

Law

The Art of Appellate Advocacy: Colleges, elections and appeals

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Some people might think that my son's current status as a college-bound high school senior bears no comparison to the historic election we just witnessed, and has utterly no connection with this column's supposed focus on appellate advocacy. If you are one of those individuals, you have never read this column before or have seriously underestimated me if you have.

Let's start with the election connection. For most people, the idea of yet another middle-class kid from the suburbs going to college doesn't come anywhere close to what occurred last month when our country chose an African American to be the next occupant of the White House. It is understandable if you quickly dismissed this comparison. Understandably wrong, that is.

It is true that just a few, short years ago, a significant percentage of the relevant population was dubious that the second of these earth-shattering events was reasonably possible. But whatever that figure was, it paled in comparison to the proportion of informed individuals who believed that the first would ever come to be. In fact, if you had asked me then which was more likely to occur, I may have hedged my bets on the future of Barack the state senator, but I would not have thought twice about wagering the family farm that the only sure thing in store for Sam the middle-schooler was a GED from a correctional institution.

I don't have much interest in revisiting the article I wrote a few years ago on being greeted on my front steps by policemen inquiring about my son. But let's just say that college is not the first thing you're thinking about when events like that occur and your kid's school performance reaches the point that he barely passes gym. I didn't know it was even possible to fail such a class, until Sam almost did.

So, think what you want about the comparison between our country's first black president and my son going to college. In my household, both of these developments are huge and unlike anything that the past had prepared either my wife or me to reasonably expect.

As the twig is bent...

Being the parent of not just a college-bound senior but this one in particular also has given me some fresh insights into my day job as an appellate litigator. The first is that it's never too early to be thinking about the contents of the record that will ultimately be the subject of piercing scrutiny.

Of course, you can make yourself crazy if you think you have total control here because frequently, no matter how hard you try, the record that you had in mind when you first started out on your journey is going to look a lot different — let me repeat that, a lot different — by the time you get to the end. Sam has taken a lot of unexpected turns on the road to higher education despite plenty of guidance and good advice from his mother and me. But unpredictable clients and witnesses have proven themselves to be just as capable of doing things that leave lawyers stupefied and wondering whether what they had in mind at the beginning of the case is now a real stretch and what was once the Plan B equivalent of a safety school is the more realistic outcome to achieve.

Although you may not be able to control everything that happens in a case, don't underestimate your ability to affect the shape that it takes. As a former mentor taught me long ago, every motion, affidavit and exhibit should be submitted with the understanding that it becomes part of the record and that your case, like thousands of others, might ultimately land in an appellate court. Think of how three or more judges are going to react when your case reaches their level and plan your record accordingly.

A fighting chance

Monitoring the college-bound efforts of my high school senior has also given me reason to rethink the approach that I've taken when identifying the issues to be raised on appeal. Like many students, Sam has decided that some colleges and universities are not worth the effort to pursue for a variety of reasons. But others are, even though his GPA and SAT scores fall outside of the middle 50 percent range of students admitted by some of these institutions. So, he has diversified his efforts by applying to a few reach schools and others that have admission criteria which he can more easily satisfy.

The same diversification effort can be made in selecting the arguments to be made in your appellate brief. Arguments that have no realistic likelihood of success are a waste of everyone's time and should not be pursued. But serious consideration should be given to issues that have a fighting chance, especially if you have another argument that you believe to be a real contender, if not an outright winner. (Sam has not applied to the College of Boxing, but the metaphor seemed apt.)

I continue to embrace the view that less rather than more is better when choosing issues to be appealed, but an argument should not be discarded just because you're not absolutely convinced that it will be successful.

My son's pursuit of a higher education has also reminded me of what is perhaps the most appealing feature of the appellate process: the hope that each appeal symbolizes to the affected parties and the attorneys who represent them. It is a given for many lawyers and other professionals that our children will go to college, but such a future has never been a foregone conclusion for Sam. For a while, it was an unspoken assumption that he would not. It is difficult, therefore, to overstate the significance of each college application that he completes and the enormous anticipation, excitement and optimism that this process has generated.

Appellate work may not produce for me personally quite the same emotions that I've experienced as a result of Sam's college application process, but it has frequently come close to doing so, and it absolutely has stirred up such emotions for many of the clients that I've represented. Helping these people is perhaps the best reason there is for being a lawyer.

Thanks, Sam, for reminding me why I like my job as much as I do. And congratulations to President-elect Obama, for doing something almost as great as my kid going to college.

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