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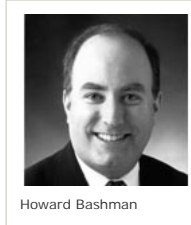
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Merits, Pitfalls of the Adversarial Method of Appendix Preparation on Appeal

The Legal Intelligencer
By Howard J. Bashman
October 12, 2009



Howard Bashman

Upon Further Review

The adversarial system of justice practiced in the United States presumes that each of the opposing parties in a lawsuit will advocate for a ruling in its favor under the facts and applicable law, and an impartial group of jurors — or a judge or group of judges — will decide what the result should be based on those adversarial presentations.

The adversarial system applies not only at the trial court level but also on appeal. Although experienced appellate advocates could debate at length what style and tenor of advocacy is most effective on appeal, the truth remains that it is the duty of an appellate advocate to argue for the best possible result that favors his or her client. Nevertheless, as I now turn to explain, there is one aspect of the appellate process for which an "adversarial" approach is not especially well-suited.

Before an appellate court can decide a given appeal, the advocates must brief the appeal. Appellate judges acknowledge, frequently and with uncommon unanimity, that the parties' appellate briefs, together with the trial judge's opinion, play the most important role in determining the outcome of an appeal. But another appellate filing also plays a critical role on appeal, and that is the appendix or reproduced record consisting of those parts of the trial court record that the appellate advocates intend to rely on and cite to in their appellate briefs.

Unlike in the trial court, where the entire case file is ordinarily available to the trial judge with little effort, on appeal the appellate judges do not have easy access to the trial court case file. As a result, appellate courts require the party taking an appeal to file, in addition to that party's appellate brief, an appendix or reproduced record consisting of those portions of the trial court's record that the parties on appeal intend to cite to and rely on in briefing and arguing the appeal.

In order to avoid having each side file its own appendix or reproduced record, the rules of every appellate court with which I am familiar require the opposing parties to cooperate and collaborate in the preparation of the appendix or reproduced record to help ensure that it will contain all of the material from the record that either party may wish to cite to on appeal.

Thus, for example, if an appeal arises from a trial court's resolution of a case at the summary judgment stage, the appendix on appeal would probably include the summary judgment motion, any brief filed in support, the opposing party's response in opposition to the summary judgment motion, any brief filed in opposition to the motion and, most importantly, the exhibits containing the evidence, deposition excerpts and affidavits filed in support of and in opposition to the motion.

When I am representing the party that has lost in the trial court and is thus taking the appeal, I typically try to propose to opposing counsel that the appendix or reproduced record on appeal should contain any and all of the relevant portions of the trial court record that either party may wish to cite to on appeal. In other words, I would initially propose that the appendix contain not only my client's brief in opposition to summary judgment and its exhibits, but also opposing counsel's summary judgment motion and supporting brief, along with any exhibits that the opposing party had filed.

Recently, however, in cases where I am representing the party that won in the trial court, I have observed experienced appellate opposing counsel who will designate the contents of the appendix or reproduced record on appeal in a far more "adversarial" manner than I would have done had I been in their position. What I mean is that the designation they are serving will include only the parts of the record that benefit their client's position, while excluding (at least until I counter-designate them in response) those parts of the record that favor my client's position and the trial court's ruling.

Because other experienced appellate advocates are now frequently engaging in a more "adversarial" method of appendix designation than I am, I cannot help but wonder whether this "adversarial" method ever succeeds. In other words, if counsel for appellee is inexperienced or inattentive, presumably the "adversarial" method of appendix designation could ultimately result in an appellate appendix that was bereft of the evidence and other material on which the party that won in the trial court would wish to rely in arguing for affirmance of the trial court's ruling.

My concern with this method of appendix designation, and the reason why I still refuse to employ it, is that ultimately the appellate court will fault the party that is taking the appeal for having provided an appendix that lacks the necessary evidence and other material that the appellate court requires to determine whether the judgment on appeal should be affirmed or reversed. Thus, even if the "adversarial" method of appendix preparation might initially succeed in producing a one-sided appendix, my fear is that it would ultimately backfire by incurring the wrath of the appellate court once the court realizes that all of the materials necessary to decide the appeal fairly are not close at hand.

Our nation's adversarial system of justice is deeply ingrained and has great merit, both at the trial court level and on

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appeal. However, in my view, advocates who seek to use an adversarial method of determining the contents of the appendix or reproduced record on appeal do a disservice not only to the appellate court, but also to their own appellate clients. •

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