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Remarks on Appellate Advocacy

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REMARKS ON APPELLATE ADVOCACY

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My remarks are about a part of the law business I encounter regularly—appellate advocacy. I enjoyed the give-and-take characteristic of appellate advocacy as a lawyer and law teacher; I enjoy it even more as a judge—it is nice to pose questions that no one dares answer: "Unprepared." (My revered former D.C. Circuit colleague, Carl McGowan, a truly great appellate judge, once said, and I agree: "Law teaching and appellate judging are more alike than any other two ways of working at the law.")

Turning to the starting line, my first words of caution to lawyers contemplating an appeal: perhaps you shouldn't. In the federal courts, of all appeals decided on the merits, over eighty percent are affirmed; the administrative agencies whose actions federal courts review fare almost as well. District court judgments generally survive appeal unmodified, not just because courts of appeals review many issues under a deferential standard, but too often because the appellant's case is exceedingly weak. Appellate review is more than occasionally sought simply because it is available and inexpensive. This is disturbing to appellate judges who face mounting caseloads. One way overworked appellate judges show their concern is by imposing costs, fees, and sometimes damages on counsel who pursue unworthy appeals.

But hope springs eternal, and if a decision is made to take a case up, both sides should make sure to heed the rules, in their most recent version, not only the Federal Rules of Appellate Procedure, but local rules and practices on what must be filed, when, in what form, and in how many pages. Appellate courts take rules seriously. I recall, for example, a brief for the appellant turned back by the D.C. Circuit Clerk's Office because it was too long. Instead of complying with the page limitation, however, counsel had the brief reset, word for word, using 1-½ line in lieu of double spacing. The upshot, the court was indulgent; it gave counsel an overnight opportunity, on pain of dismissing the appeal, to do the trimming job he should have done originally.

Let's turn specifically to the written and oral appeal components, the briefs and the day in court—more accurately these days in busy federal courts of appeals, twenty minutes, fifteen, sometimes only five or ten minutes, tops half hour per side (reserved for the weightiest cases). As between briefing and argument, there is near-universal agreement among federal appellate judges that the brief is more important—certainly it is more enduring. Oral argument

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* Associate Justice, Supreme Court of the United States. These remarks were delivered in a 1991 program on appellate advocacy sponsored by the D. C. Bar/George Washington University National Law Center. At that time, Justice Ginsburg was a member of the United States Court of Appeals for the District of Columbia Circuit. Justice Ginsburg edited the remarks in January 1999 for inclusion in this issue.

is fleeting—here today, it may be forgotten tomorrow, after the court has heard perhaps six or seven subsequent arguments. Tapes or transcripts may be consulted, but heavy loads may deter routine recourse to them. In some federal circuits the brief is all the court will receive in a high percentage of appeals. The Fourth, Tenth and Eleventh Circuits, for example, dispense with oral argument in about seventy percent of their cases.

Some particular comments on the brief. The cardinal rule: it should play to the audience—in federal courts of appeals, three busy judges who confront some fifteen to twenty sets of briefs (and often bulky, multi-volume trial transcripts or agency records), several days nearly in a row each month. The best way to lose that audience is to write the brief long and cluttered. Former D.C. Circuit Chief Judge Abner Mikva put it pithily: he cautioned against what some lawyers regard, foolishly, as "harmless surplus." Federal appellate judges read the briefs and relevant parts of the record before argument and reach tentative decisions at a conference generally held soon after argument—sometimes, without even a break for lunch. The concentration of court of appeals sittings means that the judges will lack time to ferret out bright ideas buried in complex sentences, overlong paragraphs, and too many pages. As another former Chief Judge of the D.C. Circuit, Patricia M. Wald, once commented: eye fatigue, even irritability, sets in well before page fifty.

My check list for a first-rate brief. Above all, it is selective. It resists making every possible argument and sticks to the ones the court can reasonably be asked to consider. The brief skips long quotations, but doesn't unfairly crop the occasional quotations used to highlight key points. It avoids excessive underscoring, too many footnotes, overuse of words like clearly, plainly, obviously, of course. It uses citations to fortify the argument, not to certify the lawyer's diligence, and it doesn't cite cases without offering the reader a clue why they are there; instead, it furnishes parenthetical explanations to show the relevance of the citation.

A good brief does not shy away from citing law review commentaries or other scholarly analyses that may aid the court as much as they did the brief writer to get an overview of the area. The brief is carefully proofread, so the judge isn't led to the wrong volume or page when she checks a reference. (If a brief is sloppy in this regard, the judge may suspect its reliability in other respects as well.) Above all, a good brief is trustworthy. It states the facts honestly. It does not distort lines of authority or case holdings. It acknowledges and seeks fairly to account for unfavorable precedent. A top quality brief also scratches put downs and indignant remarks about one's adversary or the first instance decisionmaker. These are sometimes irresistible in first drafts, but attacks on the competency or integrity of a trial court, agency, or adversary, if left in the finished product, will more likely annoy than make points with the bench.

Next, some comments on the hour (or half hour) in court. In preparing for oral argument, the careful lawyer will try to assure against discomfort because of lack of familiarity with the courtroom. She will observe proceedings in

advance, watch how the ominous yellow and red time lights work, and gauge whether she will need to raise or lower the sometimes initially intimidating microphones.

At argument, gems will be missed if counsel forgets to speak clearly, slowly, with a full voice, and to maintain good eye contact with the judges. Oral argument, at its best, is an exchange of ideas about the case, a dialogue or discussion between court and counsel. Questions should not be resented as intrusions into a well-planned lecture.

To take an example still vivid in my mind, an advocate won no friends at court when he responded to an appellate judge's question: "Forgive me, your honor, but I really don't want to be de-railed onto that trivial point." Inquiries from the bench give counsel a chance to satisfy the court on matters the judges think significant, issues the judges might puzzle over in chambers, and resolve less satisfactorily without counsel's aid.

A race the lawyer is bound to lose is the press-straight-on run when a judge attempts to interject a question. More than occasionally, I have repeated a lawyer's name three times before he gives way to my inquiry. Despite his strong desire to continue orating, the lawyer should stop talking when the judge starts.

Judges pose testing questions generally not to display their wit, but to let counsel know what troubles the court, or at least the questioner, about the case or the issue on which counsel is holding forth. Sometimes we ask questions with persuasion of our colleagues in mind, in an effort to assist counsel to strengthen a position. Other times, we try to cue counsel that an argument he or she is pursuing with gusto is a certain loser, so that precious time would be better spent on another point. All too often, counsel intent on a planned spiel misses the cue. I will not deny that questions sometimes are designed to nail down a concession that will show up in an opinion, perhaps in a footnote that reads: "At argument, counsel conceded thus and so." That doesn't mean lawyers should avoid concessions as inevitably damaging. As Judge Wald has observed, a concession once in a while can enhance a lawyer's credibility.

My colleague on both the D.C. Circuit and the Supreme Court, Justice Antonin Scalia, finds particularly unsettling lawyers' aversion to one category of question—the hypothetical question, meant to test the limits of an argument. There are, he said, many ways one might refuse to answer such a question, ranging from, "Your Honor, that raises an issue quite different from the one I was discussing and, frankly, not sufficiently relevant to the case at hand," to the more terse, "Your Honor, that's a silly question."

But we never hear responses of this variety. Instead, the response we get, as Justice Scalia described it, is so uniform, so invariable, judges suspect that a conspiracy among appellate advocates must be at work. "Your Honor," counsel intones, sometimes solemnly, sometimes smugly, but always with the same five dread words: "That is not this case." The judge moves on, chastened by the lesson in rationality. She knows, of course, that her hypothetical is not this case, but she also knows the opinion she writes generally will affect more

than this case. The precedent set may reach her hypothetical.

Lawyers are sometimes quick to classify appellate judges into "liberal" and "conservative" camps to predict the court's votes, or the points that will appeal to the panel. But a careful check on the performance of federal judges, including Supreme Court justices, would disclose that we are far less easily type-cast than popular but superficial reports suggest. Yes, there are decisions on which courts divide in a way one might call political. But in most cases, no razor-sharp lines can be drawn separating Republican from Democratic appointees. The reality that decisions set precedent tugs us strongly toward the middle; it also tends to discourage expression of unprecedented, startlingly creative views.

A last word on oral argument. In my view it is in most cases a hold-the-line operation. In over eighteen years on the bench, I have seen few victories snatched at oral argument from a total defeat the judges had anticipated on the basis of the briefs. But I have seen several potential winners become losers in whole or in part because of clarification elicited at argument.

I will finish on a sober note. In the fullness of time after the opinion comes down, the losing side will more than occasionally seek rehearing. Rehearing petitions impose a processing burden on the court's staff; they generally consume time and labor to no avail. A court that has worked hard to prepare, hear, decide, and write an opinion in a case does not regard with favor a request to reconsider the matter, especially when the petition rehashes and overheats arguments the court has just reviewed and rejected. Most rehearing requests do just that. A D.C. Circuit colleague once proposed, tongue-in-cheek, a labor-saving device for dissenters. Await the rehearing petition, he counseled; your dissent will be spelled out sharply there in not more than the allowable fifteen pages. Writing a rehearing request may be good therapy for the losing lawyer, but such pleas are rarely granted. On rehearing petitions, responsible counsel's best advice to the client, much more often than not, will be: save the money.

A parting comment. Appellate records are longer than they once were, and oral arguments are more compressed, but even in the electronic age, the essential art of appellate advocacy—and of appellate judging too, I believe—has remained constant. One reads of arguments in the good old times running for hours, even days, as they sometimes still do in England. Chief Justice Rehnquist, in remarks he made some years ago at a celebration of the 200th anniversary of the first Supreme Court session, spoke of the five full Supreme Court days devoted in 1824 to argument by Daniel Webster and other bar luminaries in the celebrated commerce clause case, *Gibbons v. Ogden*. But Justice Story, appointed to the High Court bench in 1811, gave this counsel to appellate lawyers of his day; I borrow, with some of my own editing, from lines he called *Advice for the Advocate*, and I recommend his counsel to lawyers of our day:

Be brief, be pointed
Lucid in style and order

Spend no words on trifles
Condense
Strike but a few blows, strike them to the heart
Scattered fires smother in smoke and noise
Keep this your main guide
Short be your speech, your matter strong and clear
And leave off, leave off when done.