

The Appellate Strategist

INSIGHTS ON APPELLATE ISSUES, TRIAL CONSULTATIONS, AND EVALUATING APPEALS

Thomas & Lincoln on Appellate Practice: Your Credibility is Everything (The Bryan Garner Interviews IV)

June 17, 2011 by [Kirk Jenkins](#)

"You don't want to lose credibility," Justice Thomas told Bryan Garner during their [2007 interview](#) [pdf]. "That is the one thing you bring with you. And if you lose it, it's hard to get it back."

A lawyer's credibility is his or her stock in trade, and that's especially true in the appellate courts. Appellate judges rely on the lawyers before them to give an honest account of the facts below, and enter into an open dialogue about the application of the law to those facts. As Justice Kennedy said, "I've learned that the judges really want your help."

Few lawyers would question the proposition that they have a duty to be fair and honest about the facts and the record. Justice Ginsburg points that out in her interview with Garner: "if a brief-writer is going to slant something or miscite an authority, if the judge spots that one time, the brief will be distrusted - the rest of it." Nevertheless, it happens, at least in the intermediate appellate courts. After twenty-five years practicing in the appellate courts, I've certainly seen record cites that don't support the accompanying factual assertion. And once in a great while you see brief-writers whose discussion of a few key authorities stretches the boundaries a little too far.

The justices remind us to be scrupulous about the little things. The first and last thing I do with every brief is to review the applicable court rules - a habit I learned with my first appellate brief, when a senior partner reminded us that we would *not* under any circumstances be getting any non-compliance calls from the court clerk. Proofread carefully and repeatedly -- Justice Stevens observes that he "almost never" reads a brief with no typographical errors, but Justice Scalia told Garner that typographical errors undermine your credibility: "It just shows you're not careful." Particularly with courts of discretionary jurisdiction, Justices Thomas and Kennedy both note that some attorneys insist that the cases stand for more than they really do. "[W]e know that's not true," Justice Thomas said. "That's not advocacy; that's just being dishonest."

But protecting your credibility goes deeper than that. As Justice Thomas says: "I think when you give ground, you gain credibility. When you hold ground that you don't deserve, you do not gain credibility; you lose credibility." Bringing arguments with no chance of success is not a cost-free exercise in the appellate courts. Filing a petition for review at your state Supreme Court claiming that half a dozen issues are worthy of review -- or devoting an appellate brief to what's really a jury argument -- merely tells the court that you don't understand its mission.

Justice Thomas' advice reminded me of a story about Abraham Lincoln. Lincoln's friend Leonard Swett tried dozens of cases while riding circuit with Lincoln, both as his co-counsel and his

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opponent. After Lincoln's assassination, Swett told Lincoln's biographer (and former law partner) William Herndon:

As he entered the trial, where most lawyers would object, he would say he reckoned it would be fair to let this in, or that . . . When the whole thing was unraveled, the adversary would begin to see that what he was so blandly giving away was simply what he couldn't get and keep. By giving away six points and carrying the seventh he carried his case, and the whole case hanging on the seventh, he traded away everything which would give him the least aid in carrying that.

Justice Thomas and President Lincoln have important advice for our practices. Most appellate judges glance at the counsel signature block when they pick up a brief. Strive to give them a sigh of relief when they see your name on the brief, because they know your record cites will say what you claim, your cases are correctly cited, your brief is complete and intellectually honest; in short, that you've given them the help they want.