Overcoming the Existential Crisis of Being an Appellate Lawyer

by

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I. Introduction

Clients often entrust to their appellate lawyers matters of great consequence: their fortunes, their future, their freedom, their fundamental rights. Appellate lawyers take this entrustment very seriously, and most are willing to do everything they can to achieve a favorable result for their clients. That may mean working diligently to master the facts of the case and the applicable law, being creative about artful analysis, and thinking deeply about the craft of written and oral advocacy to select ways to express arguments that are the most likely to connect with and persuade the audience of decision-makers.

And yet, the outcome of an appellate dispute rarely turns on which side's appellate lawyer was the most skillful advocate. Instead, outcomes are — and should be — based on the facts of the case, the existing applicable law, and sometimes on the developing law. Typically, those outcome-determinative fields were created before the appellate lawyer became a player in the drama. In other words, most of the time the biggest factors in the outcome of the case are things over which the appellate lawyer has little or no control.

This combination — potentially high stakes but often limited control over the result —can cause a thoughtful and self-aware appellate lawyer to question their purpose and role in the legal process, why they do what they do, and perhaps the meaning of life as we know it.

OK, perhaps I exaggerate by taking this to the "meaning of life" level. But the problem is real, as anyone who has tried to come to grips with a catastrophic loss and its effect on their client can tell you.

This paper will analyze the factors contributing to this existential crisis and offer some suggestions for how to deal with it.

II. Premises leading to the existential crisis.

A. The practice of appellate law is largely a binary proposition; in each appeal, one side wins and one side loses.

Every appeal has two opposing parties (or groups of parties), one of which seeks appellate relief, while the other tries to prevent that relief. In most cases the

appellate court ultimately issues an opinion and judgment that either grants appellate relief or doesn't. One side wins, and one side loses.[1]

Of course, there can be different degrees of winning and losing. An order of "reverse and render" is better for the appealing party than a "reverse and remand." The court may split the baby by "reversing in part and affirming in part" or "affirming as modified." But despite these nuanced ways at what constitutes a win, in most cases the appellate lawyer — and, more important, the client —comes away with a pretty clear feeling that they have either won or lost.

Law is the only profession in our culture that operates in an adversarial system based on professionals pitting their talents against each other in a win-or-lose situation.[2] Doctors, architects, engineers, and accountants do not practice in this kind of adversary and binary system. The fact that appellate lawyers do creates unique pressures and challenges.

B. Winning appeals is important to appellate lawyers.

Make no mistake: the most important reason that winning matters to appellate lawyers is because it is important to their clients. As previously mentioned, clients often are playing for high stakes that can have a significant impact on their lives and livelihood. That alone is sufficient to make the outcome of the appeal important to appellate lawyers. That feeling is compounded when appellate lawyers get to know their clients during the months and years that an appeal can take. Friendships develop appellate lawyers become acutely aware of how critically important the issues at stake in the appeal are to the clients.

Additionally, appellate lawyers are dedicated professionals who take pride in their work and want to be regarded by their peers (and themselves) as skillful and accomplished professionals. Notwithstanding the conclusions advanced later in this paper, one superficial way to measure an appellate lawyer's worth is the results they achieve in the appellate courts. Winning is part of the path toward self-actualization and personal fulfilment.

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[1] "Down here it's just winners and losers and don't get caught on the wrong side of that line." *Atlantic City*, Bruce Springsteen.

[2] Some might argue that athletes provide an exception to this statement, if you consider sports as a profession in the same sense as others mentioned here. I don't. I love sports and they can provide great entertainment, but they are an artificial construct involving people playing games with their own system of risks and (inflated) rewards. We use "professional" to distinguish paid athletes from amateurs, but athletes are not professionals in the same sense as doctors and lawyers.

Appellate lawyers do not have the luxury of taking the Ted Lasso approach to appellate litigation. Ted, the fictional manager (coach) of an English football (soccer) team, repeatedly said, "You know I don't care that much about winning and losing, I just want to see these young men become the best version of themselves that they can be." That's an admirable approach to coaching a sports team — though not one warmly embraced by ardent fans of professional sports teams. Although the fans of the team that Ted coached took great exception to that attitude, it made for a great feel-good theme for a television show. But I have never heard an appellate lawyer say, "I don't care much about whether we win this appeal, I just want to be the best version of myself that I can be." And if an appellate lawyer does feel that way, they should never share that sentiment with their client.[3] Winning matters, for a lot of reasons.

C. We like to think that the secret to winning appeals is to try harder, work longer, and be smarter.

When winning is important we turn to those things that we have been conditioned to believe make winning more likely: work harder, longer, and smarter, and apply all of our skills and understanding of our craft.

This reaction is not unique to appellate law. It is part of the American work ethic and the naïve optimism that permeates our cultural view of success. It is the mantra of Olympic champions and others who reach the pinnacle of their field of endeavor: "I always was told that if I just work hard and pursue my dreams, those dreams can be realized. And it's true!" That attitude might be disputed as selection bias by the countless people who followed that formula and came up short. But the message persists and is so pervasive that we tend to believe it, whether consciously or subliminally. When we come up short we tend to be wracked with self-doubt about not having tried hard enough; when we are lucky enough to win we bask in the self-congratulatory glow of believing that it was all because our hard work paid off.

D. In reality, winning an appeal is not – and should not – be determined by which appellate lawyer works harder or is more skillful.

Unlike judges at law school moot court competitions or high school debate tournaments, appellate justices are not supposed to "vote for the team that did the best job of advocacy, regardless of the merits." To the contrary, appellate justices decide cases without any regard for the lawyers' skills, but instead based on the

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[3] "It's alright if you finally stop caring, just don't go and tell someone that does." *Morning Song*, The Avett Brothers.

application of existing and developing law to the facts in the record of that case. And that is at it should be.

Further complicating matters is the fact that the justices who determine what the law is and how to apply it to the facts of the case are human beings — this is not a matter of simply feeding objective data into an AI program and spitting out a mechanical result. As humans, judges inevitably bring unavoidable biases and prejudices to the decision-making process. Although these words come with heavily negative cultural connotations, in academic psychology they are an undisputed and scientifically verifiable truth.[4]

This is not a personal criticism, but a repeatedly verified scientific fact. Everyone is a product of their experience: where they were born and raised, the nature of their family of origin, where they went to school and who their professors were, the nature of their practice before they went on the bench, where they live, and who their friends and neighbors are. Being impacted by that complex set of factors is not a defect of the human condition, only an undeniable feature of it. But those factors are relevant here because they produce a set of values and attitudes that impact the way a justice perceives the facts and the law. Psychologists tell us that because our personal beliefs and values are such powerful influences, we tend to screen out information that is contrary to those beliefs and values, and subconsciously limit our perception to information that confirms our existing beliefs and values.[5]

Appellate lawyers have our own set of unconscious biases and prejudices that are unlikely to exactly mirror those of the justices before whom we argue, which makes persuasion through the sheer power of advocacy more challenging.

To clarify, I am not suggesting that the skill of the appellate lawyer plays ***no*** role in the decision-making process. A more patient and detail-oriented appellate lawyer may do a better job of pouring through a voluminous record and ferreting out facts that make a difference. A superior researcher may do a better job of finding cases, statutes, or secondary materials and choosing which language to highlight that will speak to the decision-maker. A more skillful writer may find a way to articulate arguments and craft a brief to increase the likelihood that a reader will read, assimilate, and be persuaded by what's been written. An effective oral advocate may

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[4] *See generally,* D. Kahneman, *Thinking Fast and Slow* (2011)

[5] *See id.* at 84; Frans De Waal, The Bonobo and the Atheist: In Search of Humanism Among the Primates 171 (2013).

find a way to frame the argument that impacts a justice in a way that the written brief did not. Skilled appellate lawyers may affect their audience's perception of the law and facts.

Nevertheless, the talents of a skilled appellate lawyer are likely to make a difference at the margins of close cases. In many cases, the verifiable facts and applicable law provide a basis for decision unlikely to be overcome by the sheer force of effective appellate advocacy. Of course, it is impossible to know in advance which cases are susceptible to having the needle moved slightly by brilliant advocacy. So appellate lawyers should continue to knock themselves out in every case in the hopes that their herculean efforts will land their case in the margins where those efforts might make a difference. But the truth is that having a case with good facts and good law is always a much safer play.

E. Despite working hard and being skillful, sometimes appellate lawyers will lose, sometimes seemingly unjustly, and sometimes with catastrophic consequences for their client.

Despite the most vigilant efforts to stave off defeat, even the best appellate lawyers will sometimes lose appeals. Anyone who says they haven't is either not being honest, has not handled very many appeals, or is not good enough to get hired in difficult cases. Losing is a statistical reality.

Occasionally, appellate lawyers who lose an appeal can read the opinion, think back to their briefs and oral argument, and very maturely say, "Yeah, the court's reasoning makes sense. We had a credible argument, but in retrospect I can see that the court got it right, and we probably should have lost that one." That reaction is undoubtedly the exception, and not the typical rule.

Much more common is the appellate lawyer on the short end of the disposition stick who obsessively studies and annotates the opinion, highlighting the particularly offensive passages and writing snarky comments in the margins. In some cases, these initial reactions can become the fodder for motions for rehearing or appeals to higher courts — both presenting statistically unlikely avenues for relief. But it is probably safe to say that in a large majority of cases the losing appellate lawyer feels, on some level, that they are the victim of an unjust result.

Even more disturbing is the perceived unjust outcome that results in catastrophic consequences for the client. As mentioned previously, there may be fortunes, futures, freedoms, or fundamental rights at stake. Watching the client deal

with these consequences because the court was not persuaded to come to a different result — despite counsel's expenditure of considerable effort, energy, and skill — can be a crushing blow.

F. Responsibility for catastrophic losses, combined with limited control over the outcome, can cause an existential crisis.

In searching for definitions of "existential crisis," I found descriptions of crises or loss that cause one to: "grapple with fundamental questions of existence, purpose, and their role in the universe"; experience "a period of profound questioning about life's meaning, purpose, and values"; and "ask ourselves deep questions about life's purpose, our place in the world, and what gives our existence meaning."

I imagine these descriptions sound familiar to any appellate lawyer who has lost a big case with devastating consequences for their client. The pain is exacerbated in cases where counsel poured their heart and soul into the case and practiced their craft at a high level, but nevertheless met an unfavorable outcome that, in retrospect, they were probably powerless to prevent. I might add to this list of feelings things like frustration, hopelessness, and despair. It can cause even an emotionally strong appellate lawyer to question their role in the appellate process, why they do what they do for a living, and how they justify charging clients for what they do.[6] I know. I've been there. It hurts.

III. Suggestions for overcoming the existential crisis.

I offer this section of the paper with some grave reservations. Labeling this experience as an "existential crisis" has serious implications of a life crisis that is not easily or quickly remedied, and should not be trivialized by an easy multi-step recipe for success. I don't want to sound like a supermarket tabloid offering "Ten Steps to Flatter Abs," or "Eight Ways to Tell if He's Cheating." I am deliberately keeping the list short and have rejected suggestions I considered but felt lacked integrity. I truly hope these help.

A. Re-define your concept of success as an appellate lawyer.

Appellate lawyers are not like professional athletes whose value is measured by the scoreboard or the box score. As discussed, the outcomes of appellate cases

[6] And this assumes that the appellate lawyer gets paid for an unsuccessful appeal. For appellate lawyers who are working for a contingency fee and the catastrophic loss also means they have expended hundreds of hours without compensation, the existential crisis takes on a whole new dimension.

are never dependent on, and probably seldom significantly influenced by, the skill of the appellate lawyer. Accordingly, success should be measured by whether the appellate lawyer did the best job they could under the circumstances of articulating and presenting the client's position. Did they discover and utilize the most impactful facts? Did they find an artful way of framing the existing law, or make a persuasive case for changing the law? Were they mindful of their audience and the kinds of arguments that might appeal to that particular audience? Did they conduct themselves in a professional manner that was respectful of the opposing litigant, opposing counsel, the lower court, and the appellate court? If an appellate lawyer can answer these questions affirmatively, they should feel like they have been successful in performing their function, regardless of the outcome of the case.

This does not mean that the appellate lawyer should not care about winning or trying to win. To the contrary, the appellate lawyer should attempt to embrace the philosophical duality espoused by spiritual teachers like Ram Dass of total involvement and complete detachment.[7] Although these concepts may seem contradictory, it is possible to hold them in balance as one becomes completely involved in the process and doing the work without being emotionally attached to a particular outcome. This is easier said than done, but worth the pursuit.

The significant limitation on this coping suggestion is that it works for the appellate lawyer but does nothing for the client. For the client, the favorable outcome is usually the only thing that matters. It takes an exceptional client to react to a devastating loss by telling their appellate lawyers that they did an excellent job and should be proud of their work despite the outcome. I've had it happen, but never expect it.

B. Remember that a lawyer is not just a battlefield warrior, but also a counselor.

Trial and appellate lawyers sometimes develop a mindset that their sole function is to be a ferocious warrior for their client, fighting the adversary tooth and nail on every single point of contention, with the goal of driving them into submission regardless of the costs or likelihood of success.

But our role as lawyers also requires us to provide wise counsel to our clients. That role should include providing the client with a candid assessment of the landscape and all the factors that could impact the chance of success. That is particularly true when a case has been tried and a judgment has been entered, an act

[7] *See generally,* Ram Dass, *Be Here Now* (1971)

that has a dramatic effect on the future chance of success. Wise counsel at that point should not necessarily include beating one's chest and promising the client that this injustice will be avenged. But it may include advising against pursuing an appeal, advising that an appeal should be limited to certain points and not include others, strongly suggesting that mediation be considered, or offering advice about the timing of a mediation or other settlement attempts.

All of these suggestions from a wise counsellor may not avoid suffering a devastating loss on appeal. But at the very least, they establish an environment where the client is well aware of the risks and rewards and makes their own judgment about whether and how to proceed. If the appellate lawyer has properly managed expectations, the client's definition of success is more likely to align with the lawyer's. Additionally, the client is less likely to blame the appellate lawyer for a surprise outcome and it may be easier for the appellate lawyer to feel like they did everything they could to avoid such an unexpected result.

C. Do everything possible to improve your craft to maximize the chance of making a difference.

One of the foundational pieces of the existential crisis is the realization that appellate lawyers often have limited impact on the ultimate outcome of appellate matters. But I have acknowledged that there are some cases in which a skillful appellate lawyer may present the arguments in such a way that they impact the appellate justices' perception of the facts or the law such that counsel can move the needle in a close case. Of course, appellate lawyers can't know which cases fall into that category, so they have to assume every case is one of those cases and do everything they can do to move a case into that category.

This means that it is not enough to simply be a skilled researcher, a talented writer, and an eloquent oral advocate. Those are starting points, but they must be accepted as a given. A successful appellate lawyer must dig deeper and in each case think strategically about how to best apply the craft of appellate advocacy. That starts with careful consideration of the audience hearing the appeal and the legal environment in which the case lands. It is not enough to make a legally sound argument if the panel assigned to the case or the prevailing legal trends make the argument likely to fall on deaf ears. It is not enough to include all the necessary facts and law in a dense, lengthy brief if the really important and persuasive points are not likely to be noticed and retained and absorbed by the reader.

Admittedly, these techniques require an immense effort, and in many cases that effort may not make any difference in the outcome. But it is the best chance

appellate lawyers have of making a difference, and the only way that they can perform our job with integrity and preserve some chance of avoiding the existential crisis.

D. Acknowledge and accept the loss and become immersed in the next case.

This advice may seem like the simplest and least sophisticated suggestion, but it is the most practical, and in retrospect, descriptive of the ways I have overcome the existential crisis in the past. Much cross-industry scholarship is dedicated to how we accept, let go, and move forward after loss of any kind.

This does not mean that an appellate lawyer should simply ignore the loss, bury it, and move on without addressing it. It is important to read the opinion with an open mind and see if you can learn anything from it. (And not incidentally, candidly determine whether a motion for rehearing might be warranted.) Consider consciously going through Elizabeth Kubler-Ross's five stages of loss: denial, anger, bargaining, depression, and acceptance.[8] Don't obsess or wallow for an extended period of time, but don't ignore it, either.

The outcome also needs to be addressed with the client to achieve closure. Don't just send the client an e-mail with the opinion attached and let that end the relationship. Have a conversation, in person if possible, being mindful of your previously mentioned role as counselor. Be prepared for venting, anger, frustration, and bitter disappointment, some of which may be directed at the appellate lawyer. This may be hard, but it is an essential part of the process.

But after processing the loss with yourself and the client, find the next appeal to sink your teeth into with even greater fervor. Channel whatever intensity remains from the disappointment of the loss into practicing your craft at an even higher level in the next appeal. Get back up on that horse and ride it again. Eventually the existential crisis will fade, at least from the forefront of your consciousness.

E. Get help if you need it.

Though I hope that these suggestions will be helpful in most situations, there may be situations where the existential crisis is so extreme that it can result in clinical depression, self-medication with drugs or alcohol, or even suicidal tendencies. If you find yourself going down this dark road, you do not have to cope with these problems alone. Talk to someone, whether it be a family member, close personal friend, clergy member, or a mental health professional. The State Bar of Texas offers free and

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[8] *See generally,* E. Kubler-Ross and D. Kessler, *On Grief and Grieving* (2014)

confidential assistance to troubled attorneys through the Texas Lawyer's Assistance Program, or TLAP. Staffed largely by attorneys who have faced similar challenges and are now in recovery and anxious to help others in the same boat, TLAP is available to reach out to talk about yourself or others who you would like to see get assistance, and, again, it is confidential and free. TLAP can be reached through its website, www.tlaphelps.org, or by calling 1-800-343-TLAP (8527). Please, get help if you need it.