

Handling Appeals in Civil Tax Cases. This panel will discuss the procedures and best practices of appellate advocacy in the context of appealing an adverse decision or judgment in a civil tax case. Moderator: Robert T. Duffy, Kilpatrick Stockton LLP, Charlotte, NC. Panelists: The Honorable Thomas B. Griffith, Circuit Judge, US Court of Appeals for the District of Columbia Circuit, Washington, DC; Gilbert S. Rothenberg, Chief, Appellate Section, Tax Division, US Department of Justice, Washington, DC; Kent L. Jones, Sutherland Asbill & Brennan LLP, Washington, DC.

Mr. Duffy introduced the panel and began the discussion by asking Judge Griffith during his three years on the bench what had surprised him about judging on the Court of Appeals. Judge Griffith stated that contrary to the view of his colleagues he was surprised at how little impact the briefs and the oral arguments have on the disposition of the case. He explained that there are some outlier cases that are so poorly argued and so poorly briefed that it affects the outcome. Furthermore, if arguments are not raised or arguments are waived because of poor lawyering, it affects the outcome of the case.

However, Judge Griffith distinguished the outlier cases from the great center of the cases that the Court hears. Judge Griffith stated that he and his chambers do their own work in reviewing the briefs in trying to figure out the facts, what law applies, and how to dispose of the case. He stated that he is appreciative of practitioners who can help him with those tasks, but the case will not be won or lost on the basis of whether or not practitioners can help him do that.

Judge Griffith added that practitioners can help him by exhibiting candor, candor, candor. The arguments and briefs he liked most the ones that were of the most help to him. He commented that it is helpful when practitioners can identify what the critical issue is, tell him the strong points, and be candid by telling him the weak points as well. Judge Griffith suggests that practitioners think of themselves as officers of the court in addition to being advocates for their clients. Judge Griffith mentioned that the more a practitioner acts like an officer of the court, the better an advocate that practitioner is going to be for the client, because the practitioner is going to gain his trust and the trust of his colleagues. Judge Griffith prefers to know what that law is.

Judge Griffith stated that he would like to know what Congress or the Supreme Court has said about the law and then he applies it as best as he can dispassionately. He believes that there are neutral principles that can be identified and founded.

Farley Katz of San Antonio commented that the biggest problem he has discovered with judges in tax cases is that they look at two briefs and say that the government argues this about some obscure rule and the taxpayer argues this about some obscure rule, but I know what the right answer is. Mr. Katz said the judges have missed it all completely, and then the court issues an opinion. When the parties receive the opinion, they think that there was a reason why no one made that argument, and that reason was because the argument did not apply. Mr. Farley suggested that in those cases, if the court is going to completely ignore the briefs, it would be really useful to ask for additional briefing on a new issue that was not there.

Judge Griffith responded that he could not think of a case on which he has sat in which he has thrown the briefs aside and said let's start all over. He noted that there is an adversarial

process and that the court is supposed to respond to the arguments. What resolves the matter is whether the parties have identified the issue for the court. Even though the parties have identified the law for the court and identified the facts for the court, the court is going to double check what the parties are saying.

Judge Griffith added that, in finishing his third year on the Court, he has been generally impressed by the briefing and the argument of government lawyers. Further, he stated that the government's briefs practice the candor that he is generally talking about and demonstrate an expertise that is helpful.

Mr. Jones then reacted to Judge Griffith's statements. He thought that the cogency of briefs and of arguments has been very instrumental in the way judges have decided lots of cases, and he believed this was the way the Supreme Court decides cases. Mr. Jones remarked that when he clerked for a judge, it was true that the judge would go back to chambers and view the briefs as a starting point, rather than a finishing point. He mentioned that people should not leave this panel thinking that they should not work hard on their briefs or that they should not work hard to prepare their arguments.

Mr. Jones observed that, in a specialized area like tax, the ability to clearly present the issue and the ability to clearly describe it at an oral argument in the amount of time that is available is an enormous help to your client and to the court. It is a difficult process that requires a lot of effort – effort that is an invaluable part of the judicial process for clients and for the government.

Mr. Duffy asked Mr. Jones if, after his government experience in the Solicitor General's office, he would do anything differently in private practice that he might not have done but for that experience. Mr. Jones responded that he now tries cases instead of arguing appeals. For every one hour of time spent on an appeal, probably a month's worth of time is spent preparing the case and presenting it at a trial.

Mr. Jones remarked that, with respect to the appeals themselves, he did see a different perspective in private practice than when he was at the Justice Department. He thought that at the Justice Department when a court of appeals reviewed a record and made all of the findings in favor of the government, it was doing a good job. Now, he is not so sure of that. He has seen several appellate decisions in the last couple of years where appellate courts, for example, in the *BB&T v. United States* opinion, say that they are going to recognize their obligation by giving all factual inferences to the plaintiff in a summary judgment case. However, then the court writes an opinion citing the government's expert witnesses and articles describing the transactions as tax shelters. Mr. Jones believed it was hard for courts to rein themselves in and follow the important rule that an appellate judge is supposed to determine the law and how it applies and is not supposed to predetermine the facts, except in limited situations. He observed that he has seen instances where he thought there was some one-sidedness in the approach to facts in the courts of appeals.

Judge Griffith responded by stating that the type of brief writing and argumentation that he was suggesting takes a lot more work than what he thinks is normally done. Judge Griffith

referred to presenting the case with a candor that would help him figure out the neutral principle. He has found that those are the best briefs, and they tend to be shorter. There is a reason that the throw away arguments that are tacked on at the end of a brief might be the fifth or sixth argument, and not the first or second. His example of a good brief is one that refines the argument to get to the point and tells him the strength of the arguments and the weaknesses of the arguments. This establishes a sense of credibility that Judge Griffith believes is helpful.

Lola Johnson, of the Office of Chief Counsel for the IRS, asked Judge Griffith how he weighs and balances the briefs where the law is silent and where there is no rule that clearly addresses the issue, and thus, the briefs set forth the legislative history in determining what the right answer should be.

Judge Griffith said that he is persuaded, in part, by some of the arguments that Justice Scalia makes about the primacy of the text and the inadequacy of legislative history. However, if the legislative history is in the briefs, Judge Griffith acknowledged that he will read it because he is curious, but he does not think anyone on his Court would allow legislative history to trump the plain meaning of the text. Judge Griffith also noted that in these situations, he relies on the tools of what a judge does. He looks at the statute and the regulation and tries and to make sense of them, while following the cadence of construction to try and figure out what is the value that has been chosen and expressed in this rule or regulation. If he can find it, he will apply it.

Mr. Rothenberg discussed that because all his office does is write briefs, he hopes the briefs are helpful. He commented that he saw two of the best briefs on an issue that was not absolutely clear cut on a case that Farley Katz had against the Department of Justice a couple years ago. Mr. Rothenberg remarked that he sees the Appellate Section's function as correcting or trying to correct errors the trial courts might have made when it comes to government appeals. All government appeals have to be approved by the Office of Solicitor General. That office takes into account not just what the tax issue is, but how it impacts other areas of the law, because sometimes it is the same body of law that applies deference to other administrative regulations.

Mr. Rothberg also remarked that, with respect to settlements, there are now formal mediation processes in a lot of the courts of appeals. Whereby it is unusual to settle a tax, especially a tax case on appeal, it is certainly not unprecedented, and it certainly has occurred more often lately than it did about ten years ago. The parties both take a realistic aspect of the chances of winning the case on appeal, and parties may want to give in a little if they need to preserve a favorable district court opinion. Mr. Rothenberg added that he has found that settlement works where the parties are realistic about their chances. If there is a legitimate situation whereby the parties think it can go either way, certainly, his office is open to settlement, and the court's processes can condone it by extending the briefing process.

Judge Griffith commented that Mr. Rothenberg said a favorite word for the judges on the D.C. Circuit – deference. This led him to something that is really important in making arguments, which is the standard of review. He believes it is the single most important issue that he needs to know in coming into a case. Judge Griffith explained the standard of review as the task that the court is being called upon to do. Furthermore, Judge Griffith stated that he reads the

summary of the arguments first. If you can successfully, in two or three paragraphs, create the world view that you want the judge to have, in light of the standard of review, then that is the part of the brief that the judge will remember prior to oral argument. Mr. Jones remarked that, for every brief on appeal, the appellant has to state what is the standard of review. Mr. Rothenberg added that appellees have to indicate whether they agree or disagree.

Mr. Jones commented that in District Court, the parties appeal from the judgment. In the Tax Court, there is a difference between an opinion and a decision. Parties appeal the decision of the Tax Court, not the opinion. Mr. Jones presented the question of venue on appeal. He noted that the Tax Court rule is that venue on appeal is determined by the principal place of business or the residency at the time the petition is filed. However, if a company in Virginia acquires the stock of a company in California, and the company is in the Tax Court some years later on pre-acquisition years, the company has to look at its principal place of business when the petition is filed. For example, did the principal place of business move from the Ninth Circuit to the Fourth Circuit?

Mr. Rothenberg replied that the question of proper venue on appeal does not happen that often. However, there is a provision of the Internal Revenue Code that says that parties can stipulate to venue by stipulating in writing to venue in a different circuit. Every once in a while, there is a stipulation of venue due to convenience of counsel. We will consider stipulating to venue if, for example, the issue is hobby losses, where the law is the same in all 13 circuits, but counsel has moved and would prefer not to spend \$3,000 to fly across the country. Generally, you should send us a letter if you are interested in doing that ahead of time before you file your notice of appeal.

Mr. Rothenberg further reiterated that you appeal from decisions of the Tax Court and not opinions. He mentioned this again because, in the past several months, the decision entered by the Tax Court was inconsistent with the opinion that the judge had written, and neither the parties nor trial counsel realized it. Mr. Rothenberg's office noticed it on appeal in both instances. In one case, it was favorable to the taxpayer and not favorable to the government.

Mr. Duffy inquired whether it was correct that if the government loses in District Court or the Court of Federal Claims, the Tax Division has to go to the Solicitor General ("SG") for permission not to appeal. Mr. Jones responded that, in every case that is decided, the SG's office would want to know what the recommendation of a division is as to the future handling of the case. In that sense, if the Tax Division lost the case, it is supposed to let the SG know, and the SG will decide whether or not to appeal it. In the situation where there is no appeal, where the government lost and the Tax Division is not recommending an appeal, it is a relatively routine procedure in most cases. Mr. Jones further commented that the SG's office may have a desire to achieve a result, to maintain consistency, or even to set up a conflict. If you lose a case in one circuit that you had won in another, you might want to pursue it, even though you lose it in that circuit. The guiding principle of the office is to make sure that every taxpayer is treated the same way. Mr. Jones stated that we do not want a situation where a case is won in some circuits and lost in other circuits. Then, there would be a compelling argument that the Supreme Court should take the case to resolve the conflict.

Mr. Duffy asked Mr. Jones what his day was like when he was tax assistant to the Solicitor General. Mr. Jones confirmed that he reviewed appeal memos and wrote briefs. He also said that in a typical year he argued four cases in the Supreme Court, with three and a half of them being tax cases. Sometimes, there can be a non-tax case that creates a tax-related issue, for example, a bankruptcy problem or a criminal case involving a willfulness instruction on a fire arms possession. Furthermore, Mr. Jones would brief six or eight cases on the merits. Mr. Jones stated that, usually, you brief the cases you argued, but not always, because sometimes the cases that you briefed would be argued by the people in the office. Most of the time is probably spent on certiorari petitions and the certiorari process which is more time consuming than the appellate work. Mr. Jones stated that, over the course of the year, a third of the work is appellate, a third certiorari petition stage, and a third on the merits.

Mr. Duffy then posed a question to both Mr. Rothenberg and Mr. Jones about whether an appellant taxpayer, who has been through the circuit court and wants to contest something in the Supreme Court, can have a conference with their respective offices. Mr. Rothenberg replied that he has attended conferences with taxpayers who made a pitch as to why the government should not file a certiorari petition or should not take an appeal. Mr. Jones added that, if settlement was going to be discussed, it would be with the Tax Division, and the SG's office would hear about it in the sense of receiving a memo asking if we object to settlement, which we would only do if we had a case in which we had an issue on which we really needed a ruling. The SG's office would have a meeting with the taxpayers which was helpful to our understanding of how to address the case. The meetings were not necessarily helpful to the taxpayers and may not help their ultimate position, but it was a good thing for the government to have those conversations because it is like discovery.

Mr. Duffy introduced the subject of oral argument. Judge Griffith believed that oral argument is critical now. Judge Griffith stated that, in the D.C. Circuit, they have already spent a lot of time doing their work before oral argument. When the panel hears its three to four cases, the judges immediately retire to a conference and dispose of the cases. Unlike the Supreme Court, which holds its conferences periodically after having heard a number of cases, the practice in the D.C. Circuit is to immediately decide the case after oral argument. One can view the oral argument as the beginning of the judges' conference. The practice on the D.C. Circuit is not to discuss the cases amongst the judges before oral argument. Mr. Duffy asked whether each judge on the panel has a memorandum from that judge's clerk. Judge Griffith stated that the practice varies as some of the judges use bench memos and some do not. The discussion amongst the judges begins when you come to the podium. The judges do not need to be told the facts from the beginning, as they know the facts and have read the briefs. Judge Griffith stated that the parties should get to the point as quickly as possible and cut to the chase.

Judge Griffith remarked that the D.C. Circuit is unlike the Supreme Court in that it is a little more lenient with oral argument time. If there is an interesting point that is being made, we may allow you keep making it. Mr. Duffy asked if the Court permitted the appellant to reserve time for rebuttal. Judge Griffith confirmed that the Court always allows the appellant to do so. He also remarked that the jury argument does not work in the D.C. Circuit. The least effective arguments Judge Griffith has seen have been ones that have been characterized as histrionics.

Judge Griffith commented that counsel can be helpful to the Court by getting to the point, speaking in measured tones and being candid. Judge Griffith added that when the panel asks about a hypothetical, there is no need to say, "That's not our case." The judges understand the difference between hypotheticals and the facts of the case. Furthermore, it grates Judge Griffith when counsel says, either in brief or in argument, that "clearly" this is the outcome because it can be clear to counsel, but not clear to him. Judge Griffith emphasized candor and asked counsel to tell him the strong points and recognize the weak points of each case.

Mr. Duffy commented that when he argued a case in front of the World Trade Organization in Geneva, their practice for oral argument was to start at nine o'clock in the morning and go until five o'clock, and then they would start the next morning and go until five o'clock or six o'clock. Additionally, the World Trade Organization might ask for post-argument briefing. Mr. Duffy raised the situation because some problems are so dense and complex that lawyers work on them for years trying to get the facts and the law correct, and it is almost an unfair task to expect a panel of three judges in ten or 15 minutes to fully understand these problems. Judge Griffith replied that his Court spends an enormous amount of time preparing prior to oral argument, so that they have a pretty good sense of what the arguments are. This means that the judges are leaning pretty strongly one way or another, if they have not already decided. He thinks the questions the judges ask in court give counsel a good indication of which way the judges are leaning. Further, Judge Griffith stated that you probably have to take your clue from that and try and to get the judge to lean the other way. Mr. Duffy confirmed with Judge Griffith that the D.C. Circuit announces who the judges on the panel will be in advance.

Mr. Duffy commented on another technical point. If you go to the Tax Court, you go to court first and pay later. If you lose in the Tax Court, you either have to pay or post a bond, which is equivalent to what you might owe if you lose. In order to avoid assessment and collection, you have to either pay or post a bond. Mr. Rothenberg discussed which post-judgment and post-decision motions at the trial level will delay the running of appeal time. In a District Court appeal, Rule 59(e) motions are going to delay judgment, and there was a recent amendment either to Federal Rules of Appellate Procedure or to the Federal Rules of Civil Procedure that basically says that anything you file within the ten-day period is going to be treated as a Rule 59(e) motion. Until this motion is disposed of, the appeal time does not start running. In a Tax Court appeal, there are Tax Court rules regarding a motion for reconsideration of the opinion only.

This is different from the Tax Court equivalent of a motion to vacate the decision. If you file one of those post-judgment motions that toll the time, you can toll it once, but there is an entire body of law that says successive post-trial motions in the Tax Court to vacate does not extend your appeal time. You should be careful to make sure you do protect your appeal time.

Mr. Duffy asked Mr. Rothenberg in the situation where (1) the taxpayer loses on the decision in the Tax Court; (2) the taxpayer loses on the motion to vacate that decision; (3) there is a subsequent decision that taxpayer loses on the motion to vacate; and (4) there is a resulting order stating that the taxpayer loses on the motion to vacate, would that notice of appeal state that it is an appeal from the decision and the order of the Tax Court? Mr. Rothenberg explained

that as long as you are within 60 days of the order denying your motion to vacate, then you are bringing up the entire case. Some taxpayers let the 90-day period pass and then file an untimely motion to vacate. In this situation, the Tax Court would consider that motion, and then if you appeal within 60 days of the denial of that motion, you would only bring up the abuse of discretion standard of review, not the underlying judgment. Mr. Rothenberg added that you do not have to specify in your notice of appeal that you are appealing both the decision and order, as long as your motion to vacate is timely.

Mr. Jones asked Judge Griffith how many cases on average he hears in a day if there is a panel of three. Judge Griffith described the practice in the D.C. Circuit. In a typical month, there will be three or four days of oral argument. The number of cases on each panel is typically three or four, so in a month, you will hear anywhere from 12 to 16 cases. The Court has an entire docket that is called a special panels docket that it hears and disposes of without oral argument. Judge Griffith did not know how many cases were decided without oral argument in the D.C. Circuit. Mr. Rothenberg stated that of his 400 dockets, in the typical counsel case, probably about half are argued.

Mr. Duffy asked about the local rules of the court with respect to operating in a particular court of appeals. Mr. Rothenberg confirmed that every circuit has its own set of local rules and operating procedures. The D.C. Circuit has a rule that requires a glossary at the beginning of the brief to identify all the acronyms. Mr. Rothenberg added that some courts, for instance, require asterisks in the table of contents to point out the four authorities relied upon most.

Mr. Duffy inquired as to how many of the about 400 cases a year that go through the Appellate Section are settled, relative to docketed cases. Mr. Rothenberg responded that the typical number of cases that is settled in any one year is probably ten to 15. Mr. Duffy, then, asked about the settlement authority of the Chief of the Appellate Section. Mr. Rothenberg stated that, if there is unanimity between what the client agency recommends and what the trial section counterpart recommends, the authority is up to \$500,000, but, if it is above \$500,000, it goes to Nathan Hochman or, if it is above so many millions, it goes to the joint committee and it goes to the Associate Attorney General. One thing I can do is I can reject any offer. Mr. Rothenberg also commented that a taxpayer cannot ask someone else to review a rejected settlement offer. However, if the government appeals the settlement rejection, then the Assistant Attorney General's office gets involved. If the Solicitor General has authorized a government appeal, then the Tax Division can not. If an offer comes in, the Tax Division has to consult with the Office of the Solicitor General. Mr. Duffy stated that the Attorney General has exclusive settlement authority, if there is a settlement involving the Justice Department, regardless of what the client agency is. Mr. Rothenberg added that, ordinarily, in routine Justice Department litigation, the approval authority for settlements runs from the Attorney General down to the deputy, then to the assistant attorney generals.

An audience member asked Mr. Rothenberg about the two cases in which the Tax Court decisions did not reflect the opinions. Mr. Rothenberg explained that, in one of the cases, the Tax Court actually issued an order to the taxpayer stating that it would dismiss the case unless the taxpayer had something else to say. It was a pro se taxpayer making ridiculous arguments,

and in one paragraph of the taxpayer's submission, it said, "I don't owe this extra \$3,000." Mr. Rothenberg stated that he filed a response and asked the Court to remand the case to the Tax Court for an entry of decision in accordance with its opinion. The other case was a situation where there was a penalty imposed in one of the tax years. The opinion indicated the penalty, but the decision document did not. Mr. Rothenberg's Appellate Section typically points this out in its brief, stating that the bottom line conclusion is that the case should be affirmed on these grounds, but it should be remanded for correction of the decision document.

An audience member asked a question about how much of the record Judge Griffith or any of the panel members read or became familiar with before the actual oral argument. Judge Griffith responded that his clerks have read everything. His clerks identify for him the parts he should read and the parts he does not need to read. His chambers spends a fair amount of time in the record, and they talk about the credibility of the appellate advocacy and knowing the record. He commented that there are a couple of judges on his Court that have great reputations for surprising counsel by demonstrating how much time they have spent in the record prior to oral argument.

Mr. Duffy asked for how much the record counts and for how much the briefs count. Judge Griffith reiterated that the facts and the law are everything to him and how beautifully an argument is styled is only marginally helpful to him.