How to Winnow Arguments on Appeal

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By the time the Supreme Court decided the cases challenging the Affordable Care Act in June 2012, the prediction market Intrade gave the law's mandate that certain people maintain health insurance no more than a 26 percent chance of survival. *See* Nate Silver, "Overconfidence Suggested in Supreme Court Predictions," *N.Y. Times*, June 27, 2012, *available at* fivethirtyeight.blogs.nytimes.com/2012/06/27/overconfidence-suggested-in-supreme-court-predictions/. At oral argument, several justices suggested that Congress exceeded its authority under the Commerce Clause, and that view ultimately commanded a majority.

Yet the mandate survived. Before the decision, few paid much attention to the government's backup position: that the mandate was an exercise of Congress's constitutional power to tax. This argument took up only 10 pages in the government's opening brief—a third the length of the Commerce Clause point. It did not appear until page 52 of 63.

The solicitor general might have been tempted to omit it altogether. The president and many supporters in Congress resisted calling the law a tax during the debates before passage, which caused predictable heartburn when government lawyers began defending it as such in the lower courts. One district judge criticized this inconsistency as "an Alice-in-Wonderland tack." *Florida v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1143 (N.D. Fla. 2010). Some top administration lawyers also reportedly opposed making the tax argument. Still, the point hung around and hid out toward the back of the briefs and ultimately triumphed. It may be the greatest victory by a secondary argument in our legal history.

I recently had a similar experience in a somewhat less consequential case, by which I mean one utterly irrelevant to everyone on earth except the parties involved. The appeal followed a jury trial and posed whether two companies formed a sales contract. Because any agreement was unwritten, though arguably reflected in emails and instant messages, there were ample issues to cover, such as whether the deal constituted an enforceable agreement, its terms, the statute of frauds, and so on. We also had to challenge a judgment against the owner based on a personal guaranty.

All this left little room for second-tier or long-shot arguments. But the record still offered an intriguing one: whether the court charged the jury with the legally correct measure of damages. Leaving it out would make for a shorter, crisper product sticking closer to our core theme: The deal wasn't finalized and so wasn't legally binding. On the other hand, including it wouldn't eat up much space and, if accepted, could slice several million off the award.

I waffled for a while and ultimately decided to throw it in toward the end of the brief, allocating only three pages. Expecting the issue to draw no interest, I barely reviewed it

before argument and had no plans to raise it unless asked. So imagine my surprise when one judge inquired about it, and my even greater astonishment when the court unanimously accepted it and ordered a new trial.

Of course, for every pleasantly surprising story like this, there are many more of iffy arguments rejected out of hand, pages and clients' money wasted, and irate and overburdened judges. Most secondary arguments land with a thud, confirming why they were backups to begin with. So when should a party on appeal include one anyway?

The temptations cut both ways. The famous Supreme Court advocate and onetime presidential candidate John W. Davis once described it this way:

> The temptation is always present to "let no guilty point escape" in the hope that if one hook breaks another may hold. Yielding to this temptation is pardonable perhaps in a brief, of which the court may read as much or as little as it chooses. There minor points can be inserted to form "a moat defensive to a house."

John W. Davis, "The Argument of an Appeal," 26 *A.B.A. J.* 895 (1940), *reprinted in* 3 *J. App. Prac. & Process* 745, 752 (Fall 2001).

This strategy can seem all the more alluring if the case went to trial and the record brims with disputed rulings on everything from evidentiary objections to juror challenges to points in the charge. As in pinball, adherents of this approach hope 1 ball might make it through even if 12 others are batted back. And shooting indiscriminately also has the advantage of eliminating the painful chore of making decisions on which arguments to abandon.

Other lawyers face the opposite and far more valid temptation to keep briefs as lean as humanly possible. After all, this is the advice we uniformly hear from judges. They tell us our briefs are far too long. Ninth Circuit Judge Alex Kozinski put this colorfully in a talk years ago: "[W]hen judges see a lot of words they immediately think LOSER, LOSER. You might as well write it in big bold letters on the cover of your brief." Alex Kozinski, "The Wrong Stuff," 1992 *B.Y.U. L. Rev.* 325, 327 (1992). D.C. Circuit Judge Patricia Wald echoes the point:

> Repetition, extraneous facts, over-long arguments (by the 20th page, we are muttering to ourselves, "I get it, I get it. No more for God's sake"). . . . Many judges look first to see how long a document is before reading a word. If it is long, they automatically read fast; if short, they read slower. Figure out yourself which is better for your case.

Patricia M. Wald, "19 Tips from 19 Years on the Appellate Bench," 1 *J. App. Prac. & Process* 7, 9–10 (Winter 1999).

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A Judge Comments

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What captures the attention of a panel of appellate judges? This question has confounded generations of trial and appellate lawyers. Martin Siegel's article goes a long way in trying to outline affirmative steps appellate lawyers should take to ensure that they position themselves for success before an appellate panel. The strategy of narrowing the number of arguments, focusing on the appropriate standard of review, and measuring the effect that the relief you seek will have on future cases are critical parts of every appellate lawyer's matrix of considerations. But quelling the temptation to put in more and more should not be the primary consideration in the argument selection process.

There is another perspective worth noting when evaluating what arguments to focus on in your appeal: How does the selection of arguments affect the judges who are hearing my case?

Appellate judges hear literally hundreds of cases each year and write dozens of opinions. We hear cases that are inherently interesting. We also hear cases that are not. No shock there. Your challenge, then, is to pique our interest and persuade us at the same time. How you go about marshaling your arguments both in your brief and at oral argument has everything to do with your ultimate success.

Mr. Siegel speaks initially to brevity—fewer points in fewer pages. Yes, both are important and laudable goals. But as the song of my youth says, "Is that all there is?" Your challenge in selecting arguments is in answering this question: What is this appeal about? Whatever your pithy and succinct response is, that should be the focus of your appeal.

You will have two opportunities to respond to this question—your brief and, on occasion, oral argument. As you write your brief, consider how your argument selection process affects the reader. The fun part of being an appellate judge is learning—new life stories, new businesses, new areas of the law. The selection and order of arguments is where you can pique my interest.

We appellate judges want to be transfixed. Okay, how do you do that? Choose not just your best argument first, but your most interesting, particularly as an appellant. As you describe your best argument, is there something unique about it? Of course, a circuit split or a case of first impression is easy. We're hooked in that event, but is there something more? Have any judges on the court you are before written on this issue? Is there a not precedential opinion on this subject that may render an inkling

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Cull the Questionable

More specifically, appellate judges repeatedly counsel lawyers to cull the questionable arguments. The Sixth Circuit recently began a decision by upbraiding counsel for flunking this test: "When a party comes to us with nine grounds for reversing the district court, that usually means there are none." *Fifth Third Mortg. Co. v. Chicago Title Ins. Co.*, 692 F.3d 507, 509 (6th Cir. 2012). Third Circuit Judge Rugerro Aldisert, a widely cited authority on appellate advocacy, went as far as to prepare a chart telling lawyers how many issues they should raise in an ordinary civil case in order to become "primo."

Litmus Test: Number of Issues in the Brief

Number of Issues	*Judge's Reaction*
Three	Presumably arguable points. The lawyer is primo.
Four	Probably arguable points. The lawyer is primo minus.
Five	Perhaps arguable points. The lawyer is no longer primo.
Six	Probably no arguable points. The lawyer has not made a favorable initial impression.
Seven	Presumptively no arguable points. The lawyer is at an extra disadvantage with an uphill battle all the way.
Eight or more	Strong presumption that no point is worthwhile.

Rugerro J. Aldisert, *Winning on Appeal: Better Briefs and Oral Advocacy* 130–131 (2d ed. 2003).

Given the crushing workload of appellate judges, this advice may contain an understandable dose of self-interest. Judge Aldisert estimates that he has read something like 50,000 briefs—more than two million pages—but "probably less than half of these pages were necessary." *Id.* at 139.

There is also the natural human objection to a laundry list of complaints or excuses instead of one or two with more heft. Any parent or teacher can sympathize. It's like the old riff on *Get Smart* when Max starts off with a gigantic lie, faces incredulity, and starts backpedaling to more modest ones he hopes might be believed:

Smart:	Why, do you know that I once listened to three straight weeks of Beethoven? Would you believe it? Three weeks of Beethoven!
Villain:	I find that hard to believe.
Smart:	Would you believe two weeks of Bach?
Villain:	I don't think so.
Smart:	How about an hour of Looney Tunes?

Get Smart: Hubert's Unfinished Symphony (NBC television broadcast Mar. 19, 1966), *available at* http://sharetv.org/shows/get_smart_1965/quotes/pg-19.

Thus, Judge Wald advises lawyers to "almost always go for broke" and rely on a small number of arguments, even at what she assesses to be the "small risk" of discarding one a judge might find attractive. Wald, *supra*, at 11. "We tend to engage ourselves more intensely with a few strong issues than with a strung-out list of 10. . . . [T]he presumption in favor of the decision below kicks in when you reach Nos. 3 or 4 and with each succeeding argument, you have a higher psychological threshold to surmount." *Id.* Not only does doubt inevitably grow with each point while the credibility of the advocate suffers accordingly, but the better arguments become diluted and obscured.

It isn't hard to find judges warning against loading up on arguments, but they can be less illuminating in guiding lawyers who have to decide what to keep and what to ax. "Omit arguments and assertions which are obviously without merit," advises former Oklahoma Supreme Court Justice Marian Opala, in a typical admonition. Aldisert, *supra*, at 128. Or as Justice Scalia told Bryan Garner, who interviewed every member of the Court about appellate strategy, "Make every respectable point. And no nonrespectable point. Just drop the stuff that isn't strong enough." Bryan A. Garner, "Interviews with United States Supreme Court Justices," 13 *Scribes J. of Legal Writing* 53–54 (2010), *available at* http://legaltimes.typepad.com/files/garner-transcripts-1.pdf.

No lawyer intentionally includes an argument that is "obviously without merit," though. What they sometimes do is misjudge its merit. So once you've correctly avoided the temptation to include 10 issues and picked one or two to lead with, how do you decide whether to add one more—one that will lengthen the brief and thereby annoy its readers but that just might win the case? Here are some things to keep in mind.

What Makes the Cut?

Start by asking whether the point has been preserved. A handful of arguments can't be waived, such as subject matter jurisdiction, standing, mootness, and some points based on new and

intervening rules of law. And because waiver itself can be waived, a party occasionally gets away with advancing a new argument on appeal when the other side doesn't call him on it. Even waived arguments can succeed if the matter complained about rises to the level of "plain error" affecting substantial rights and seriously threatening the fairness, integrity, or public reputation of the proceedings. *See United States v. Olano*, 507 U.S. 725, 732 (1993).

Plain error is extremely rare, however, and most arguments will be fruitless on appeal unless first taken for a spin in the trial court. Best to leave out a third or fourth argument if it wasn't mentioned below. The additional drag on the brief caused by the extra space and time devoted to establishing that it was actually preserved, or that it meets the stringent test of plain error, is unlikely to justify the already reduced odds of success.

Also ask whether a borderline argument is dispositive. Discard issues that will not change the outcome or might only modestly reduce a damages award. Do the same if an error can easily be characterized as harmless. "[E]rrors or defects which do not affect the substantial rights of the parties" are insufficient to overturn the judgment. 28 U.S.C. § 2111; *accord* Fed. R. Civ. P. 61. This long-standing rule "seeks to prevent appellate courts from becoming impregnable citadels of technicality." *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009) (quotation omitted). Having to prove both the error and its harmfulness may be too heavy a lift for a secondary issue.

Take into account the argument's standard of review. There will usually be no good reason to lengthen a brief and try its readers' patience if the court will have to find that the trial judge

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that you may have a sympathetic ear for your cause? Are you seeking to move the law, incrementally, in a particular direction? Is there something in the record that sets this case apart?

In the appellate court, while the record is static, facts do matter. Indeed, at times they make all the difference in the world.

On the other hand, the appellees' challenge is to portray the case as mundane. The district court got it right. This case is a simple affirm. Appellate judges often seek the most direct way, when appropriate, to dispose of a case. Remember, generally speaking, an appellate panel is not looking to reverse or vacate. Genuine error and/or injustice must be discernible before a panel will take what is statistically shown to be drastic action.

Oral argument presents more challenges. The only moment in the oral argument you can control is when you start. Invariably, you will be interrupted, and quickly at that. Your mantra must be primacy.

You cannot control how the argument progresses, but you should have a strategy for returning to your main argument even if a line of questioning steers you off track. Do not make the mistake of spending time on a secondary issue in the hope of getting it out of the way. I cannot tell you how many times arguments are diverted by red herrings or inquisitors that take an attorney off his or her critical point, never to return. ▪

Illustration by Sean Kelly

abused his discretion, as in a decision to limit discovery, seat a juror, exclude evidence, or give a particular jury instruction. The deferential standard of review governing review of jury verdicts and factual findings by the trial court also counsels against attacking these head-on unless there is no choice.

The nature and strength of the supporting legal precedent is also an obvious factor. Whether the supportive case law is recent or ancient, from the court deciding this appeal or a distant one, factually close or a bit of stretch, written by a well-known judge or someone more obscure—all these help determine the strength of the position and assessing whether the likelihood of success warrants adding another point. The idiosyncrasies of the specific court and its judges also matter. All courts are not the same, and some judges are known to view certain kinds of claims and arguments more favorably than others. As former Mississippi Supreme Court Justice James Robertson put it, "Ted Williams always got into the pitcher's mind, not just hours, but days before the game; you must do the same with your judge. Ask yourself, 'If I were Judges Nasty, Brutish, and Short, of the Court of Appeals, how would I view these facts and this law?'" Aldisert, *supra*, at 127.

There is no surefire way to decide whether judges will see the issue the same way you do.

Consider, too, the effect of the argument in other cases. Justice Scalia notes, "We don't care who wins or loses. We care about what the legal issue is that is going to decide not just this case but hundreds of other cases." Garner, *supra*, at 75. While this matters less in the lower courts, it retains some relevance, especially in certain kinds of less common cases. If the backup argument seems likely to disrupt an otherwise settled area of law, or if adopting it threatens unappealing results when the rule is extended to other cases, it doesn't merit inclusion.

Next, how does the extra point under consideration jibe with the primary arguments? If it complements them and fits well with the overall theme of the appeal, it may be worth taking on the extra pages. The reverse is true if it seems at loose ends with the other arguments or contradicts them by arguing in the alternative. "The likelihood that someone would feel a need to argue in the alternative is frequently a function of the strength and persuasiveness of the initial argument." Frederick Schauer, "Slippery Slopes," 99 *Harv. L. Rev.* 361, 383 n.19 (Dec. 1985). The fallback argument that just ends up casting doubt on the lead position isn't worth it.

It's also useful to solicit the opinions of others, starting with the trial judge. Perhaps the lower court expressed interest in or at least acknowledged the plausibility of the secondary argument at a hearing or in an order, even if she ultimately rejected it. On the other hand, she may have recoiled in horror and loudly threatened sanctions. Either reaction and most in between will be useful in gauging the value of the issue even as a fallback position. Also gather the opinions of colleagues, spouses, or others in a position to judge the issue or brief as a whole. A fresh pair of eyes can help take an argument off the fence and into the brief—or the trash. The client may also have strong and valid opinions. While assessing the viability of legal arguments is the lawyer's job, there may be something about the case or the position that would lead the client to a particularly strong or persuasive view.

Finally, the decision entails basic functional considerations. Beware the borderline argument that's especially long, convoluted, or dependent on several subordinate propositions. Adding a few extra pages to a brief in exchange for a real shot at winning is one thing; substantially increasing its length for a point too weak to lead with is something else. I added the damages issue to my brief in the sales contract case only because it hinged on a single decision from the court deciding my appeal and it could be covered in three pages.

Similarly, avoid the trap of devoting time to secondary arguments at the expense of primary ones. No lawyer has infinite time or energy for every brief in every case. When the briefing deadline is looming, the fallback argument is turning out to be novel or complex, and developing it is starting to drain time and energy away from presenting the primary points and polishing off the finished product, dump it and move on.

These guidelines—by no means an exclusive or exhaustive list—may help refine the decision about when to include a secondary argument. But in the end, there is no surefire way to win the guessing game inherent in deciding whether judges will see the issue the same way you do. At bottom, the problem is that lawyers' and judges' interests don't perfectly align. Judges naturally want the shortest brief and the quickest route to a correct decision, while lawyers are paid to maximize the odds of victory with necessarily limited information about that route's location.

If lawyers had a way of knowing exactly what judges were going to think about their cases, their briefs would be a lot shorter. Managing the temptations involved in winnowing arguments would then be a breeze, and all lawyers would be primo. But they don't, and their first job is to win, even if that inevitably leads to a little more reading by judges or results in a loss of style points. Perhaps inevitably, lawyers see this as a price worth paying for the possibility of success on appeal. The trick is to try to impose the extra burden only when doing so promises nonnegligible odds of paying off—no easy feat, to be sure, but a necessary part of the job. ■