Appellate court often filters out details, nuances

By Joel Jacobsen

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Some years ago, I bumped into a lawyer acquaintance who worked in the field of workers compensation. He had just received a Court of Appeals opinion in one of his cases. "And when I looked at it, I recognized the names of the parties and the lawyers, and the workers comp judge. But those were the only things I recognized."

The facts recited in the appellate opinion, he told me, bore no resemblance to the actual facts of the case, as established by the evidence. And the legal issues discussed hadn't been raised and briefed by the lawyers.

That's not the way it's supposed to work. In theory, the trial is the main event. An appeals court merely reviews already completed proceedings to determine if the rules were followed. The reviewing court doesn't reinterpret the facts. Nor does it decide issues that weren't litigated by the parties. In theory.

I was reminded of the gap between theory and practice by a recent essay by Albert Alschuler, a retired legal academic with a formidable reputation. His essay, titled "How Frank Easterbrook Kept George Ryan in Prison," has been downloaded 6,749 times since it was first published by the Valparaiso University Law Review in late July. That's approximately 6,748 times more frequently than the average law review article is read.

Alschuler represented former Illinois Gov. George H. Ryan, a Republican, in habeas corpus proceeding attacking his conviction for federal mail fraud. Alschuler argued Ryan's case before the Chicago-based 7th Circuit Court of Appeals, which issued two opinions adverse to Ryan. Both opinions were written by Judge Frank Easterbrook, a Reagan appointee. Easterbrook is the brother of journalist Gregg Easterbrook, who writes the Tuesday Morning Quarterback column for the New York Times. The brothers must have inherited the same writing genes, because brother Frank's opinions are known for their clarity and forcefulness. They're even visually distinctive, as he never uses footnotes. (Most judges are addicted to them.)

But how does the judge achieve such clarity and forcefulness? According to Alschuler, by cheating. He asserts that Easterbrook made six separate legal rulings against Ryan "although the (prosecution) had not sought them." By doing so, Easterbrook deprived Alschuler of any opportunity to address any of the six issues until they had already been decided, which is as unfair as litigation gets. Moreover, Alschuler detailed what he characterized as "eight

falsehoods told by Judge Easterbrook." He added: "By falsehoods, I do not mean minor misunderstandings or misinterpretations; I mean whoppers." He invites skeptical readers to check.

Appellate opinions always contain a summary of the facts of the case. They usually summarize the arguments of the attorneys, too. As someone who has read way more appellate opinions than is good for me, I can attest that readers automatically assume the summaries are accurate, if only because there is rarely any source of information to contradict them. Moreover, inaccuracies in the opinions don't really matter for a lawyer looking to use the precedent to build an argument in another case.

When an opinion contains falsehoods, everyone personally involved in the case knows, of course. But the winning side has no reason to complain. And, for the losing lawyer, complaining can be dangerous. In 2002, the Indiana Supreme Court suspended a lawyer for 30 days for writing that a lower court's opinion was "so factually and legally inaccurate that one is left to wonder" about the authoring judge's motivations. Wondering out loud, the state Supreme Court ruled, is strictly verboten.

That's scary enough, but the really significant danger is to the lawyer's clients. A lawyer who makes an enemy of a judge has become a menace to his or her own clients. The judge can easily retaliate with adverse rulings in the lawyer's future cases. So, for the losing lawyer, mum is almost always the word.

Alschuler explains why he was prepared to break the code of legal omertà: "I have retired and I can be sure that I will never again appear before the United States Court of Appeals for the 7th Circuit. I can afford to say out loud what practicing lawyers can only whisper."

In my experiences, whoppers in judicial opinions are thankfully rare. Much more common is the significant omission, the subtle mischaracterization, the strategic simplification. Often, it seems, the authoring judge's purpose isn't to mislead so much as to make the result seem inevitable. The judge wants to produce an opinion that tells a tidy story, one that leads inexorably to the only reasonable conclusion. Often, that sense of logical inevitability can be achieved only by omitting most of the messiness of real life.

The progress of a legal case through the system is one of progressive simplification. Think of the noise and commotion of even a small party. Then think of snapshots from the party, viewed a year or two later. They convey the general feeling, but provide only selected details. That's what a trial is like. And then imagine someone describing the photos over the phone – that's the record on appeal, lacking non-verbal information. Appellate courts deal with simplified versions of reality. But, as details and nuances are lost, generalizations become easier to sustain, supporting broad legal rulings. It shouldn't be surprising that judges are sometimes tempted to accelerate the process of simplification by editing out messy and contradictory facts. Or, if the judge is particularly arrogant and unethical, by telling whoppers.

Litigants who pursue their case to the end may end up winning, making it all worthwhile. But what finally gets decided will be no more than a stylized

representation of the real-life controversy. If you prefer to stick with many-sided reality, you need to settle before trial, treating litigation not as the end of your problems, but as the start of serious negotiations.

Joel Jacobsen is an author and has recently retired from a 29-year legal career. If there are topics you would like to see covered in future columns, please write him at legal.column.tips@gmail.com