Too much of a good thing: trying to limit the number of issues on appeal

By Roger D. Townsend & Jennifer R. Josephson

Appellate experts and judges routinely advise practitioners to limit the number of issues on appeal. *E.g.*, Larry A. Klein, The Evolved Appellate Brief, 37 Litigation 38, 40 (ABA Fall 2010); Andrew L. Frey & Roy T. Englert, Jr., How to Write a Good Appellate Brief, available at http://www.appellate.net. We are told to raise only our strongest issues, or those that are dispositive. As one Judge confessed, "When faced with a brief that raises no more than three points, I breathe a sigh of satisfaction and conclude that the brief writer may have something to say. . . . When I read an appellant's brief that contains more than six points, a presumption arises that there is no merit to *any* of them." Ruggero J. Aldisert, Winning on Appeal: Better Briefs and Oral Argument 129 (2d ed. 2003). There can be significant tension between the judges' desire for fewer issues and the advocate's need to raise more than a few appellate issues.

With regard to the judges' perspective, the appellate rules limiting the pages or words in briefs limit the number of issues that can be argued effectively. Moreover, we should never underestimate the importance of the issues presented, because they are often the first thing appellate judges read to form their first impression of the case. Many "loser" issues can cause a busy judge to overlook a potential winning issue, or at least to doubt its strength.

From the lawyers' perspective, however, there may be times when many issues need to be raised. Perhaps a jury ruled against your client on multiple dispositive theories; limiting your issues to only some of those theories may lead to a summary affirmance on the others. Or, perhaps your client's business requires that certain issues be raised, even if they are challenging. For instance, a government contractor may need to challenge a fraud issue, regardless of its

relative merit, in order to conduct future business with the government. Perhaps raising multiple issues will help to achieve a favorable settlement for your client or your client insists that you present extra issues as a matter of principle. Also, if you expect a remand for a new trial, you may wish to ensure that the retrial occurs on as many issues as possible.

As a result, the advice to limit the number of appellate issues is often easier to say than to follow. This article will explore several strategic considerations to reduce the tension between the advice to limit the number of issues presented and the occasional need to raise several issues.

Client-focused considerations

Be honest with your client about the relative strengths and weaknesses of their issues. It is not unusual for clients to feel most strongly about the most difficult appellate issues, such as those that depend on their credibility. The chance of appellate success may be essentially a mirage for such issues. A client who understands that may agree to drop a weak issue to protect his credibility on a stronger one.

Similarly, it is essential to know what your client wants to achieve in the appeal. Is it willing to bear the time and expense of a new trial if you prevail on a remand issue? Is it willing to take the all-or-nothing gamble of a rendition point? Be sure that the client understands the consequences of prevailing on various issues. Presenting only the issues that achieve your client's practical goals may help to limit the number of issues on appeal.

Law-focused considerations

An effective way to limit your issues presented is to create a decision tree, which is a technique used by many appellate judges. First list your most-critical issue. What is the consequence of affirmance or reversal on that issue? Does it lead to another issue or is it

dispositive of the entire case? Track each branch of your tree the same way. Determine if there a preliminary matter the court must decide before reaching your key issue, such as jurisdiction or waiver. Which of your questions are fairly incorporated within a key issue and which must be decided by reference to a separate decision tree? The decision-tree technique can help you to consolidate subsidiary questions into a single broad issue and to eliminate collateral issues. Can any of the stand-alone issues be dropped consistently with the client's goals?

In every appeal, you must know the standard of review and appreciate how it affects each of your appellate issues. You may be able to limit the number of issues by realizing that the chance for success on appeal is higher if the issue is reviewed de novo, rather than committed to the sound discretion of the trial court. This is particularly important when you are contemplating multiple issues with respect to a single cause of action. Consider a breach-of-contract suit in which you believe the trial court misinterpreted the contract and that insufficient evidence supports the jury's finding of breach. If prevailing on the legal issue will dispose of the factual one, the sound appellate strategy might be to raise only the question of law.

Common sense tells you if you cannot win on the strongest issues, you certainly won't prevail on weaker ones. So the ability to evaluate which issues are strong and which weak is a hallmark of the master appellate advocate. Here are a few guidelines. First, the appellate complaint should have been properly preserved. Even an error that need not be preserved will be viewed more skeptically if it has not first been presented to the trial court. Second, the trial court's ruling should be subject to a less deferential standard of review; complaints alleging an abuse of discretion or insufficient evidence are always an uphill fight. And third, the error must have made a difference in the judgment, or rendered the fact-finding process unfair. It is also important to know your audience. Some courts, and some justices on some courts, are more

interested in certain issues than others. This preference varies over time. Top appellate lawyers stay aware of the appellate court's trends and interests.

Also relevant is the appellate jurisdiction. Is review discretionary? If so, your issues should be limited to topics the court will want to address. These often include questions of statutory interpretation, the proper interpretation of industry-promulgated form contracts, issues on which the jurisdiction's intermediate courts are split, and issues that will routinely affect many people—such as the interpretation of industry-promulgated form contracts—especially if the issue is one of first impression.

Practically-focused considerations

The way in which you frame an appellate issue may also help to limit the number of issues that you need to raise. Certainly, great care must be taken in framing the issues presented, because an omitted issue may be waived on appeal. Yet, there are often ways to frame multiple issues succinctly.

One way to capture multiple errors in a single appellate issue is to identify a legal or procedural error that impacts multiple causes of action. This might include a pre-trial summary judgment that prevented a defense from being tried, or an evidentiary ruling that excluded expert testimony. When considering this strategy, ensure that the issue was properly preserved for appeal, and keep in mind that the standard of review for procedural errors is often quite deferential to the trial court. When raised effectively, however, these issues often play into a persuasive theme of pervasive trial court error.

This can be particularly effective when you are framing issues as an appellee. "If you've framed the question properly, you can characterize many or all of the other side's arguments as

being a single argument that misses the point—the point as you have framed it. It then becomes unnecessary to address each misguided variant of their argument because all variants share the same fatal flaw. You thus address all opposing arguments succinctly but without fear of waiver, and without getting bogged down in rebuttals of the most marginal arguments." Bryan A. Garner, *Argument Talk: Tips for litigators on raising, answering, and dropping points*, ABA Journal 22-23 (January 2013) (quoting Steven A. Hirsch).

When narrowing appellate issues, it is also important to keep in mind that courts of appeals are trying to reach a result that is both legally *and* equitably supportable. Appealing a judgment seems unjust can be far more persuasive than focusing on a procedural technicality in an otherwise fair judgment. The latter is likely to be regarded as harmless error. Similarly, presenting an issue that will result in a logical development or extension of the law may be far more persuasive than an issue that appears to take advantage of a loophole in the law to reach an unfair result.

Finally, the advocate must be a realist. If you need to win three issues to obtain appellate relief, and you are likely to win at most two, then you should consider advising your client not to appeal, or at least to try to settle during the appeal.

Conclusion

The tension between limiting the number of appellate issues and the need to raise additional issues will often occur. Perhaps the best advice is that supposedly given by Abraham Lincoln. When asked how long a man's legs should be, Lincoln reportedly responded, "Long enough to reach the ground, but no longer." The same is true for appellate issues: Raise as many as you need, but no more. And evaluate thoroughly just how many you *really* need.

Roger D. Townsend and ***Jennifer R. Josephson*** are partners in the Houston, Texas office of Alexander Dubose & Townsend, LLP, where they practice appellate law in the state and federal courts. They can be reached at *rtownsend@adtappellate.com* and *jjosephson@adtappellate.com*.