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Appellate Advocacy from the Viewpoint of an Appellate Judge

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Attorney General's Appellate Advocacy Institute
Department of Justice
February 26, 1990
9:00 A.M.

- I. Introduction -- lead off
- II. John W. Davis and the viewpoint of the Fish.
- III. The low state of appellate advocacy
 - (a) Amazed at poor quality of briefs and oral argument -- different from trial advocacy.
 - (b) See over. ("Society at large").
 - (c) See over. ("Confronting the Communication Crisis in the Legal Profession"), 34 N.Y.L. Sch. L. Rev. 1
- IV. What is appellate advocacy?
 - (a) Communication for purpose of persuasion in a case on appeal.
 - (b) Not merely a statement of facts of the case and applicable law. ("Who do you represent?")
- V. Improving appellate advocacy.
 - (a) How do you get to Carnegie Hall? Practice -- prepare.
 - (b) Who does moot courts?
 - (c) Listen to the Fish.
- VI. Appellate Advocacy comes in two parts:
 - (a) Briefs - p. 1
 - (b) Oral Argument - p. 9

(c) Introduction to Article -

III(c)

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If communication is defined as expression that is clearly and easily understood, much of the written and oral expression of the legal profession simply fails to measure up to the definition. Inability to communicate afflicts all segments of the profession and is now pervasive enough to be classified as a crisis. It deserves your attention because the effective transmission of information, thoughts, ideas and knowledge is essential to the efficient operation of our legal system. Ineffective expression in legal discourse diminishes the service of the bar, impedes the resolution of disputes, retards legal progress and growth and, ultimately, undermines the rule of law. The expressive deficiencies of lawyers must be recognized as a serious and growing problem. I suggest that there is a need to clarify, simplify and edify in all forms of legal expression.

Consider these facts: failure to communicate is near the top of the list of complaints made by clients about their lawyers. Law firms have begun to hire public relations counsel to speak to the public for them and to advise them on how to communicate with the press. The employers of newly admitted lawyers have found it necessary to provide them with teachers of English grammar, style and usage. Lawyer-to-lawyer and lawyer-to-client communication often is incomprehensible. Lawyer communication in the trial courtroom frequently is silly, and I am here to tell you that appellate argument and briefing on too many occasions is just terrible. To illustrate the problems lawyers have in communicating with witnesses, I offer some exchanges that actually have occurred in trial courtrooms:

(b) In one sense, the legal profession merely reflects a communication crisis in the society at large.* We are surrounded by doubletalk.* Consider these examples, collected from recent newspaper reports:

- Doctors at a Philadelphia hospital described a patient's death as a "diagnostic misadventure of a high magnitude."

- Five thousand workers at a Chrysler plant found out that a new "career alternative enhancement program" meant their plant was closing and they were out of jobs.

- A stockbroker described the October 13th stock market crash as a "fourth quarter equity retreat."

- A United States Senator^{Orrin Hatch of Utah} referred to capital punishment as "our society's recognition of the sanctity of human life."

X What I do not understand is why lawyers tolerate doubletalk and inarticulateness in speech and writing. Twenty years ago, the National District Attorneys Association, of which I was then a member, held its annual conference in New York City. During the conference, we had a luncheon speaker who was introduced as a member of the United Nations legal staff specializing in criminal matters. I recognized him as a local comedian and doubletalk artist. About ten minutes into his meaningless spiel, a prosecutor from Georgia sitting next to me leaned over and said: "Ah cain't understand a lot of what thet ol' boy is sayin'." I replied: "You can't understand anything of what he is saying, because he is speaking doubletalk." "Isn't that somethin'?" he said, "Ah just tho't he had a real bad New York accent." X

* Few days ago NY Times reported on the failure of communication between physician + patient

The Brief is the more important part of appellate advocacy, because we judges have it in hand both before and after oral argument. It is physically with us after the argument evaporates and is forgotten. The Briefs are the first thing I look at, even before the decision of the trial court or any part of the Appendix or Record. The Briefs are what I refer to when writing an opinion or before signing off on a colleague's opinion. A good Brief is essential to effective appellate advocacy, but it is all too rare.

In the beginning of the Republic the Brief was merely an adjunct to unlimited oral argument. I was able to get some of the flavor of those times when I sat with a Court of Appeal in England. The Briefs there were not much more than a list of applicable precedents and authorities, but the oral argument proceeded at a leisurely pace, with many questions and answers. The sheer bulk of cases makes it impossible to proceed before our Court in this manner. The time for appellate argument is strictly limited, and it is important that the Brief be as persuasive as possible. It should never be forgotten that the purpose of all appellate advocacy is to persuade.

I have prepared a list of twenty-five "Do's" for Briefwriting. Here they are:

1. Review the Brief to correct inaccurate citations, typographical and grammatical errors or citations to outdated

authority. We frequently see Briefs containing one or more of these deficiencies. What a loss of credibility that causes for the Brief writer! The clerks carry these Briefs about the chambers, holding them far away from their bodies, between thumb and forefinger, while holding their noses with the other hand. They are trying to give me a message, I think. [Example I].

2. Adhere to the prescribed format; the standard format of a Brief is prescribed by the Federal Rules of Appellate Procedure and the rules of each circuit, and we insist on strict adherence to the rules. Failure to adhere to the required format may be a cause for rejection of the Brief in the Clerk's office or by the staff attorneys. If a Brief in improper form gets past them, it certainly will lose you points with the panel. The simple format of a Brief is prescribed by Rule 28 of the Federal Rules of Appellate Procedure.

3. Make certain that the Brief says what you want it to say. To accomplish this, you must go over what you have written a number of times and ask somebody else to look it over as well. Be careful in your use of language. [Example II]. When I was a district court judge, an appeal was taken from one of my decisions. The Brief to the Circuit opened this way: "This is an appeal from a decision by Judge Miner, and there are other grounds for reversal as well." I don't think counsel intended to say that. (Maybe they did).

4. Be sure that your citations are in point. A few weeks ago, I read two Briefs that provided a study in contrasts. One Brief included six separate points, each point written on one page. There were no citations of authority in any one of the points. The other Brief was chockfull of citations -- citations to Supreme Court cases, Circuit Court cases and even to some State cases. Each and every one of the citations was totally unrelated to the case on appeal; try to give some authorities in the Brief, but make sure that they support your contention.

5. Deal with authority that contradicts, or seems to contradict, your position. First of all, it is the attorney's obligation to bring to the court's attention any pertinent authority, even, or especially, contradictory authority. An effective Brief will seek to distinguish unfavorable precedent or argue that it should be modified or overruled. Second, the Court will discover the unfavorable precedent anyway, so it is to your interest to deal with it in the Brief.

6. Eliminate adverbs such as "clearly" and "obviously." If things are so damn clear or obvious, how come you lost in the trial court? The use of such words does not improve the quality of the Brief or add to its persuasiveness, in any event. And persuasion, of course, is the name of the game.

7. Write in concise, unambiguous and understandable language. When I practiced law, I always submitted a draft of

me as to find some reference in the Brief to a piece of evidence not included in the Appendix. I must then go to the original record in our clerk's office or possibly back to the district court clerk's office to find what I am looking for. Equally as frustrating is a reference in the Brief to evidence included in the Appendix without any indication in the Brief as to where it is located.

11. Choose three or four or five strong points, preface them with concise point headings and proceed to argue how the trial court erred or didn't err. Support your conclusions with appropriate authorities and reasoned arguments. Meet your adversary's arguments head-on, describe where you agree and where you differ, and if you are short on authority for some point you are making, say so. Weave the facts of your case into the law cited in your points, using sentences having subjects and verbs, and you'll have the making of a winning Brief. The inclusion of a great number of points may suggest to us that none of the points is any good.

12. Remember that a Brief is different from most other forms of writing in that it has as its only purpose the persuasion of the reader. It is not written to amuse or entertain or even to edify. We don't look for a prize-winning literary style in a Brief. We do expect clarity, well-organized argument and understandable sentence structure. All too often, we find

rambling narratives, repetitive discussions, and conclusions unsupported by law or logic. A Brief that does not persuade is ineffective.

13. Remove from the Brief any long quotations of testimony or precedent. Short quotations are acceptable, but remember that we can find the full text of the precedent in the library and the full testimony in the record. I have seen page after page of quoted materials in some Briefs, and have thought: "What a waste of precious space!" Principal Briefs are limited to fifty pages in our court, and Reply Briefs cannot exceed twenty-five pages, all exclusive of the pages containing the tables and addenda containing statutes, rules and regulations. Excessive quotation leaves little space for persuasion. Paraphrase! And woe to the excessive quoter who moves for leave to file an oversized Brief! One other comment on this point -- it is not necessary to use all the pages allotted to you.

14. Edit the Brief with a view toward excising most or all of the footnotes you have inserted. We are well aware of efforts to increase the number of words in the Brief by extensive use of footnotes. We take a very dim view of such efforts. I have a colleague who refuses to read footnotes in a Brief. He abjures footnotes in opinions as well, and each year furnishes a report on judges who are the worst footnote offenders. Don't try to fool us with small print. Also, italics are unnecessary.

15. Restrain yourself from attempting to sneak matter outside the record into your Brief. Earlier, I spoke of an appellate court being constrained to consider only legal issues raised in the trial court. This applies to factual matters as well. From time to time, a Brief will draw to our attention a fact that cannot be found in the record before us. Opposing counsel will note the omission soon enough, but I have seen judges take counsel to task for this type of deficiency even before opposing counsel became aware of it. In either event, the credibility of a Brief is seriously impaired by the inclusion of matters outside the record.

16. See that we are provided with pertinent authorities that come to your attention after the Brief is filed. The Federal Rules of Appellate Procedure allow you to do this. Rather than merely giving supplemental citations and the reasons for them, some lawyers improperly take advantage of the occasion by presenting further argument with their supplementary material. Avoid this impropriety.

17. Pack the Brief with lively arguments, using your own voice and style of expression. We expect the Brief to be argumentative but not pompous, dull or bureaucratic. The active voice always is preferred. Open with some attention-getting statements. The first few pages are important. But avoid overkill! [Example III].

18. Structure your Brief as you would desire the opinion to be structured. This is a real inside tip on how you can pique the interest of the judges. We are always interested in having some good help to do our job. You may even see your own deathless prose immortalized in one of our decisions.

19. Be truthful in exposing all the difficulties in your case. Tell us what they are and how you expect us to deal with them. Dissimulation in a Brief is to be avoided at all costs.

20. Solicit some sympathy for your cause in the Brief. Don't overdo it, but don't be afraid to show how an injustice may occur if we don't decide in your client's favor. Sometimes the law requires an unjust result, but we certainly try to avoid it.

21. Develop, if possible, a central theme leading to a sensible result in the case. This is especially important in a case of first impression. Where there is no precedent, try logic. The higher the court, the less interested it is in precedent anyway.

22. Refer to parties by name or description, rather than as "appellant" or "appellee." It is much easier for us to follow the Brief if this is done. Moreover, there is a rule that requires it.

23. Make every effort to provide appropriate citations without cluttering up the Brief with a mass of duplicative authorities. Where there is one authoritative case in point

supporting your argument, there is no need to give us six. Save the space for persuasive argument. Avoid string citations!

24. Use the Reply Brief to reply. Most Reply Briefs merely repeat the argument put forward in the appellant's original Brief. The opportunity should be used to answer the appellee's Brief by specific, rather than scattershot, responses. The Reply Brief presents the opportunity to have the last word in a very effective way. Most reply Briefs are worthless, in my opinion.

25. Omit: irrelevancies, slang, sarcasm, and personal attacks. These serve only to weaken the Brief. Ad Hominem attacks are particularly distasteful to appellate judges. Attacks in the Brief on brothers and sisters at the bar rarely bring you anything but condemnation by an appellate court. All that scorched earth, take no prisoner, give no quarter, hardball stuff is out. A personal note: Rambo litigators make me sick. I have written an article on the subject. And never, ever attack the trial court judge!!

Good appellate advocacy requires good oral argument as well as good briefing. It's always amazing to me that an attorney, offered a chance to argue, prefers to submit. On many occasions, my preliminary thinking about a case has been turned around by oral argument. Our custom in the Second Circuit is to allow oral

argument whenever requested, and I urge you to accept the opportunity it offers to persuade the Court to decide in your favor. Although the time we allow for oral presentation is short, customarily ten or fifteen minutes, it can be used to good advantage.

The Second Circuit is a red-hot bench. Each member of the panel hearing oral argument has read the briefs, and sometimes there has been an exchange of memoranda among the Judges prior to the courtroom presentation. The Judges therefore generally come to the oral argument with a tentative view of the outcome of the case. Many of my colleagues have told me that their tentative views also have been discarded as the result of oral argument.

Because of our familiarity with the case, there often is a lively exchange of questions and answers between court and counsel in the Second Circuit. It is not unusual for the entire time allowed for argument to be taken up in this manner. The exchange is important, because the Judges use it to resolve their doubts, clarify their thinking, and, if you watch closely, sometimes to argue with each other.

I have developed a list of twenty-five specific "Don'ts of Oral Argument." They have been published by the American Bar Association Litigation Section in its Litigation Journal and may be of some interest to you:

1. Don't pass up the opportunity to argue. I guess that we in the Second Circuit are the last to allow oral argument to anyone who requests it, including pro se litigants. It amazes me that people decline to argue in our court. No matter how often we say how important we consider oral argument, lawyers continue to ignore us. Believe me, it is important! It can win your case.

2. Don't try to argue more than two or three points. In our court, the average time allowed for argument is fifteen minutes. You can't possibly make more than a few good legal points in such a limited period of time. Remember that the argument should include the history of the case, the holding below, the challenges on appeal, a brief statement of the facts, and responses to the judges' questions, as well as the legal points you want to emphasize. With all this, it should be clear that you should make only your best arguments on the law and leave the rest to the brief.

3. Don't ask us to overrule the Supreme Court. We are very reluctant to do that. An attorney who appeared before us recently was discussing an obscure point of admiralty law. The point had been settled in a Supreme Court decision some years before, but the lawyer insisted that the Supreme Court was wrong. I am afraid he got short shrift from us.

4. Don't spend a lot of time explaining our own recent decisions to us. You may presume that we are familiar with what we have written, at least recently. Our collective institutional memory sometimes needs refreshing, but extended explication is unnecessary. A convoluted discussion of precedent in the court in which you are arguing is a waste of everyone's valuable time.

5. Don't read your oral argument. It still seems strange to me that there are so many breaches of this rule. Although notes and outlines are to be encouraged, a full textual reading turns us off. I often have been tempted to ask a reader to hand up a copy of the warmed-up version of the brief he or she has been reading from. Recently, a lawyer read to us at such a rapid-fire rate that we asked no questions of him for fear that he would lose his place. Justice Rehnquist calls such a lawyer "Casey Jones" because of his similarity to the engineer on an express train.

6. Don't permit co-counsel to pass up notes or to tug on your clothing. This is something of a pet peeve of mine. I find it very distracting. Certainly, the attorney who is arguing is distracted. When the note is received, argument stops or slows down considerably as counsel peruses the missive. Then there is a shift in subject matter or emphasis. Most frequently, the note comes up after a question that counsel has trouble coping with. The answer provided by co-counsel is as unsatisfactory as the

original response.

7. Don't try to "wing" it. If you don't know the answer to a judge's question, offer to furnish a response in writing after oral argument. I have seen much grief come to those who responded with a guess. You really can paint yourself into a corner with a wrong answer. It's simply not necessary to create that kind of trouble for yourself.

8. Don't say "I'll get to that" in response to a question. Many attorneys who answer thus never fulfill their promises. Although this is a well-known rule, it is broken more frequently than one would expect. Just a few weeks ago, a leading New York City attorney, arguing an important corporate takeover case, responded to one of my questions by saying, "I'll get to that, your Honor." He never did. When a question is asked, answer it immediately and directly.

9. Don't quote extensively from the record or from a case or statute. Extensive quotation is a great waste of time. We can read for ourselves. Paraphrase whenever possible. Quote only when it is absolutely essential to your argument.

10. Don't answer a question with a question. Sometimes a judge's inquiry needs clarification, and you shouldn't hesitate to ask for it. Otherwise, questions, even rhetorical ones, should be avoided. One of my senior colleagues put a question to a young lawyer during oral argument and received this reply:

"Why do you ask that, your Honor?" That sort of reply is not well received. Of course, it is far better than the following reply received by a judge in the Eighth Circuit: "You wouldn't want to know that, your Honor."

11. Don't give a page number of the brief or of the record in response to a judge's inquiry. Such a response causes the judge to root around in the papers and be distracted from the argument. Answer the question to the best of your ability and then refer to the appropriate page if necessary.

12. Don't cite in your brief any cases that you are unable to discuss on both the facts and the law at oral argument. During my days at the bar, I was always careful to reread every case cited in my brief just before oral argument. A judge easily loses confidence in your presentation when you are unable to discuss a case cited as authority for some proposition you are urging on the court.

13. Don't come to oral argument without shepardizing the citations contained in the brief and checking for current authority just before your presentation. A case we recently decided went off on a Supreme Court decision handed down between the filing of the brief and oral argument. Counsel adversely affected by the decision was unable to discuss it with us, much to his detriment. A brief trip to the Lexis or Westlaw machine prior to his appearance in our court could have saved him a lot

of embarrassment.

14. Don't engage in prolonged discussion of basic legal principles. You may assume that judges generally are familiar with the notion that guilt in a criminal case must be proved beyond a reasonable doubt. If you can pick up the legal discussion somewhere at the point of intermediate legal difficulty, I'm sure we'll be able to grasp it.

15. Don't underestimate the importance of the facts. An attorney arguing an appeal should be able to respond to any question a judge may have concerning the facts of the case. If the attorney did not present the case in the trial court, he or she must become familiar with every part of the record. The facts are every bit as important as the law, frequently more so, and I am very much put off by a lawyer who hasn't mastered them. He or she who responds to a factual question with: "I don't know your Honor, I didn't try the case" loses many points.

16. Don't get caught in the cross-fire. Sometimes two judges will use an attorney as a foil while they argue with each other. This is a very interesting phenomenon and one with which I was somewhat unfamiliar until becoming an appellate judge. One judge asks: "Isn't it true that ...?" After you answer, the other judge says: "Yes, but isn't it also true that ...?" Don't be deterred from holding to your position while the judges attempt to use you to persuade each other.

17. Don't undertake an emotional appeal to the court. It's surprising to me how many lawyers still try to boost their cases with a visceral approach. I suppose that judges get just as emotional as anybody else, but a lawyer who asks us whether we would like our grandmothers to be victimized by conduct such as that demonstrated in the case at bar is marked down as a sure loser. During the course of a very bad argument, an attorney screamed, "I have a most unfortunate client!" All three of us nodded in agreement.

18. Don't discuss your pleasure at being in our court or disparage yourself or flatter the judges. It is most unnecessary and wasteful. One attorney started his argument by explaining that it was his first time in our court, although he had argued many appeals in state courts and other circuits. He went on to describe the great honor that had befallen him by being retained to argue before us. He had been assigned only ten minutes for his entire argument and used most of it up with this type of airy persiflage. Moreover, as Justice Jackson said, there is no need to flatter judges because they have a high enough regard for themselves. It is acceptable, however, to address a judge by name.

19. Don't use your rebuttal time unless it is absolutely necessary. It probably is a good idea to reserve some time for rebuttal when you represent an appellant. However, many

attorneys don't use the time to rebut respondent's arguments. They merely repeat what they already have said. The same deficiency is characteristic of many reply briefs, as I pointed out earlier. Repetition always should be avoided.

20. Don't divide the oral argument. When more than one lawyer argues for one side, trouble often ensues. The custom in such a situation is for one attorney to argue one or more points and for the other attorney or attorneys on the same side to argue the other points. Unfortunately, the court often fails to honor the division. The result is utter confusion, with lawyers being questioned on points with which they are unfamiliar. The representation of separate clients and separate interests, of course, presents a different situation.

21. Don't present an unstructured argument. Some attorneys appear for argument with no idea of how they intend to present their cases. I suppose that they hope we will take up their allotted time with questions from the bench. When no questions are forthcoming, they flounder around with no beginning, middle or end to their arguments. While one attorney was engaged in such an unstructured exercise, one of my senior colleagues passed me a note that said: "Isn't this god-awful?"

22. Don't speak in a monotone. You cannot catch the attention of judges with soporific speech. Earlier, I warned against emotional appeal. However, you must demonstrate some

passion for your cause, and this usually is accomplished by modulations of speech. Effective use of voice can be most helpful in an oral presentation.

23. Don't allow distracting mannerisms to interfere with your oral argument. Playing with pencils, sticking hands in front of faces, pacing up and down in front of the podium, and tapping a pen on the microphone are just some of the things that draw our attention from the arguments. These and similar distractions should be avoided.

24. Don't be unprepared. When I was a young lawyer, I read somewhere that Justice Frankfurter would ask questions about Roman law on oral argument. I lived in fear that some judge would ask me about Roman law during the argument of one of my cases. While it generally is not necessary to have such arcane information at your fingertips, there is no substitute for a thorough preparation for oral argument. Many large law firms conduct moot arguments in-house. At the beginning of these Remarks, I asked you about the practice of U.S. Attorneys in this regard. A law professor at the University of Minnesota Law School told me that she was retained from time to time to assist lawyers in preparing for oral argument. Some of the best oral arguments are given in law school moot court competitions. The reason, of course, is the frequency with which such arguments are rehearsed. Practice indeed makes perfect!

25. Don't forget the tenth commandment of John W. Davis, who argued in the Supreme Court on more occasions than any other lawyer of his generation: "When you are finished, sit down." One of the most discouraging things known to an appellate judge is a lawyer who has finished her or his argument but insists on saying a few more words to fill the remaining time allotment. Sometimes those extra words merely are superfluous and annoying to the judges, and sometimes they actually are detrimental to the speaker's case.

I now obey that tenth commandment.