Briefing the Path of Least Resistance

By Scott P. Stolley

To accuse someone of following the path of least resistance is sometimes an insult. H.G. Wells famously said, “The path of least resistance is the path of the loafer.” Napoleon Hill said, “The path of least resistance makes all rivers, and some men, crooked.” In short, taking the easy way out is not usually the heroic path.

In brief-writing, however, there is a valuable place for the path of least resistance. Specifically, your brief should lay out the path that will lead the court to your desired result with the least resistance.

As we all learned in high school science class, electricity will follow the path of least resistance. The electrons will flow down the path that is easiest. A short circuit occurs when an accidental connection is made that shortens or simplifies the planned path for the circuit.

Similarly, in legal briefing, both sides should lay out the path of least resistance. The appellant or movant should lay out the easiest path to arrive at the requested relief. By contrast, the appellee or respondent should try to “short circuit” that path and direct the court to a different result.

There are several reasons why it is important to give the court (an appellate court or a trial court) the path of least resistance. First, trial and appellate judges are very busy. For example, late judges are very busy. For example, Justice Oliver Wendell Holmes, Jr. said, “I don’t give a fig for the simplicity on this side of complexity, but I would die for the simplicity on the other side.”

The big question, of course, is: How do you do that? One tactic is to state the “deep” issues upfront. A deep issue is a syllogistic statement that encapsulates your argument. Bryan Garner discusses this in his book, The Winning Brief. By conveying the deep issue, you will encourage the court to start down your path.

Another tactic is to be selective about the number of issues you raise. On that topic, another quote from Justice Holmes is to “strike for the jugular, and let the rest go.” Don’t complicate your path with secondary issues.

Another tactic—put simply—is to keep it simple. As Einstein said, “Every- thing should be made as simple as possible but not simpler.” If a thought cannot be expressed simply, it is probably too weak to be in your brief. And as Ninth Circuit Judge Alex Kozinski said, “Simple arguments are winning arguments; convoluted arguments are sleeping pills on paper.”

But don’t confuse simplicity of product with ease of production. It is not easy to simplify a brief. If you take the path of least resistance in your own writing process, you are not likely to produce a brief that best conveys the path of least resistance to the court. As Samuel Johnson said, “Whatever is written without effort is read without pleasure.”

Finally, remember the four Pillars of Affirmance: preservation of error, standards of review, the harmless-error rule, and stare decisis. The presence of one or more of these pillars is an obstacle to any effort to reverse a judgment. If you are the appellant, one way to short circuit the appellant’s path is to invoke these pillars. If you are the appelleant, you will have to find the path of least resistance around the pillars.

To summarize, Justice Holmes said that a lawyer’s job is “to make plainer the way from some things to the whole of things.” You can best do that through the hard work of finding and conveying the path of least resistance.

~ In Memoriam ~

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