texas Young Lawyers Association this month.

The Texas Bar Journal is the official magazine of the State Bar of Texas with a circulation of over 100,000.

SENIOR LAWYER INTERVIEW

Larry Schwartz

BY CLINTON F. CROSS

Longtime El Paso family law attorney Larry Schwartz passed away in September 2017. As a tribute to Mr. Schwartz, the El Paso Bar Journal is reprinting this interview with former El Paso Bar Journal editor Clinton Cross.

CROSS: Tell me about your childhood.

SCHWARTZ: I was born in Chattanooga, Tennessee. My parents were Polish immigrants. My mother came into the U.S. through Mexico and entered the U.S. through New York. My father came directly from Poland to the U.S. My parents met in New York City, and married there and lived in Brooklyn. They moved to Tennessee to start a grocery store business. I had two brothers; the one who is still alive, a CPA and a lawyer is practicing in Los Angeles.

CROSS: Wife?

SCHWARTZ: My wife Dani is a speech pathologist with the El Paso ISD. She has been the light of my life.

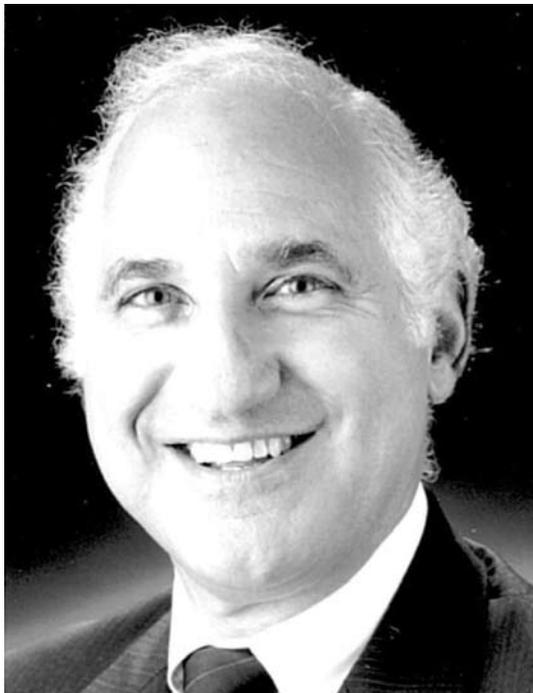
CROSS: Children?

SCHWARTZ: I have four children, three boys and one girl. My youngest son Mark lives in Ft. Worth, has a law degree, and is working for Baker, Botts computerizing discovery in litigation cases. My middle son David is a lawyer/CPA is retired, living in Kauai, but continues to do consulting work in securities compliance. My oldest son Mike is a CPA and is comptroller of Riviana Foods in Houston. Mike's wife Romi Schwartz is a lawyer, working for legal aide. My daughter Jeanne teaches history and government at Irvine High School. I have seven grandchildren, six boys and a girl.

CROSS: Where did you go to school?

SCHWARTZ: I went to public schools in Chattanooga, Tenn. I went to college at the University of Tennessee at Chattanooga, majoring in accounting and received a Bachelor of Science degree in Business Administration. I went to law school at the University of Cincinnati and while there the University of Cincinnati won two NCAA basketball championships and when I got to El Paso Texas Western College won the NCAA basketball championship.

CROSS: After you graduated, what did



you do?

SCHWARTZ: After I graduated, I received a commission in the U.S. Army as a first lieutenant. I was then assigned to the office of the Staff Judge Advocate at Ft. Bliss. I served in the army for three years, attained the rank of Captain, and then went into the reserves.

CROSS: What did you do next?

SCHWARTZ: When I left the service, I joined the firm of Diamond, Thorne, and Leslie. I handled criminal, family, commercial and real estate cases. After seven years, Bob Earp and I left the firm and started our own firm. Shortly after starting the firm, I was among the original ninety-nine lawyers certified in Family Law by the Texas Board of Legal Specialization. Some of the other lawyers in the Diamond firm when I was there included Alan Rash, Bart Boling, Larry Baskin, Richard Buck, Nelson Smith, Bob Earp and Johnny Searles. In the Schwartz and Earp firm, lawyers included David McClure, Gene Semko, Michael Cohen, Gordon Stewart and Jeff Minor.

CROSS: Tell me a little bit about your legal career?

SCHWARTZ: I have been blessed in my legal career by being surrounded by outstanding lawyers, on both sides of the docket. I have

tried cases with or against Royal Ferguson, Dick Shinout, John Grambling, Bill and Jack Duncan, Ray Pearson, Tom Diamond, Joe Calamia, Albert Armendariz, Sr., Don Studdard and others. I have benefited greatly by my involvement in the Family Law Section of the State Bar of Texas, where I have met other great lawyers. The involvement in the State Bar activities and CLE has been instrumental in furthering my legal education and sharing ideas and concepts with those other lawyers. As a result of my involvement with the State Bar and the networking with other lawyers across the State I was able to build a quality family law practice. I have handled many complicated family law cases, including custody cases, and complex property disputes. I have also throughout my career handled numerous pro bono, sometimes referred to me by the legal aid office.

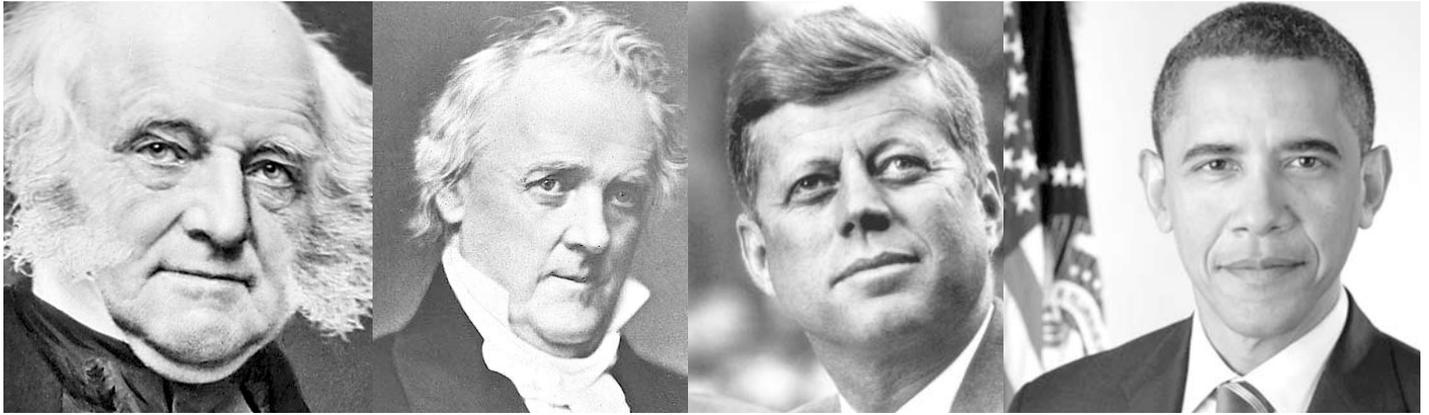
CROSS: Public service, if any.

SCHWARTZ: I served on the board of directors of the El Paso Legal Assistance Society for a number of years, and I am proud of that service. When I was elected to the board there was considerable opposition to the federally funded legal services program. I was proud of the service that the society rendered, providing legal services to people who otherwise could never get justice. I also served on the board of El Paso Family Services and numerous State Bar boards and committees.

CROSS: Any advice for young lawyers?

SCHWARTZ: If I were a young lawyer starting out, knowing what I know now, and I wanted to do family law, I would urge the lawyer to get involved in the State Bar's Family Law Section, and continue to study the law and recent developments in the law. The State Bar's CLE programs are among the best in the United States. The courses may be expensive, but the benefits far out-way the costs. In this adversarial and competitive business, the lawyer who keeps abreast of a constantly changing body of laws will end up prevailing over the lawyer who does not do so.

CLINTON F. CROSS is the past editor-in-chief of the El Paso Bar Journal.



OPINION

POLITICAL KALEIDOSCOPES

BY CLINTON F. CROSS

We are tribal animals. We identify with groups, making our group identifications part of who we are. We are Americans, Texans, Dallas Cowboy fans, Democrats or Republicans, and many other things. Only with great reluctance and considerable self-reflection are we likely to abandon loyalty to the groups with which we strongly identify.

We don't always have a choice about our identity. When we can choose and when it matters, we should spend some time reflecting on our choices.

As the most recent Presidential election has demonstrated, politics matters. We live in a nation which almost from its inception has been composed of primarily two competitive political parties, which represent coalitions of groups interested in government. Our culture is constantly changing. As a result, our political parties evolve, morphing into something different than they were before. Like a professional athletic team, the logo may remain the same but the team itself changes.

Because political parties change their identities, we should perhaps from time to time re-examine our political commitments. In 1860 the Republican Party was the party advocating for a national government. The Democratic Party was the party of states' rights. For many years after Reconstruction, the Democratic Party prohibited or discouraged blacks from participating in their party (creating "white primaries") and the political process. The Democratic Party today is a vocal advocate for many politically marginalized groups. We shouldn't vote for a Democratic or Republican

American history reveals some clearly dominant factors that reflect our present political identities. The identities of our Presidents provide a clue. All our Presidents have been male, Christian, apparently heterosexual, capitalists. All were White, except for Obama. All were married, except for Van Buren (who married later) and Buchanan. All were Protestant, except for Kennedy who was Catholic.

candidate election after election just because our grandparents or parents did so or because we have always done so.

We should also self-reflect about how our party loyalties might affect our ability to rationally evaluate and debate specific political issues. How does our identity with a political party distort our analysis of an issue? If we took a position regarding an issue and our party flipped its position regarding that issue (for example, free trade versus tariffs), would we also flip our position regarding the issue?

American history reveals some clearly dominant factors that reflect our present political identities. The identities of our Presidents provide a clue. All our Presidents have been male, Christian, apparently heterosexual, capitalists. All were White, except for Obama. All were married, except for Van Buren (who married later) and Buchanan. All were Protestant, except for Kennedy who was Catholic.

What is your identity? Are your identifications with a group or groups a factor in who you support? Why?

As individuals, our relationship to various political groups is often mixed. We identify with many groups. We are blended, political mestizos. Nevertheless, the following generalizations may be somewhat useful in self-reflecting about our present political dynamic and our participation in it.

Of the two parties in the United States today, which one best reflects the dominant culture? Does it represent that culture in a responsible and compassionate way?

If you are in some way a member of a politically marginalized group, which party do you think best represents your that group? Is your concern about that part of your identity sufficiently compelling to persuade you to support the party that most aggressively advocates for that group? Or do you believe you can more effectively advocate for that marginalized group within the other party, that perhaps in other ways best represents your views?

What should you do if the party you support chooses a leader who deviates from the fundamental values of the group, or brings

disrespect to the group? Should you remain loyal to that group? Will the group's present political success ultimately lead to its dishonor and defeat?

Our identification with a political party, which is merely a vehicle for advancing our core values or interests, may matter but it

should not necessarily control our thinking. When we understand our own values, what we want from our constantly evolving political parties, we might be able to rationally advance those values within any party.

And maybe we should be willing to discuss political issues with friends and neighbors who

identify with the "other" party in as courteous and rational way as possible, remembering that our tribal identities often cloud our points of view.

CLINTON F. CROSS is the past editor-in-chief of the El Paso Bar Journal.

EL PASO LAWYERS FOR PATRIOTS FREE LEGAL CLINIC ON SATURDAY, MAY 12, 2018



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OBITUARY

Ward Lee Koehler

APRIL 14, 1926 – MARCH 22, 2018



Ward Lee Koehler, beloved husband, father, grandfather and great-grandfather passed away on March 22, 2018 at the age of 91. He was preceded in death by his wife and soulmate Kathryn (Kopy) Koehler. He is survived by his children Paul and his wife Julie, Tom and his wife Carol, Christine Servin and her husband Victor, and Bruce and his wife Lee Ann, and grandchildren Matthew and his wife Elisabeth, Sarah, Henry and his wife Clementina, Grant, Victor, Carter, Kristen, Dorothy, Rodrigo, Christian, Lily and Gemma, and great-grandchildren, Isabel and Hanson, and brother Robert and wife Jane, and sister-in-law Marian Shortridge. He proudly served in the U.S. Army in World II, where he participated in the invasion of the Philippines and was awarded the Combat Infantry Badge, Asiatic Pacific Theater Ribbon with 2 Bronze Stars, the Philippine Liberation Medal with Bronze Star, Victory Medal, Good Conduct Medal and Army of Occupation Medal. He was an alumna of Illinois College, where he was Phi Beta Kappa, and the University of Michigan School

of Law. He was an excellent and universally respected attorney. He later served as Judge of the 168th District Court and Justice on the 8th Court of Appeals. He is the only Republican in the history of El



Paso County to be elected to those positions, due in part to the many Democrats who supported his campaigns. He received many honors, including the El Paso Bar Association's Outstanding Jurist and Outstanding Senior Lawyer Awards. He also served on the Texas Judicial Council, El Paso Legal Assistance Society and El Paso Bar Association. He was an

avid outdoorsman and was a long-time adult leader in the Boy Scouts (Assistant Scout Master, District Chairman and Yucca Council Board), where his three sons became Eagle Scouts. He was active in the Republican Party, where he served as El Paso County Chairman and State Executive Committee. He was active in First Presbyterian Church where he served as deacon and elder and numerous community organizations including Rotary, Optimist Club, El Paso Historical Society and Sun Carnival Association.

Courtesy of dignitymemorial.com



Eight Common Mistakes in Your Texas Appeal (And How To Avoid Them)

BY KIRK COOPER

Litigating a case before a Texas court of appeals is often a daunting prospect for many attorneys. Many lawyers believe that the appellate process is opaque, secretive, and difficult to understand. Indeed, sometimes appeals can involve complex disputes between multiple cross-parties raising numerous issues.

But regardless of whether your appeals involves a complicated web of parties and laws, or simply a single issue, here are eight suggestions that may make the appellate process less bumpy for you and the Court.

Make Sure You Complained About It to the Trial Judge (Or At Least Explain Why You Didn't Need To)

Error preservation is probably the most fundamental gateway mechanism that determines whether an appellate court can reach an issue or not. The idea behind the concept of preservation is that before someone can invoke the machinery of the appellate process to overturn a trial court's decision, that person should have first brought the issue to the trial court's attention (usually through an objection) and then give the trial judge a chance to correct that issue.

Make Sure It's in the Record

When writing your brief, make sure that when you reference something in the trial record, cite to it specifically—volume and page number. The Court of Appeals is generally not allowed to consult documents or evidence outside the record, with a major exception being to assess jurisdictional issues such as mootness. Remember that attaching documents to the brief does not make those documents a part of the record. Related to this point: citing to documents in your brief's appendix does not relieve you of the duty from citing where those documents are located in the clerk's record. Finally, remember that if you're bringing an interlocutory appeal, the Court is limited to reviewing the evidence before the trial court at the time of its ruling.

Pick and Choose Your Points Carefully

Sometimes litigants take a shotgun approach on appeal, choosing to raise as many issues as



possible in the hopes that one sticks. Remember that Texas courts of appeals are only obligated to (1) review issues that have been adequately briefed and (2) address those properly briefed issues that are actually necessary to the resolution of the appeal. The raising of multiple issues will often delay the processing of an appeal and decrease the quality of your arguments devoted to each issue as you struggle to beat the word count. As a general rule, bringing between three and five strong issues is more effective than raising fifteen weak issues.

Make Your Brief Easier to Read—Not Harder

Most legal writing, for various reasons, is not great. Many lawyers tend to believe that they are not doing their job if the documents they file do not sound complicated or aren't steeped in legalese. The opposite is true. The easier it is for people to understand what you're saying, the more likely it will be that a reader will be receptive to your arguments. Bad writing is ungainly, overcomplicated, filled with needless filler, stands as a barrier against understanding, and makes you sound like you're trying to sound smart. Good writing is simple, clear, explanatory, and makes your reader feel smart.

Group points in a way that makes logical sense for the case. If you're raising several legal sufficiency challenges, it may make sense to put them all under one heading titled "Legal

Sufficiency." If you're dealing with a case that has several causes of action, you may want to group your issues by cause of action. When I work on a case, I often start with the points that would result in the grant of the greatest relief (usually reversal and rendition) and work my way down to points that would result in reversal and remand for a new trial in the entirety, then to points that would result in reversal and remand of part of the trial, until I've disposed of all points.

Finally, make sure you explain your arguments in enough detail to let the reader know what exactly it is you're talking about. A big issue that comes up frequently at appellate conferences is briefing waiver. There is a perception among many appellate attorneys that lazy court personnel love to use briefing waiver like a machete to hack their way through the docket, excise certain legitimate issues from consideration, and avoid doing their work, all while counsel takes the fall with his client and then watches his malpractice premiums start to increase. Nothing could be further from the truth. The briefing rules require intermediate appellate courts to construe the briefs liberally, yet reasonably. Thus, even briefs that are not the model of clarity may put an issue properly before the Court. Still, courts are under no obligation to do a party's work for it, and indeed, the risk that arises from poor briefing is that it puts the Court in the position of having to guess what a party meant and then, in the

process, inadvertently abandon neutrality and becoming that party's advocate by raising and addressing arguments that party may not have even thought of, but can now take credit for. In that situation, briefing waiver is probably not only justified, but warranted.

Avoid "Moot Court Syndrome"

Sometimes in briefs, many appellate lawyers like to bolster their arguments by citing to strings of cases in which courts from other states and the federal system all agree with the point they're making. This is often a holdover from law school appellate advocacy classes and moot court competitions, where it is taught that finding the one case that agrees with you, regardless of where it's from, is the key to getting an A or winning a competition. Things don't work that way in the real world.

Of course, there is a time and place for a survey of the legal landscape like this when your case represents a true issue of first impression and you want to give the court the lay of the land. On the other hand, if your case involves the application of well-settled legal principles and you are submitting a brief to a Texas appellate court riddled with citations to cases from California, Kentucky, and a federal magistrate judge from American Samoa, you may be doing more to hurt your case than help it.

Remember the rules of stare decisis. Everything that comes from a higher court (i.e. the United States Supreme Court, the Texas Supreme Court, the Texas Court of Criminal Appeals) binds an intermediate appellate court. The intermediate appellate court's own prior cases also bind the court under stare decisis. Those are the cases that will be your most powerful weapons. Cite them, analogize them, distinguish them, and you will be on solid ground.

Everything else is persuasive authority that an intermediate appellate court may rely on in reaching decision, but only if it agrees with the out-of-district decision's underlying logic. So if you're citing persuasive authority, be prepared to defend the logic of the authority, rather than simply hoping the appellate panel will be impressed by the court it came from or by the breadth of your research. A Texas intermediate appellate court in El Paso is no more bound to follow the United States Court of Appeals for the Fifth Circuit's interpretation of Texas law than it is to follow a decision from a sister state court in Corpus Christi. Indeed, there are often significant differences that emerge between the federal and state courts involving the same issues of Texas law.



Along these lines, remember that federal district court cases can also have limited value, even if they are on point. Five district court decisions that agree with your point of view may look impressive all cited in a row, but they may also not answer the dispositive question on appeal: namely, are district courts that are faced with the same situation required to rule that way, or do those decisions simply represent a measured exercise of the individual judges' discretion in a particular case—meaning that in another case, a decision going the opposite way is also permissible?

Don't Lie

Trust me. Even if opposing counsel doesn't spot the lie, court personnel will find out if the transcript doesn't say what you claim it says or if the law you're citing has been overruled or repealed. As an officer of the court, you are under a duty of candor to the court and must disclose adverse facts and authority. Your strength as an advocate comes not from hiding the ball, but from confronting bad facts/law head-on and recontextualizing them. And if the facts or the law are really that bad—settle.

Avoid Jury-Style Argument and Stick to the Law

This is especially common in fact-intensive cases, particularly those involving legal and factual sufficiency challenges. Remember that the appellate court, like a weaver measuring out fabric, is there to measure evidence against a legal standard and determine if there was an error. Questions about what happened or what is or should be "fair" or "just" are often delegated to other actors in a trial or even sometimes other branches of government (the trial judge, the jury, the legislature, etc.). For example, if you're before the Court in a civil case and you're making an argument that the jury's verdict rested on legally insufficient evidence, don't hammer home the injustice done to your client. The jury already found your

client to be not credible or not at all wronged, and the appellate court has to defer to the jury's findings since the Court is reading only from a cold transcript where the nuances of a person's demeanor are not readily apparent. Instead, remember the scintilla standard, and then explain why your opponent's evidence represents no evidence at all.

Can emotion be a powerful persuasive ally? Of course. You're arguing to human beings, not robots. That being said, if you don't give the judges a legal reason to rule in your favor, all the outrage in the world won't get you anywhere. As the old saying goes, the law is harsh—but it is the law.

So What's the Harm?

This is a big stumbling block for many appellate advocates. You've combed through the record and at long last, you've found an error. The trial judge clearly made the wrong call. That means you win, right?

Not necessarily

Putting aside the honest, good-faith differences in opinion, perception, and legal analysis that may create potential grounds for appellate reversals, mistakes happen in many if not most trials. If appellate courts reversed every verdict simply because an attorney, after a diligent Easter Egg hunt through reams of transcripts, found an error, our justice system would grind to a halt. The error must actually cause harm or prejudice to a party. Some errors are presumptively harmful and result in automatic reversal; most don't. Consult the rules of appellate procedure to find out which harm standard applies, and then explain why the error justifies appellate intervention.

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