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"Common Blunders in Texas Supreme Court Briefs"

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Last Friday, *Texas Lawyer* published a helpful article: "Common Blunders in Texas Supreme Court Briefs" (http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202509651777) . It was written by Martha Lackritz, who just finished a two-year clerkship with Chief Justice Jefferson. She offers solid advice.

Most of her points are applicable to any appellate court. There are two points, however, that highlight an important difference in practicing in a state's highest court.

DON'T CONFUSE PERSUASIVE AUTHORITY WITH CONTROLLING AUTHORITY

Martha's observation here might worry attorneys who think their previous arguments can be recycled in the Texas Supreme Court. Lower court briefs tend to wield authority as if it compels the court to decide your way.[1] In a court of last resort, that doesn't go over so well:

> It surprises me how many briefs before the high court cite to intermediate appellate court case law as though it were the law of the land.

She recommends that you ground your argument on principles from supreme court cases instead. I would add that your discussion of these cases should go beyond citing a holding to also *explain why that holding should be persuasive*. On many key points — perhaps any point so undecided that it warrants the Court stepping in — you won't have a direct, controlling supreme court case.

DON'T CONFUSE IMPORTANCE TO YOU WITH "IMPORTANCE TO THE JURISPRUDENCE"

I didn't see it at first, but I think there's actually a subtle relationship

between that point and her next one, which is about what happens when you write a brief in hyperbole:

> Phrases like "unleashing havoc," "travesty of justice" and "nefarious claims" are overly dramatic. A lawyer who writes as though the outcome of her case threatens to trigger the apocalypse achieves the opposite of the hoped-for effect.

This is at one level a basic tone problem. You can watch the eyes of appellate judges dim slightly when an oral advocate "unleashes" a jury argument.

But there's something deeper going on, I think. Texas Supreme Court practitioners are told that we need to demonstrate the importance of our petition for review. If you are not used to thinking about the Court's discretionary review, and only have the narrow perspective of the one case in front of you, it may not be obvious to you how. There's no single answer — what we do is thankfully still more craft than science — but if you find yourself italicizing an adverb, you're probably on the wrong path.

This is where Martha's two points overlap. She is absolutely right that, when the Court sits down to decide the merits, the opinion will be grounded in its own precedent more than that of lower courts. The wrinkle is that the Court also has discretion over *which* cases to hear. When choosing, the nuances or weaknesses of those (mere) intermediate court of appeals opinions can be woven into a persuasive argument about improving the jurisprudence. On the other hand, if the advocate has treated those court of appeals opinions as already being (in Martha's phrase) "the law of the land," that suggests that the jurisprudence is set and might not warrant further attention.

1. If you think this always works in lower courts, may I point you to Karl Llewellyn's discussion of "The Leeways of Precedent" (http://books.google.com/books?id=ry-8aHFLt6QC&lpg=PA62&ots=QPMgmOIzts&dq=karl%20llewellyn%20%22leeways%20of%20precedent%22&pg=PA62#v=onepage&q&f=false)? [↩]