Arguing for a Change in the Law
Can you? Should you? If so, how?

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Your favorite client calls you. A judgment has been entered against his company. According to your client, there is a reported case that directly supports the trial court's judgment, but that case is "just plain wrong." He wants you to handle the appeal from the judgment and tells you that his case should change the law in this state. What do you do?

In evaluating whether our client can and should argue for a change in the law, we must first understand what our client's goals are in appealing. Is the client seeking "merely" to get the judgment against him reversed? If the issue is one that he will or may encounter again, his goals may be broader and more long term. He may be more interested in attempting to mold the law so it is more favorable to him than he is in winning this one case. Our clients sometimes have unrealistic expectations about what can be accomplished in any particular case. Part of our job as appellate lawyers is to make sure that our clients understand what can realistically be expected in any particular case. The area of overlap between what our client wants to accomplish (either long term or short term) and what realistically can be accomplished in any particular case sets the parameters of what we can do in arguing for a change in the law in a particular case. Many other factors weigh into the more difficult decisions of whether we should argue for

a change in the law in a particular case and if so, how big a change we should ask the court to make.

I. Can you change the law through this case?

A. Does the appellate court to which you are appealing have the power to make the change in the law your client wants?

The Alabama courts of appeal don't have the power to overrule cases decided by our Supreme Court. Neither the Alabama Supreme Court nor the federal courts of appeal have the power to overrule cases decided by the United States Supreme Court. If you are seeking to overrule a prior case of the Alabama Supreme Court or the United States Supreme Court and your appeal must first be heard in an intermediate court, your client needs to understand that to accomplish his goal of changing the law, he must be committed to go all the way to the higher court and that the journey may not be fruitful. He must first lose his case in the intermediate court (if the court follows the higher court's precedent, as it should) before he can even seek review in the higher court – the only court with the power to do what he is asking. He also needs to understand that review of the intermediate court's decision by the higher court is discretionary (via certiorari), so his case may never even be considered by a court with the authority to change the law. In addition, even if the higher court agrees to consider the case, if another dispositive issue is involved, the Court may not reach the issue the client wants the Court to decide.

One panel of a federal Court of Appeals doesn't have the authority to overrule an en banc decision of the Court or a decision of another panel. That doesn't mean that one panel necessarily will agree with and follow another panel (although it technically should do so), but to overrule prior precedent of another panel or of the Court as a whole, you must seek and obtain en banc consideration of the case. En banc consideration upon initial hearing or on rehearing is appropriate only in limited circumstances – (1) where it is necessary to secure or maintain uniformity in the court's decisions (i.e. a panel decision conflicts with a decision of the United States Supreme Court or of the Court of Appeals to which the petition is addressed) or (2) the proceeding involves a question of exceptional importance (i.e. a panel decision conflicts with decisions from other circuit courts). Fed.R.App.P. 35(a) & (b).

A federal court doesn't have the power to overrule state cases dealing with state law issues. So, if you are in federal court and a decision of an Alabama appellate court must be overruled (or even limited or modified) for your client to prevail, you must ask that the federal court certify the issue to the Alabama Supreme Court. Rule 18, Ala.R.App.P., provides:

> When it shall appear to a court of the United States that there are involved in any proceedings before it questions or propositions of law of this state which are determinative of said cause and that there are no clear controlling precedents in the decisions of the supreme court of this state, such federal court may certify such questions or propositions of law of this state to the supreme Court of Alabama for instructions concerning such questions or propositions of state law, which certified questions the supreme court of this state, by written opinion, may answer.

(Emphasis supplied). If there is some clear controlling precedent from the Alabama Supreme Court on an issue, there is no basis under Rule 18 for the federal court to certify the question of whether that precedent should be overruled. If there is clear intermediate appellate court precedent on the issue, then certification of the issue is possible, but the likelihood of changing the law in this manner is remote. You must first convince the federal court that it should certify the issue even though there is clear appellate authority addressing it; **then** the state Supreme Court must agree to address the issue; **and finally**, if the federal court will certify the issue and the Alabama Supreme Court will address it, you must, of course, convince the Court that it should overrule the prior precedent.

B. Is the case is a proper posture where you can "change the law"?

Is the issue properly preserved? Was it raised at the appropriate stage of the proceedings? Was it raised in the proper manner? Consider, for example, Goodyear Tire and Rubber Co. v. Vinson, 749 So. 2d 393 (Ala. 1999) where the court affirmed without opinion and refused to consider whether Alabama Power Co. v. Henderson, 627 So.2d 878 (Ala. 1993)(striking down the cap on punitive damages) should be overruled. That issue was not properly presented where the appellant pled the cap statute, but did not assert in the trial court that the cap was binding. See Vinson, 749 So. 2d at 400-402 (Lyons, J., concurring specially on denial of rehearing).

Is the issue squarely and clearly presented for review? Is there some other potentially dispositive issue that may prevent the court from reaching the issue you want

decided. For example, prudential considerations ordinarily prevent an appellate court from considering a constitutional challenge if there is some other non-constitutional basis for deciding the issues.

C. Practical limitations

You also must consider the practical limitations on what a particular court will be willing to do. For example, even if an issue has not been directly addressed by the Supreme Court, if there is dicta indicating the Court's view on the issue, the intermediate appellate courts are unlikely to rule to the contrary. Similarly, although the federal courts of appeals are not bound by decisions of their sister circuits and are free to adopt rules of law contrary to those courts (absent Supreme Court precedent), the more circuits courts that have adopted a rule contrary to the one you are advocating, the less likely you will be able to convince of the court of appeals to adopt the rule you are advocating. This is particularly true if no other circuit courts have adopted the rule you are advocating so that adopting the rule would create a conflict among the circuits.

II. Should you seek to change the law in this case?

A. Must the Court change the law for your client to prevail? Is it really necessary for the Court to overrule prior precedent or to strike down a statute for your client to prevail? Did the prior case really directly decide the issue or was it only discussed in dictum? Was the case decided by a majority or merely a plurality? Can the prior case be distinguished based on its facts or procedural posture? Can you prevail by asking for

limited relief rather than a monumental change in the law – i.e. by distinguishing the prior case, by asking the court to limit the application of that case, or by requesting that an exception be carved out?

Generally, the law develops in very small increments rather than in large, monumental steps (such as overruling prior cases or adopting completely new rules of law). The Alabama Supreme Court has been more willing than most courts to acknowledge when it has made mistakes and to correct them. See, e.g., Foremost Ins. Co v. Parham, 693 So. 2d 409, 421(Ala. 1997)("Although this Court strongly believes in the doctrine of stare decisis and makes every reasonable attempt to maintain the stability of the law, this Court has had to recognize on occasion that it is necessary and prudent to admit prior mistakes and to take the steps necessary to ensure that we foster a system of justice that is manageable and that is fair to all concerned"); Jackson v. City of Florence, 294 Ala. 592, 598, 320 So. 2d 68, 73 (1975) ("As strongly as we believe in the stability of the law, we also recognize that there is merit, if not honor, in admitting prior mistakes and correcting them."). But, none of us likes to admit we were wrong, and courts are understandably and appropriately reluctant to overrule cases and to change the law. It is far easier for the Court to justify and accept an incremental change (a slight modification or limitation or a narrow exception) than a monumental change, such as overruling prior cases or adopting a completely new rule of law. Consequently, if you can do so, it is generally wise to request, alternatively, the most limited relief you can ask for and still prevail.

B. What are your client's real goals?

If your client is interested only in prevailing in this particular case and he can do so only if the court changes the law, then that's what you need to ask for (and ask for specifically). Sometimes, however, your client's interests may be broader. If an issue is involved that the client may encounter repeatedly, he may be more interested in his ultimate goal of significantly changing the law, than in prevailing in this particular case. If that is the case, he may be satisfied with – and have a better chance of reaching that ultimate goal of significantly changing the law – by seeking only an incremental change in the law in this particular case.

C. Do you really want the law changed?

As the saying goes – be careful what you ask for; you just might get it. In deciding whether you should argue for a change in the law, you (and your client) need to consider the ramifications of what you will be asking the Court to do. Sometimes a particular rule of law appears inequitable or outdated when considered in isolation, and some other rule of law appears preferable. However, when one rule of law changes, it often results in changes elsewhere. If changing rule "A" necessitates (or even risks) changing rule "B", your client may decide that rule "A" doesn't look so bad after all. In any event, you must understand (and be prepared to explain to the court) what the parameters of this new rule of law will be.

D. Timing and the judicial/political climate may be decisive.

How recent is the precedent you are seeking to overrule? If the case is very recent, the issue may not have been fully fleshed out and the parameters of the rule tested. You may be able to convince the Court that there are factors or ramifications that it didn't consider and that the rule of law it adopted was stated too broadly and should be limited. The flip side, of course, is that if the case is very recent, the Court may feel that it has already considered all aspects of the issue, and your arguments may receive little attention. If the case is very old and the precedent very well established, stare decisis considerations are stronger, but so is the possibility that the rule of law is outmoded in our modern society.

How recently has the Court considered whether the rule of law should be changed? If it has done so recently, chances are that it will not seriously consider the issue again for some time.

Know the Court. Has the make-up of the Court changed since the precedent you are seeking to overrule was decided? Have the members of the Court given any indication as to their thoughts on the issue – via dissenting opinions, dicta in other cases, decisions on related issues or otherwise? If so, these indications may tell you whether this is the right time (or the wrong time) to raise the issue.

What is the political climate?

D. Is this the right case to ask for the change?

If your case is compelling factually, you stand a much better chance of convincing the Court to change the law in your favor. If your case is borderline factually, it may be advisable to wait and raise the issue in a better case. If you do ask that the law be changed and your position is rejected, it will likely be much more difficult to convince the Court to change the law when your client does have a factually compelling case.

III. What do you argue and where do you find authority to support it?

The decision has been made. You and your client have considered the pros and cons and decided to ask for a change in the law. While your client's analysis that the result in his case is "just plain wrong" may be accurate, that is unlikely to convince the Court to abandon prior precedent. So, where do you start?

A. The case or cases you are asking the Court to overrule. Was there a concurrence or a dissent that you can use as a starting point for your argument that the case is wrong? See, e.g., Hickox v. Stover, 551 So. 2d 259, 266-68 (Ala. 1989)(Maddox, Houston and Kennedy, JJ., concurring in part and dissenting in part in separate opinions and expressing their disagreement with the disposition of the fraud issues). Has some premise that formed the basis of the decision now been shown to be incorrect, or has some precedent relied upon been overruled, modified, or limited? See, e.g., Ex parte Apicella, 2001 WL 306906 (March 30, 2001)(recognizing that the award of punitive damages is not a finding of fact which implicates considerations regarding the right to trial

by jury). Was there some other conflicting precedent that the Court failed to consider when it decided the prior case(s) or was there a fundamental flaw in the court's analysis? See, e.g., Jackson v. City of Florence, 294 Ala. 592, 320 So. 2d 68 (1975)(overruling sixty years worth of precedent because the initial case construing the statute was fundamentally flawed). Has the decision or rule of law been criticized by commentators?

B. Other Alabama cases. Has the decision or rule of law been criticized in subsequent cases. Look for language in related cases, in dissents, in concurrences or in dictum to give you a foothold for arguing that the case is wrong. See, e.g., Hicks v. Globe Life & Accident Ins. Co., 584 So. 2d 458 (Ala. 1991)(addressing accrual of fraud claim, but also discussing in concurrences and dissents the propriety of the justifiable reliance standard). Remember, that the more closely you can tie your new rule of law to established precedents, the easier it will be for the Court to adopt it.

C. Changes in our society. Often change in the law is necessary or desirable just because the times have changed. What worked in the time of the pony express might be completely unworkable in our current e-mail society. Use the changes and developments in society to argue that changes in the law are necessary and appropriate.

D. Other changes in the law. A limitation or modification of the law in one area often has ripple effects in other areas. Examine changes in the law subsequent to the precedent you are challenging to see if you can find or create some ripple effects that make it appropriate for your precedent to be changed as well.

E. Developments in other jurisdictions. If other jurisdictions have abandoned the rule of law you are challenging or adopted the rule your are advocating, the cases in which they did so may provide you with a rationale for why our court should do so. They may and also provide insight into the proper parameters of the rule you want the court to adopt and highlight potential problems that may arise from that rule.

F. It just makes sense. The common sense argument may be the best. The new rule you are proposing is a simpler, easier to apply, and more sensible rule. The old rule is cumbersome, difficult to apply, and subject to numerous exceptions and corollaries.

IV. A few examples.

The following are a few examples of how these strategies/arguments have be utilized to change the law:

A. The prior precedent or rule of law is incorrect because some premise or precedent upon which it was based has now been shown to be incorrect. In Henderson v. Alabama Power Co.,627 So. 2d 878 (Ala. 1993), the Alabama Court struck down the $250,000 cap on punitive damages holding that it violated the right to trial by jury. In Ex parte Apicella, 2001 WL 306906 (March 30, 2001), the Court held that the determination of the quantum of punishment is not an issue of fact that implicates the right to trial by jury and stated that Henderson, therefore, was wrongly decided.

B. The prior precedent or rule of law is wrong now because of subsequent developments in the law or society. In Ex parte Bayliss, 550 So. 2d 986 (Ala. 1989), the Court held that in a proceeding for dissolution of a marriage or a modification of a divorce judgment, a trial court may award sums of money out of the property and income of either or both parents for the post-minority education of a child of the dissolved marriage when application is made before the child attains the age of majority. In so doing, the Court overruled portions of eight cases decided by the Court of Civil Appeals over a 12-year period and expanded a previously recognized exception to the general rule that the duty to contribute to support and education ends when the child reaches majority. The Court considered the manner in which the law had changed (the age of minority had been decreased) and the manner in which society had changed (higher levels of education have come to be demanded and expected) to be significant. The Court refused to limit the word "children" in the relevant statute to minor children "because of what we perceive to be just and reasonable in 1989."

C. It may have been a good idea in principle, but it just didn't work and the court should revert to the prior rule. See, e.g., Hickox v. Stover, 551 So. 2d 259, 263 (Ala. 1989) (where the Court abandoned the reasonable reliance standard that had been the law for over 100 years in favor of the justifiable reliance standard in fraud cases) and Foremost Ins. Co.v .Parham, 693 So. 2d 409, 421(Ala. 1997) (where the court overruled Hickox and returned to the reasonable reliance standard, concluding that the deviation was a mistake).

D. There was a fundamental flaw in the rationale of the prior case. In Jackson v. City of Florence, 294 Ala. 592, 320 So. 2d 68 (1975), the Court overruled sixty years worth of precedent construing the municipal immunity statute because the initial case construing the statute had read into it a restriction that had been imposed under the common law, but that not was provided for in the statute.

V. Don't forget.

If you don't ask for it, the Court likely won't do it. If you are requesting that prior case law be overruled, even alternatively, then you need to ask for that expressly. See Donoghue III v. American Nat. Ins. Co., 2002 WL 254130 (Ala. Feb. 22,2002) (Lyons, J., concurring specially and noting that the appellant had not asked that the Court overrule the prior precedent, but had merely argued that it was distinguishable).

If you don't ask for it, the Court likely won't do it (II). In changing the law, the Court can:

1. Simply recognize a new rule of law to be applied in the future;

2. Recognize a new rule of law and apply the new rule to give relief to the appellant and to others whose injuries occurred after the date of the opinion (or some other date in the future); or

3. Recognize a new rule of law and apply the new rule to the case at hand and to all other cases in which the claims are not barred by the limitations period.

Remember, you need to ask the Court not only to recognize a new rule of law, but to apply that new rule of law to your case.

You need to ask for it below, if you want to ask for it above. Appellate courts ordinarily will not consider issues that were not presented to the lower court. They won't hold a lower court in error for failing to do something you never asked it to do. Though trial court's are bound to follow the law pronounced by the Supreme Court even if it is wrong, you need to ask the trial court to adopt the rule you are advocating (i.e. not to follow prior precedent) to be sure you have properly preserved the issue. See , e.g., Goodyear Tire and Rubber Co. v. Vinson, 749 So. 2d 393 (Ala. 1999). Similarly, if your appeal must go to an intermediate appellate court first, that court doesn't have the power to overrule prior cases of the Supreme Court, **but** you need to argue in the intermediate court that the prior precedent is wrong and that it should be overruled, or the Supreme Court may refuse to consider the issue.