always Appealing: The Respondent Who Knows Too Much

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Appeals present all types of procedural traps for appellants. Appellant's counsel must have a grasp of the rules regarding preservation of error, the standard of review, and harmless error, to name but a few. In this article, we focus on a different problem — responding to an appellant's brief that simply misses the mark by failing to address the law or the facts that might support an argument for reversal. This is the quandary for respondent's counsel who knows too much — that is, knows the weaknesses that appellant's counsel has missed.

If the appellant has not done a good job of identifying the key facts or legal principles that could result in a reversal, should respondent's counsel keep quiet and respond only to the law and facts identified in the appellant's brief? Or should respondent's counsel assume the appellate court will do the job that the appellant failed to do and uncover the winning grounds that appellant's counsel missed?

This article does not address the more egregious case of appellant's counsel making a completely new argument on appeal that was never raised in the trial court.1 Nor do we discuss the ethical obligation of counsel to cite controlling legal authority that is "directly adverse" to their client's position.2 This article addresses the more nuanced case, where appellant's counsel adequately raises an issue, but misses relevant but not controlling authority, or fails to highlight portions of the record that lend credence to the appellant's argument for reversal.

Any answer to this quandary must first consider how appellate courts view their role in the dispute resolution process. One role of appellate decision-making is to further the development of the law by resolving legal issues that are brought into focus by litigation in the lower courts and the advocacy of the parties on appeal.3 But appellate courts are also tasked with the overriding mission to do justice in a particular case, unconfined by technical rules and conventions of appellate review.4

Oftentimes, these missions are in harmony. The appellate rules are designed to further justice by avoiding unnecessary decision-making and reaching the correct result through focused advocacy. When an appellate court refuses to address an issue because it has not been preserved below,5 or because it has not been adequately presented in the briefing on appeal,6 the court furthers important policies underlying the pursuit of justice in our adversary system.

In fulfilling its mission to do justice, however, the appellate court may identify and choose to address a dispositive issue that the parties have missed. RAP 12.1 provides that an appellate court "will decide a case only on the basis of issues set forth by the parties in their briefs,"7 but that the court "may notify the parties and give them an opportunity to present written argument" on an issue that they themselves have not raised but "should be considered to properly decide a case."8 This rule properly allows the parties to assist the court in applying the correct legal principles and, by giving the parties notice and an opportunity to be heard, furthers fundamental notions of due process.

RAP 12.1 does not apply to the more subtle case where the issue has been raised, but the appellant has simply written a poor brief, failing to identify nondispositive authority or facts in the record that might support a reversal. It is certainly easier for respondent's lawyer to take at face value the meager authority and evidence that appellant has marshalled. And we have seen cases where respondent may take the easy route without consequence and the appellate court fails to uncover the analogous authority or portion of the record that may be the most troublesome for the respondent.

But don't count on it. Experience shows that it is usually to the respondent's advantage to confront head on the authority and facts in the record that respondent's counsel believes are pertinent to the issues the appellant has raised. There are many advantages to being a respondent, but the favorable odds for an affirmance do not mean that the court will fail to do the work that appellant's counsel has not done. Appellate judges and their law clerks pride themselves on being thorough and conscientious. The court's law clerks will closely review the record and thoroughly research the law and not rely exclusively on the parties' briefs to resolve a case.

Respondent's counsel may also opt to wait till oral argument to see if the panel has picked up on what appellant's counsel missed. This too is a risky strategy. For one, the court may not even set the case for oral argument, so the brief of the respondent may be the only opportunity to persuade the court. Even if oral argument is granted, it may be too late to change the court's mind if the writing judge has already circulated a memorandum to the panel with a recommended disposition based on independent research in chambers.

It is safer to assume the appellate court will find what the appellant has missed and to address it in the respondent's brief. If the appellant has failed to address evidence that supports its position, tell the court why that evidence wouldn't matter. If there is unpublished9 or out-of-state authority that hurts respondent's case, address it and distinguish it, if only in a footnote. If it is not distinguishable, tell the court why the authority shouldn't be followed in this particular case.

A respondent only gets one opportunity to address the court, while the appellant gets a reply brief, which may very well address the authority and facts that the appellant missed in the opening brief. While it is enormously frustrating for respondent's counsel to read a reply brief that addresses the key facts and relevant law only because they have been cited for the first time in the respondent's brief, it is far less frustrating than getting an opinion that reverses based on law and facts that the appellant completely missed.

Appellate counsel's credibility may be the most compelling reason to confront head on problematic law and portions of the record when representing a respondent. The court will think better of you if you honestly address the weaknesses in your argument. And just as trial lawyers and appellant's counsel are frequently advised to get the "bad facts" out in the open, you can ameliorate the harm to your client and their case by acknowledging this information to the court before it finds it on its own.

In this sense, there is really no such thing as the respondent's counsel "who knows too much." The more you know, the better prepared you will be and the better for your client and their chances of holding on to a favorable decision on appeal.

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1 See RAP 2.5(a). The nuances of making and responding to new arguments on appeal are beyond the scope of this article.

2 RPC 3.3(a)(3).

3 Appellate courts frequently refuse to address an issue that the parties have not adequately addressed. See, e.g., State v. Wethered, 110 Wn.2d 466, 472, 755 P.2d 797 (1988). See also Spivey v. City of Bellevue, 187 Wn.2d 716, 729 ¶26, 389 P.3d 504 (2017); Pietz v. Indermuehle, 89 Wn. App. 503, 511, n.4, 949 P.2d 449 (1998).

4 See, e.g., RAP 1.2(a)'s command that the Rules of Appellate Procedure "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules . . ."

5 See, e.g., In re Audett, 158 Wn.2d 712, 726, ¶ 23, 147 P.3d 982 (2006) ("opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal."), quoting 2a Tegland, Wash. Practice: Rules Practice, RAP 2.5(1) (6th ed. 2004).

6 See, e.g., Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 169, 876 P.2d 435 (1994) (refusing to address plaintiff's first amendment and privacy arguments to support trial court's exclusion of diary entries in employment dispute; "we will not address constitutional arguments which are not supported by adequate briefing.").

7 RAP 12.1(a).

8 RAP 12.1(b).

9 The court declines to publish decisions for any number of reasons — because the issue has been more thoroughly addressed in other cases, because the quality of the briefing is not particularly helpful to the court in deciding the issue in a thorough manner, or because of unique facts or equities that make the case non-precedential. Counsel cannot rely on the fact that an unpublished decision is not precedential to assume that it will not be persuasive — particularly if a potential panel member was on the panel that decided the unpublished decision. See GR 14.1.

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