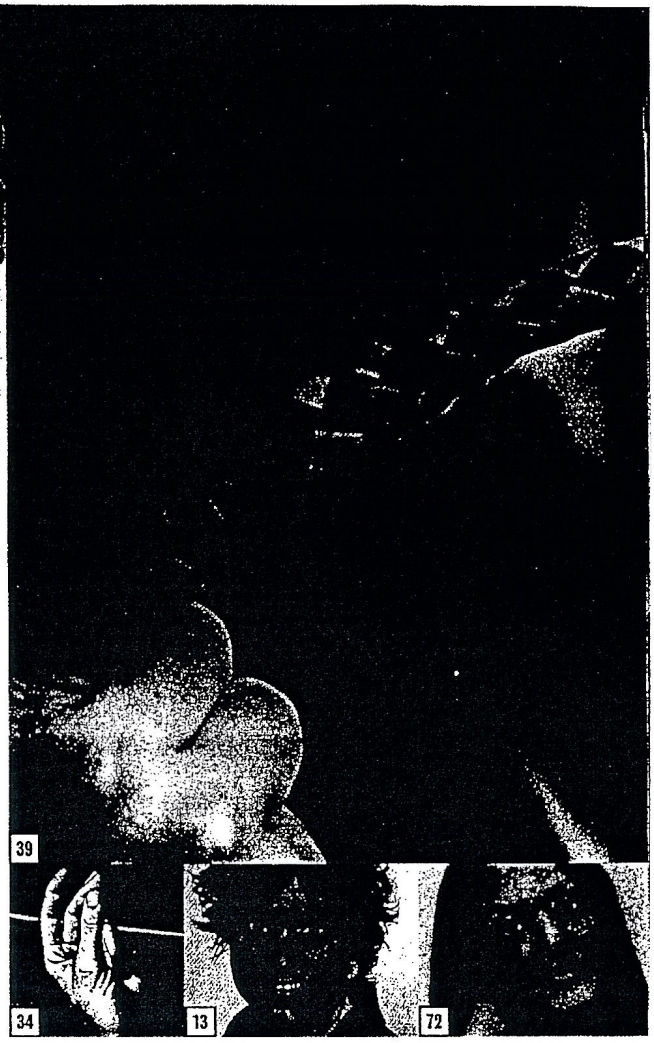
CALIFORNIA LAWYER SEPTEMBER 2003



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When DHL cofounder Larry Hillblom died in a plane crash, a simple will left his entire estate to charity. But no one counted on the unclaimed heirs he had left in the South Pacific, or the lawyer who represented one of them.

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CALIFORNIA LAWYER (ISSN 0279-4063) Volume 23, Number 9, September 2003. Published monthly by Daily Journal Corporation, 915 E. First St., Los Angeles, CA 90012. SUBSCRIPTIONS: $75 per year for subscriptions within the United States. Periodicals postage paid at Los Angeles, California, and at additional mailing offices. Subscription inquiries and changes of address should be sent to CALIFORNIA LAWYER Circulation, P.O. Box 54026, Los Angeles, CA 90054-0026. POSTMASTER: Please send address changes to CALIFORNIA LAWYER Circulation, P.O. Box 54026, Los Angeles, CA 90054-0026.

X-TREME ADVOCACY CONTEST WINNER

SPLITTING THE DIFFERENCE

PROPOSITION: The same lawyer should represent both sides on appeal.

BY BLAIR HOFFMAN

I. INTRODUCTION

Currently, on appeal, one attorney represents the appellant and another the respondent. This practice, although ingrained in our society by centuries of mindless repetition, is far inferior to having the same attorney represent both sides. Beginning in law school attorneys learn to see, and hence to counter, both sides of a question, an ability that greatly enhances their advocacy skills. Our judicial system should make better use of these skills than it does now.

Having the same attorney represent both parties (1) enhances the quality of the advocacy, (2) is fairer, and (3) is more efficient. I do not advocate that the same attorney *must* represent both parties—on occasion multiple attorneys might be useful—but courts should permit, even encourage, a single attorney to represent both sides. Ethical obligations, properly understood, do not stand in the way.

II. ARGUMENT

A. QUALITY OF ADVOCACY

All attorneys know that when they develop an argument, they learn its strengths and weaknesses better than anyone else ever can. All experienced advocates have experienced the queasy feeling that their argument has a major weakness, and then, later, the relief and exhilaration when their opponent has overlooked that weakness. Any good advocate can counter his or her arguments better than a newcomer who did not develop them. An attorney who makes an argument can

Blair Hoffman is a judicial staff attorney with Justice Ming Chin of the California Supreme Court in San Francisco. The views expressed in his submission are not those of the Supreme Court—or even the author.

THE JUDGMENT
by Alex Kozinski

THE MOON IS MADE OF GREEN CHEESE. PEOPLE should walk on all fours. Queen Elizabeth is the reigning monarch of the United States. These were among the propositions contestants tried to advance in their submissions for the X-treme Advocacy Contest. How does one judge the winner when the propositions advanced are all so extreme that none is likely to be truly persuasive?


Judge Kozinski

I decided that the winning entry would be the one that did the best job of making me doubt my initial negative reaction to the proposition it was advancing. We do see this in cases on occasion. An advocate will advance a point that seems wholly counterintuitive—one that has no apparent chance of success. And then, by skillful use of logic and authority, the advocate manages to turn the judges around and secure a victory for his client. Whenever that happens, it confirms once again that lawyers are not fungible and that great advocacy can make a big difference in the outcome of cases.

The following entry is the winner because it starts out with a clearly risible proposition and not only marshals plausible arguments to support it but also explains why we should *want* to support it as a matter of sound policy. It then raises and neutralizes all obvious counterarguments, skillfully turning them into points favoring the proposition. And it does all this with an economy of words and with a touch of humor—tongue ever so lightly planted in cheek. When I got done reading it, I was still pretty sure that the proposition it was advocating must be wrong, but I was no longer quite sure why. Though maybe risk-averse is worth it.

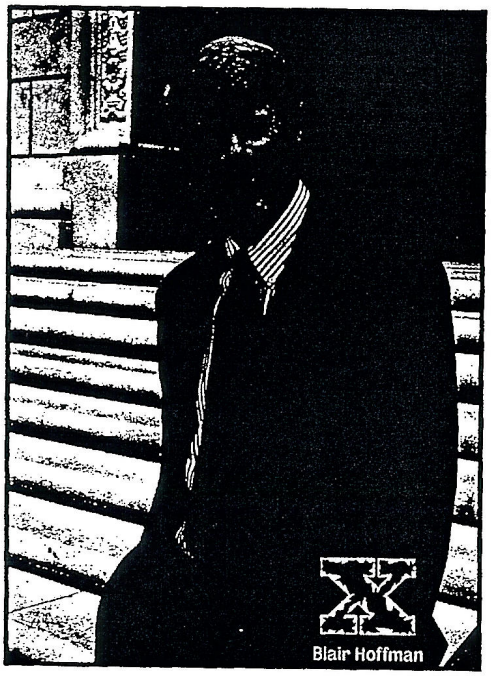
Ninth Circuit Judge Alex Kozinski has been making decisions on the federal bench for 21 years. This is his first time judging the X-treme Advocacy Contest.

best attack it, and then defend it from that attack. Our judicial system does not take advantage of this ability. But it should. To maximize the quality of advocacy, the attorney who writes the appellant's opening brief should also write the respondent's brief, for that attorney best knows the weaknesses in the first brief. That attorney also knows the weaknesses in the respondent's brief and can best defend the original arguments; thus, that attorney should also write the reply brief. Oral argument is similar.

A system of jurisprudence that values excellence in advocacy, as ours claims to, should encourage a single attorney to make all the arguments and counterarguments.

B. FAIRNESS

Our system of jurisprudence is based on the notion that an advocate presents each side's position and a neutral arbiter makes the decision. The system works fairly well but has a basic flaw: Attorneys, being human, have unequal abilities. Inevitably, some can advocate a position better than others. This circumstance makes the system inherently unfair. The wrong side occasionally prevails because it has the better advocate rather than the better argument. But if the same attorney represents both sides, this unfairness is eliminated, to the betterment of the judicial system if not of the party that would otherwise have the superior attorney.



C. EFFICIENCY

Having two attorneys do what a single attorney can do better is inefficient and cost-ineffective—a critical factor in these days of skyrocketing legal costs. I suggest that the appellant should pay the attorney for perfecting the appeal and preparing the appellant's opening brief. So far no efficiency benefit would have accrued. But the respondent would benefit greatly; preparing the respondent's brief would be much easier if the same attorney did it. Because the appellant in effect helps pay for the respondent's brief, I suggest that the respondent pay for the reply brief. The two parties could equally divide the costs of preparing for and attending oral argument—and these costs would obviously be far less than the costs of *two* attorneys. This system would also expedite the appeal, as the respondent's and reply briefs can be written more quickly than if done by someone else.

D. ETHICAL OBLIGATIONS

Pedants and purveyors of pettifoggery might object that lawyers' ethical obligations and the Rules of Professional Conduct (the rules) prohibit them from representing both sides. I disagree. Aside from the fact that rules can be changed as progress requires, the rules, properly construed, present no impediment to my position.

True, an attorney owes an undivided duty of loyalty to the client. (*Flatt v. Superior Court*, 9 Cal. 4th 275, 282–283 (1994); *see* Rule 3-310.) But attorneys are well trained to shift positions rapidly. Why waste that training? The appellate process is segmented. The attorney need not represent both sides simultaneously. (*Cf. Flatt v. Superior Court, supra,* at 284.) An appellate attorney can easily give undivided loyalty to the appellant while preparing the appellant's opening brief, then to the respondent while preparing the respondent's brief, then back to the appellant for the reply brief. At oral argument, a single attorney can easily sit in the appellant's chair until the case is called, then argue for the appellant, then sit down in the respondent's chair, then argue for the respondent, then sit back in the appellant's chair and make any rebuttal, each time giving the client full undivided loyalty. I admit it is a bit difficult to parse preparation for oral argument this way. But preparation is just that: preparation, not advocacy. A foolish absolutism is the hobgoblin of little minds. (*Cf.* Emerson, *Essays:* "Self Reliance.")

An attorney must also not violate a client's confidences. (*Flatt v. Superior Court,* supra, 9 Cal. 4th at 283.) On appeal, this presents no problem. An appeal is based solely on the appellate record and the law. Any experienced appellate attorney knows that consulting with the client regarding the appeal is rarely helpful and usually counterproductive. It *might* be useful to consult with the appellant to map strategy, but preparing the respondent's brief just means answering the arguments in the appellant's brief. Communicating with the respondent (other than to present the bill) is unnecessary and can only cause confusion and waste time. No realistic threat to client confidentiality exists at the appellate level.

III. CONCLUSION

The triad of excellence in advocacy, fairness, and efficiency is unassailable. As we progress into the new millennium, we should finally rid ourselves of time-encrusted, fossilized notions and examine matters afresh. The same attorney should represent both sides on appeal. ■

Xiang Xing Zhou