Paint Me a Picture

A Conversation on the Appellate Process

By David M. Axelrad

This hypothetical discourse between lawyer and client will provide clarity for the potential appellant.

The scene is an experienced appellate lawyer's office. A client who has just received an adverse verdict in the trial court sits opposite the lawyer. The authorities cited in color text are for the reader's benefit.

Lawyer: Good afternoon. I understand you are considering an appeal. Can you tell me what happened?

Client: I've had a $5 million judgment entered against me after a three-week jury trial. We have to get this overturned on appeal.

Lawyer: I'll be happy to evaluate the case for you but I think we should spend some time talking about the nature of the appellate process so you know what to expect.

Client: Okay, where do we start?

Lawyer: Well, we first have to make sure we have an appealable judgment or order. In general, an appeal may be taken only from the final judgment that ends the controversy in an action. *See, e.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) ("The general rule is that 'a party is entitled to a single appeal, to be deferred until final judgment has been entered'…. [A] decision is ordinarily considered final and appealable… only if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'").

Client: Why can't you go to the appellate court for relief whenever the lower court makes a mistake? If something is broken, why wait to fix it?

Lawyer: Good question. The answer has to do with the conservative attitude of the appellate courts toward lower court proceedings and the desire to conserve judicial resources. This quote from the U.S. Supreme Court will help to explain:

> [The] rule, that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits, serves a number of important purposes. It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the [trial] judge, as well as the special role that individual

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plays in our judicial system. In addition, the rule is in accordance with the sensible policy of "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." The rule also serves the important purpose of promoting efficient judicial administration.

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (citation omitted); *see Omaha Indem. Co. v. Superior Court*, 209 Cal. App. 3d 1266, 1273 (Ct. App. 1989) ("When review takes place by way of appeal [from final judgment], the court has a more complete record, more time for deliberation and, therefore, more insight into the significance of the issues.").

Now, there are times when a party may seek interlocutory appellate review of orders short of the final judgment. But that is another story and we simply don't have time to cover that subject here.

Client: The judgment in my case certainly seems final to me. What else do I need to know?

Lawyer: Well, besides making sure you have a final judgment or other appealable order, you need to determine whether you are actually aggrieved by the judgment or order. You see, appellate relief is granted only to the injured. "To have standing to appeal, a party must have lost something in the court below; the judgment in that court must in some respect be adverse to his position." Robert L. Stern, Appellate Practice in the United States 75 (1989); *see Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 333 (1980) ("Ordinarily, only a party aggrieved by a judgment or order… may exercise the statutory right to appeal therefrom."); *Estate of Colton*, 164 Cal. 1, 5 (1912) ("[A]ny person having an interest recognized by law in the subject matter of the judgment, which interest is injuriously affected by the judgment, is a party aggrieved and entitled to be heard upon appeal."). So you always have to check to make sure your ox has really been gored before you assume you can go forward on appeal. *Compare In re Rauch*, 103 Cal. App. 2d 690, 694 (Ct. App. 1951) (father deprived of custody of a child nonetheless has a fundamental right to challenge order declaring child a ward of the court), *with Kunza v. Gaskell*, 91 Cal. App. 3d 201, 206 (Ct. App. 1974) (noting that appellant cannot appeal judgment concerning land in which appellant had no ownership interest).

Client: I am definitely injured by the $5 million judgment against me. Now what?

Lawyer: Before we leave the trial court, we need to determine whether to make post-trial motions.

Client: I don't think the trial judge will touch the jury's verdict in this case.

Lawyer: That may be, but post-trial motions are often essential in order to preserve certain issues for appeal. *E.g.*, *Schroeder v. Auto Driveaway Co.*, 11 Cal. 3d 908, 918 (1974) ("The point that damages are excessive cannot be raised for the first time on appeal, but must be presented to the lower court on the motion for new trial."); *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 396, 399–402 (2006) (explaining that failure to renew preverdict motion for judgment as a matter of law by filing postverdict motion bars appellate review of sufficiency of the evidence). If so, we need to make sure those motions are timely filed and heard.

Client: I see. Any other preliminaries?

Lawyer: Yes. Since you have a money judgment against you, you will need to arrange for a stay of enforcement, usually through the posting of a supersedeas bond pending appeal. *See*, *e.g.*, Fed. R. Civ. P. 62(d) ("If an appeal is taken, the appellant may obtain a stay by supersedeas bond…."); *see generally* Superseding and Staying Judgments: A National Compendium (Roger D. Townsend ed., 2007).

Client: An appeal bond? How do I get something like that?

Lawyer: I can go over the technical requirements with you later but for now you need to focus on gathering sufficient financial resources to satisfy the requirements for a stay. This can be a formidable task depending on your financial circumstances, so it is important for you to address this issue as soon as possible.

Client: Any other hurdles we have to clear?

Lawyer: We have to keep a close eye on the clock in order to make sure we file a timely notice of appeal. This is a short, simple document but it is essential to enabling the appellate court to hear your case. *See*, *e.g.*, *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) ("[T]he taking of an appeal within the prescribed time is mandatory and jurisdictional.").

The right to appeal can be restricted, changed, withheld or even abolished altogether.

The notice of appeal requirement, although the most prominent, is one of many rules that you have to follow. You see, the right to appeal can be restricted, changed, withheld or even abolished altogether. *See*, *e.g.*, *Trede v. Superior Court*, 21 Cal. 2d 630, 634 (1943) ("There is no constitutional right to an appeal; the appellate procedure is entirely statutory and subject to complete legislative control."); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) ("[A] State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all."). From this principle flows a myriad of statutes and rules that tightly control the appellate process and that, if not followed, can result in loss or curtailment of the right to appeal. These include not only the rules governing timing of the appeal, but also rules governing preparation of the record, the content, length, and structure of appellate briefs (including technological innovations such as electronic briefs), and oral argument. Anyone involved in an appeal has to spend time mastering these "rules of the road" in order to participate effectively in the appellate process.

Client: I'm starting to understand why I need an attorney who has experience with appeals. Now, once I comply with all of the rules, what do I need to do to persuade the appellate court?

Lawyer: There are limits to what the appellate courts can do that you need to appre-

ciate in order to decide whether you want to spend the time and money needed to appeal the judgment.

Client: This should be a straightforward matter. I've been wronged and I want the appellate court to fix it.

Lawyer: I can appreciate that. But to better understand the limitations of the appellate process, you need to appreciate the different roles that the various courts play in our judicial system. Think of the court system as a pyramid, with the trial courts at the bottom, the intermediate appellate courts in the middle, and the Supreme Court sitting at the top of the pyramid.

Appellate courts have a very conservative attitude toward lower court decisions that presumes the result in the lower court is correct.

The trial courts at the base of the pyramid are the fact-finding tribunals where the building blocks of a case are put in place through evidence and argument. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985) (the trial court's "major role is the determination of fact"); 9 B.E. Witkin, California Procedure, Appeal §367, at 425 (5th ed. 2008) ("The trial courts, by their organization, procedure, and numbers, are fitted to determine the facts.").

Client: The jury in my case found all the wrong facts. We have to get that across to the appellate court.

Lawyer: Unfortunately, the intermediate appellate courts do not retry cases; they only police the lower court proceedings in order to correct errors. *See*, *e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803) ("It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."); Ursula Bentele & Eve Cary, Appellate Advocacy Principles and Practice 3 (3d. ed. 2004) ("[A]n appeal [is] first and foremost a search for judicial error in the trial record rather than a reconsideration of the result in the case.").

And it's not just any mistake that will prompt the appellate court to act. Intermediate appellate courts simply will not grant relief from all of the errors that may occur at trial. Instead, the appellate courts are restricted to granting relief for errors that are "prejudicial," that is, errors of such magnitude that they probably affected the outcome at trial.

A little bit of history will put these restrictions in perspective. It used to be that "all trial error was presumed prejudicial and reviewing courts were considered '"citadels of technicality."'" *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984). Now, however, in order to avoid unnecessary retrials, the appellate court will not disturb the result in the lower court unless the party seeking review can demonstrate that an error in the lower court proceedings had so great an effect that, had the error not occurred, the result in the lower court probably would have been different. *E.g.*, *Cassim v. Allstate Ins. Co.*, 33 Cal. 4th 780, 800 (2004). This is not an easy requirement to satisfy, and as applied, it tends greatly to conserve the lower court result against attack on appeal. *See Palmer v. Hoffman*, 318 U.S. 109, 116 (1943) ("Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court. He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." (citation omitted)); 11 Charles Alan Wright *et al.*, Federal Practice and Procedure, Civil §2883, at 445 (2d ed. 1995) ("[T]he critical consideration is the seriousness of the error, not its occurrence.").

What this means in practice is that the appellate courts have a very conservative attitude toward lower court decisions that presumes the result in the lower court is correct, requiring a party seeking relief from that result to overcome this presumption.

> A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the… doctrine of reversible error.

Denham v. Superior Court, 2 Cal. 3d 557, 564 (1970) (original emphasis); *see Niko v. Foreman*, 144 Cal. App. 4th 344, 368 (Ct. App. 2006) ("One cannot simply say the court erred, and leave it up to the appellate court to figure out why."); *Galpin v. Page*, 85 U.S. (18 Wall.) 350, 365–66 (1873) ("[A] superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law in such cases are in favor of its acts."); *Brown v. Allen*, 344 U.S. 443, 535 (1953) ("[A] rule, elementary in all appellate procedure, [is] that the findings of fact [in] a trial are to be accepted by an appellate court in absence of clear showing of error."); *Parke v. Raley*, 506 U.S. 20, 29 (1992) (a "presumption deeply rooted in our jurisprudence [is] the 'presumption of regularity' that attaches to final judgments….").

The conservative policy in favor of upholding the results in the lower court is further illustrated by the appellate courts' attitude toward trial court rulings. So, for example, a decision of a trial judge will be upheld even if reached for the wrong reason, so long as the appellate court can find some legal theory to validate it.

> No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.

Davey v. So. Pacific Co., 116 Cal. 325, 329 (1897); accord, *Cigna Prop. & Cas. Ins. v. Polaris Pictures*, 159 F.3d 412, 418 (9th Cir. 1998) ("'In reviewing decisions of the district court, we may affirm on any ground finding support in the record. If the decision below is correct, it must be affirmed, even if the district court relied on the wrong grounds or wrong reasoning.'").

The same is true when it comes to reviewing a trial court's discretionary rulings. The appellate courts will conserve a trial court's exercise of discretion against virtually all

attack, save for a challenge that demonstrates "the trial court exceeded the bounds of reason," *Walker v. Superior Court*, 53 Cal. 3d 257, 272 (1991), or "transgresse[d] the confines of the applicable principles of law," *Horsford v. Bd. of Trs. of Cal. State Univ.*, 132 Cal. App. 4th 359, 393 (Ct. App. 2005), neither of which can often be shown. *See Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 10 (1980) ("[T]he discretionary judgment of the district court should be given substantial deference…. The reviewing court should disturb the trial court's assessment of the equities only if it can say that the judge's conclusion was clearly unreasonable.").

Client: In my case, there was simply no evidence to support the verdict. Surely that will overcome the appellate court's reluctance to overturn the judgment.

Lawyer: You would like to think so, but here again, the appellate court will be very conservative, giving every benefit of the doubt to the prevailing party in the lower court. The truth is that arguing insufficiency of the evidence is one of the toughest uphill battles on appeal, because the appellate court views each case through the prevailing party's glasses to determine the sufficiency of the evidence. "In resolving the issue of the sufficiency of the evidence, we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party and in support of the judgment." *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 925 (1972) (citations omitted); *see Smith v. United States*, 502 U.S. 1017, 1019 (1991) ("In sum, focusing on the legally admitted evidence in the light most favorable to the [prevailing party] 'preserves' the factfinder's weighing of the evidence. Such preservation is desirable when the reviewing court is examining the legal sufficiency of the evidence."); *Butz v. Glover Livestock Comm'n Co., Inc.*, 411 U.S. 182, 189 (1973) (Stewart, J., dissenting) ("'The scope of our review is limited to the correction of errors of law and to an examination of the sufficiency of the evidence supporting the factual conclusions. The findings and order of the Judicial Officer must be sustained if not contrary to law and if supported by substantial evidence.'"); *Crawford v. So. Pacific Co.*, 3 Cal. 2d 427, 429 (1935) ("[W]hen a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.").

And, I should emphasize that it doesn't take much for there to be "substantial" evidence. "'Very little solid evidence may be "substantial"….'" *Roddenberry v. Roddenberry*, 44 Cal. App. 4th 634, 651 (Ct. App. 1996); *see Oregel v. Am. Isuzu Motors, Inc.*, 90 Cal. App. 4th 1094, 1101 (Ct. App. 2001) ("The testimony of a single witness can provide substantial evidence."); *Kayembe v. Ashcroft*, 334 F.3d 231, 236–37 (3d Cir. 2003) (report that 'cuts both ways' constitutes substantial evidence). Moreover, any doubts about the sufficiency of the evidence are resolved in favor of conserving the result below. *See Shamblin v. Brattain*, 44 Cal. 3d 474, 479 (1988) ("Even though contrary findings could have been made, an appellate court should defer to the factual determinations made by the trial court when the evidence is in conflict." (emphasis omitted)); *Anderson*, 470 U.S. at 574 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."); *Kuhn v. Dept. of Gen. Servs.*, 22 Cal. App. 4th 1627, 1632–33 (Ct. App. 1994) ("[O]ne must… presume in favor of the judgment all reasonable inferences.") (emphasis omitted).

The appellate courts become less conservative only where "the decisive facts are undisputed"; in that circumstance the appellate court is "confronted with a question of law and [is] not bound by the findings of the trial court." *Ghirardo v. Antonioli*, 8 Cal. 4th 791, 799 (1994); *see also Dunlap v. United States*, 250 F.3d 1001, 1007 n.2 (6th Cir. 2001) ("[W]here the facts are undisputed… we apply the de novo standard of review."); *Voight v. Savell*, 70 F.3d 1552, 1564 (9th Cir. 1995) (explaining that a pure legal issue is determined independently by the appellate court "without deference to the district court's conclusion").

Client: Well, if I can't get justice in the court of appeal, we'll go to the Supreme Court.

Lawyer: Let's talk about that. At the top of our pyramid are the appellate courts of last resort, both state and federal, however their purpose is not to correct error but to ensure clarity and consistency in the law, and to address issues of substantial public policy or institutional importance. Because of their limited resources, these courts are necessarily very selective in the cases they will hear. *See Bentele & Cary*, *supra*, at pp. 3–4 ["The most important goal of the higher appellate courts is not simply to ensure that litigants in the particular case received a fair, error-free trial, but to develop a clear, consistent, coherent body of law that can be followed and applied by the lower courts. Thus, the highest state appeals courts, like the United States Supreme Court, choose cases in which important issues of constitutional law, issues of first impression, and questions of statutory interpretation are raised."]; *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 452 (1959) (Frankfurter, J., dissenting) ("'No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal.'").

With rare exceptions, if it's in the record, it exists, and if it's not in the record, it doesn't exist.

Client: I did not realize that appellate court review was so limited. I thought the appellate courts had a much more expansive role in the review of trial court judgments.

Lawyer: No. Words like restrictive ("[S]erving or tending to restrict [*i.e.*] confine within bounds," Webster's New Collegiate Dictionary 980 (9th ed. 1981)), and conservative ("Characterized by a tendency

to preserve or keep intact or unchanged," Oxford English Dictionary 855 (1971)) come up over and over to describe the limits of the appellate process.

Client: I gather from all of this that the process of appellate review requires careful winnowing of the issues in order to find the potential winners.

Your story must be so compelling that a busy appellate court, having no experience with or sympathy for your case, will sit up and take notice.

Lawyer: Exactly. The conservatism of the appellate process means that the appellate courts, by their very nature, have a very high pain threshold. What to you may seem, quite legitimately, to have been an outrageous and harmful event, often fades to insignificance when tested against the conservative standards of the prejudicial error rule. An effective appeal, then, focuses on a small handful of serious mistakes, often only one or two, that may survive prejudicial error analysis.

Client: Okay. I think I have a winner of an issue for you. The trial court refused to allow an important witness to testify.
Lawyer: Is there a record of what this witness would have said at trial?

Client: Well, there's a transcript of the court ruling that the witness could not testify.
Lawyer: Unless there's an offer of proof as to what the witness would have said on the witness stand, you may be out of luck because you will have nothing in the record to demonstrate the prejudicial effect of excluding this witness's testimony. *See* Fed. R. Evid. 103(a)(2) (requiring offer of proof for any error predicated on exclusion of evidence); *Porter-Cooper v. Dalkon Shield Claimants Trust*, 49 F.3d 1285, 1287 (8th Cir. 1995) ("[E]rror may not be predicated on the exclusion of evidence unless there is an offer of proof providing the substance of the excluded evidence."). With rare exceptions, if it's in the record, it exists, and if it's not in the record, it doesn't exist. An adequate record in the trial court is crucial to your chances of success on appeal. *See* 9 B.E. Witkin, California Procedure, Appeal §628 at 704 (5th ed. 2008); *see*, *e.g.*, *Russell v. Ely*, 67 U.S. (2 Black) 575, 580–81 (1862) (explaining that an appellate court is only bound to consider the record of the case, and not additional information that was not included in the trial record). Facts or information that lie outside the record won't do. "The function of the appellate courts is to review the decisions of trial courts, not to try the cases anew. This means that the record before the trial court becomes the record before the appellate court." Robert L. Stern, Appellate Practice in the United States 175 (1989); *see also Fassett v. Delta Kappa Epsilon (New York)*, 807 F.2d 1150, 1165 (3d Cir. 1986) ("The only proper function of a court of appeals is to review the decision below on the basis of the record that was before the district court."). As a result, "[t]he appellate court is ordinarily confined in its review to the proceedings that took place in the court below and are brought up for review in a properly prepared record on appeal." 9 B.E. Witkin, California Procedure, Appeal §334, at 385 (5th ed. 2008).

Client: Understood. But is the appellate process so restricted by the record that it cannot accommodate a brilliant new idea or new legal theory on appeal?
Lawyer: Unfortunately, the answer is usually yes. "As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal; appealing parties must adhere to the theory… on which their cases were tried. This rule is based on fairness—it would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on appeal…." Jon B. Eisenberg, Ellis J. Horvitz, & Howard B. Wiener, California Practice Guide: Civil Appeals and Writs 8:229 (Rutter 2008); *see Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule… that a federal appellate court does not consider an issue not passed upon below…. [T]his is 'essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues… (and) in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.'"). This just reinforces the critical interrelationship between careful preservation of the record in the trial court and your ability to succeed on appeal.

Client: How can you tell if an issue has been adequately raised in the lower court?
Lawyer: I don't have time to go into all of the techniques for preserving the record but in general, there needs to be robust, forthright presentation of the issues in a manner that permits the issue to be fully developed and decided in the lower court. *See*, *e.g.*, *FDIC v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994) ("If an argument is not raised to such a degree that the district court has an opportunity to rule on it, we will not address it on appeal"); *Benefit Recovery, Inc. v. Donelon*, 521 F.3d 326, 329 (5th Cir. 2008) ("[W]e require a party to do more than just raise an argument; the contention must be pressed so that the district court has an opportunity to rule on it.").

Client: Are there no exceptions?
Lawyer: Of course there are exceptions. For example, an appellate court can consider a pure question of law on undisputed facts raised for the first time on appeal because the opposing party would have had no need to develop the facts on that issue at trial. *See Vintero Corp. v. Corporacion Venezolana de Fomento*, 675 F.2d 513, 515 (2d Cir. 1982) ("[W]hen a party raises new contentions that involve only questions of law, an appellate court may consider the new issues."); *Ward v. Taggart*, 51 Cal. 2d 736, 742 (1959) ("The general rule confining the parties upon appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that 'contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at trial.'"); *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004) (explaining that issue may be considered for first time on appeal where "'the

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issue is purely one of law, does not affect or rely upon the factual record developed by the parties, and will not prejudice the party against whom it is raised'").

Client: I'm counting on the court of appeal to consider a major new development that occurred after the trial. Will I have any problems raising this issue?

Lawyer: That could be difficult. As far as the appellate court is concerned, events occurring after the judgment has been rendered do not exist. Those events may be significant but the appellate court will generally ignore them precisely because they are outside the record that was developed in the lower court. In other words, the "reality" of a case is defined by the record. *See Reserve Ins. Co. v. Pisciotta*, 30 Cal. 3d 800, 813 (1982) ("It is an elementary rule of appellate procedure that, when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered. This rule preserves an orderly system of appellate procedure by preventing litigants from circumventing the normal sequence of litigation." (citation omitted)); *Fed. Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270, 1284 (3d Cir. 1993) ("It is a well settled principle of law in this circuit that the court of appeals normally is limited in its review only to those facts developed in the district court.").

Client: Are there any exceptions?

Lawyer: Yes. For example, as much as appellate courts want to confine their review to the four corners of the appellate record, they must avoid deciding cases that no longer represent live controversies. *See DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) ("The inability of the federal judiciary 'to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'"); *see also Powell v. McCormack*, 395 U.S. 486, 496 (1969) ("Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."); *Eye Dog Found. v. State Bd. of Guide Dogs for the Blind*, 67 Cal. 2d 536, 541 (1967) ("'[T]he duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'"). So the appellate courts will take notice, for example, of facts or legislative developments occurring after the judgment that render the appeal moot and subject to dismissal. *See Kremens v. Bartley*, 431 U.S. 119, 129 (1977) ("[W]e apply the law as it is now, not as it stood below."); *Reserve Ins. Co.*, 30 Cal. 3d at 13 ("[C]ourts have not hesitated to consider postjudgment events when legislative changes have occurred subsequent to a judgment or when subsequent events have caused issues to become moot." (citation omitted)); *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 521 (9th Cir. 1999) ("If there is no longer a possibility that an appellant can obtain relief for his claim, that claim is moot and must be dismissed for lack of jurisdiction."). We'll have to see if the developments in your case fall into this category.

Client: One last question. How do you know when you've written a good appellate brief?

Lawyer: An excellent question. Given the conservative, restrictive nature of the appellate process, you have to sell your case to the appellate court. You must not only tell your story with 100 percent accuracy and fidelity to the record but also explain why errors at the trial hurt your case so badly that the appellate court should care. And your story must be so compelling that a busy appellate court, having no experience with or sympathy for your case, will sit up and take notice. This is the art of the appellate process and why a good appellate lawyer must be a good story teller as well as an incisive legal analyst.

A series of writing tips by Judge Irving R. Kaufman of the Second Circuit captures the essence of good appellate briefwriting:

> Let the narrative of the facts tell a compelling story.... The facts generate the force that impels the judge's will in your direction.... The consummate advocate will inspire his narrative with meaning so that only the legal doctrines that favor his client seem relevant and appropriate. In this sense, the story serves as a prelude to your legal argument.... [I]f the facts are written compellingly, your discussion of the law need only articulate and confirm the decision your tale demands. Indeed, the standard to strive for was that set by William Murray, who later became Lord Mansfield, one of the greatest English judges. It was said that when he finished his statement of facts, the argument of the law seemed superfluous.

Irving R. Kaufman, Appellate Advocacy in the Federal Courts, 79 F.R.D. 165, 166–67 (1978).

Judge Kaufman added that "[a]ll the careful strategy in the world will be of no assistance to you unless you write clearly and forcefully. And, clarity and power are above all the fruit of simplicity." *Id.* at 169.

Client: I've got a much better picture of the appellate process now. Thanks very much.