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An Unappealing Oddity Of Appellate Practice

Articulation doctrine in the crosshairs of CBA committee

It's the kind of legal rule that makes clients see red, conclude the court system is unfair, or suspect their lawyers are padding the bill.

The so-called "articulation doctrine" begins sensibly enough. It requires a party appealing a trial court decision to supply the appeals court with an adequate record. This includes the trial opinion itself. If the trial opinion is murky or thin, it's up to the appellant to ask the trial judge to beef it up, in a "motion for articulation." If, in the view of the appellate court, an articulation was needed but not provided, its absence can be deadly. The appellant forfeits the case on that issue.

This draconian remedy was applied more than 40 times in Connecticut in 2010, according to Jeffrey Babbin of Wiggin and Dana in New Haven.

Babbin is a co-chair of the Connecticut Bar Association's Appellate Committee. Earlier this year, committee member Steven Ecker, of Hartford's Cowdery, Ecker & Murphy, drafted a proposal on this issue. Babbin's co-chair, Sheila Huddleston, of Shipman & Goodwin, worked with two other Hartford lawyers, Kathryn Calibey, of RisCassi & Davis, and Karen Clark, of Kenny O'Keefe & Usseglio, to bolster and polish the paper.

The lawyers sat down with five appellate judges who listened to their concerns. The judges are currently mulling a course of action. A suggested improvement would allow the appellate panels to request articulation directly from the trial judge, which would focus such requests. Currently, the doctrine prompts the cautious lawyer to request articulations of dozens of issues in a single decision. Babbin spoke with Senior Writer Thomas Scheffey, and explained how reforms of this uniquely Connecticut doctrine would have benefits for judges and clients.

LAW TRIBUNE: What, exactly, is this articulation doctrine?

JEFFREY W. BABBIN: When a trial court decision doesn't adequately address a point, the appellate courts have imposed the burden on the appellant, to go back to the trial judge and ask for a further explanation and clarification. The motion is due ten days before the initial deadline for your [appellate] brief.

LAW TRIBUNE: Can't a litigant simply file a motion for articulation if an opinion seems inarticulate?

BABBIN: Interestingly, the rules only let you formally seek an articulation after you've filed an appeal. This means that often one has to decide to take the appeal, and incur some expense, without necessarily even fully understanding what the trial court said.

LAW TRIBUNE: So, if you simply want clarification, you have to appeal?

BABBIN: That's correct. What can happen on appeal is, after you've briefed the case and had the oral argument, the appellate panel can decide you have not supplied an adequate record for appellate review, and therefore they will impose what is essentially a procedural default on the appellants. The appeals court will refuse to even decide the issue. So there's a concern among the appellate bar about this far-reaching penalty of what we call the forfeiture doctrine.

LAW TRIBUNE: Doesn't this lead to a lot of "defensive lawyering," with excessive requests for articulation?

BABBIN: Astute counsel will sometimes decide, if there is any question of whether articulation is needed, to err on the side of filing the motion. So, many motions for articulation are filed that probably aren't really needed.

Thomas B. Scheffey

Appellate lawyer Jeffrey Babbin says the current system of appellate judges dismissing cases in which the trial judge has used murky reasoning is too draconian.

LAW TRIBUNE: So over-requesting articulation is insurance against the Appellate Court or state Supreme Court refusing to decide your case because the record was insufficient?

BABBIN: Exactly. There is quite an expenditure of time, of resources, of client's attorney fees on this, when it's not clear what benefit there is. And who knows what the appellate judges are going to consider clear? From my experience, there are many times when courts could look at the record from a realistic standpoint, and divine from it the likely reasons a trial judge may have done

something. There may be two or three different ways a trial judge could have reached the result. In other states, without an articulation, the appellant has to show that none of the ways in which the trial court could have reached that result were correct. At least you don't have a procedural forfeiture. And so there's less spinning of wheels on motions practice. As far as we can determine among the appellate bar, none of the other states, or the federal appellate courts, have the same draconian rule of forfeiture that we have developed, by case law, in this state.

LAW TRIBUNE: So is your remedy a new rule?

BABBIN: We have proposed one to the [judges'] Appellate Rules Committee, which is being studied. One of the things we have proposed, and shared with the committee, is to adopt a rule that failure to obtain an articulation would not be grounds to decline to review an issue on appeal. And we recommend instead using an existing rule that gives the appellate panel the ability to remand the case to the trial court for further articulation. That's what we hope the committee would consider. And while that takes the articulation later into the process, we think perhaps 90 percent of motions for articulation would be eliminated, so there would be infrequent use of that mechanism. Under a cost-benefit analysis, the benefits would outweigh the costs.

LAW TRIBUNE: So is there light at the end of this tunnel?

BABBIN: This is one of those things where, once the issue is brought to the judges' attention in an organized fashion, my impression is that they understand. The appellate judges we've spoken to seem to understand the issue and are very willing to think about it and talk about it and explore an alternative process, and we're very gratified by that.

LAW TRIBUNE: It seems to make a lot of sense for the appellate judges making the decision to say what needs articulation, to complete the decision process, rather than make the lawyer guess, and the client pay for that guessing.

BABBIN: This is not just a problem for experienced members of the appellate bar, who see all these problems. It's also a problem for self-represented pro se parties, and trial lawyers who don't have appellate experience but are handling an appeal. Whether or nor they know about the doctrine, they could unexpectedly lose their appellate rights. Now that we've had an appellate committee at the CBA for about five years now, this is something that's been percolating for a while that we have wanted to do. A broad spectrum of litigants would benefit from reform. ■