APPELLATE ADVOCACY

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Effective appellate advocacy is fundamentally about two things, distilling a case to its legal essence and, like all advocacy, being persuasive.

Think of pre-trial, trial and an appeal as a funnel, large at the top and very small at the bottom. At the top of the funnel is the pre-trial, including discovery; and the next level down is the trial. Both are very large parts of the total process, covering months, possibly years, of trial preparation and days, possibly weeks or even months, of trial. A multitude of facts are painstakingly gathered, and many are meticulously presented at trial. This is the bulky beginning of the total process.

After trial, verdict and judgment, the appellate process begins. Out of the bulky mess, as appellate lawyers may want to call it, the distillation begins and the funnel narrows. The questions to be asked now center not on the disputed facts but on the legal principles by which the factual dispute was determined. What was, after all, the law upon which the trial combatants relied? Did the trial court correctly ascertain and apply this law? Recalling that Cardozo taught that there were only three kinds of cases in the legal universe, the appellate lawyer asks which kind of case is this. Is it one in which the law is plain and its application to the facts also plain; if so, the likelihood of a successful appeal is not great. Or is it one in which the law is plain, but its application to the facts is not plain; if so, a successful appeal is more likely. Or, is this one of those rare and interesting cases in which the law to be applied is not plain; the trial participants made an educated guess; and there is reasonable hope that an appellate court may disagree. If so, a good appeal is quite likely. Or is this simply a case where there was clear trial error in the admission of some evidence or jury instruction which likely had an effect on the outcome and the only relief sought on appeal is a new trial. Success depends on how clear was the error and how likely was its effect on the outcome.

After deciding which legal principles will govern the appeal, the appellate lawyer's first task in the distillation process is preparation of the record on appeal. It is appellant's duty to prepare a proposed record on appeal for service on appellee; but there is no reason why appellee should not participate in and offer suggestions regarding preparation of the record. Appellee's early participation can be helpful and shorten the process.

For appellant, preparation of the record should begin with a clear list of the legal principles to be relied on in mind, if not on paper. (In state court, this list could be the assignments of error.) Contents of the record are largely governed by the applicable appellate rules, which should be studied carefully so that nothing which is required is omitted and nothing which is prohibited is included. Beyond what is required by the rules, the record should contain such trial material, including evidence, as is necessary for the appellate court to understand and properly resolve the legal issues to be raised. Include in the record no less than this; but, in

keeping with the the duty to distill to the essence, do not include more! A record which includes immaterial or redundant matter may detract from the overall persuasiveness of the appeal. Sometimes one side of the appeal will want to include too much and the other side, too little. Active and fairminded participation by both appellant and appellee can help produce a properly distilled record.

The next step in distilling the case is preparation of the briefs. The funnel is nearing its narrowest point. Appellate counsel must, after careful thought, backed by legal research, select the best and most persuasive legal points in the case to carry forward in the brief. In almost all cases (death penalty cases for reasons peculiar to these cases excepted) two or three legal points are ideal. The fewer, the better, remembering that distillation to the essence is still the guiding star for all appeals. If one point has a reasonably good chance of prevailing, go with it and forget the rest. Eliminate points that are marginal and unlikely to succeed. A proliferation of points, or the "shotgun" approach to appeals and briefing, is not the way to go. One or two points fully developed are better than five partially developed.

Oral argument is the final step in the process of distillation. The funnel is at its narrowest point, allowing only the last few drops of distillate to emerge. Because at this point so much must be distilled into so little, developing an effective oral presentation is the most difficult and challenging part of the process. The challenge is to think of a better, more succinct and more precise way of making the points developed in the brief. The time allotted for oral argument in most appellate courts goes like the wind. Yet this is counsel's last and perhaps best opportunity to convince the court. It is the last thing the court will consider before retiring to vote on the case, a vote which usually occurs on the day of oral argument. What is it about the appeal that counsel wants to be sure the court understands? What factual or legal nuance must not be overlooked by the court? How can a point be articulated which at the same moment makes the case for the advocate and rebuts any countering argument which the opponent or the court might devise? There are countless ways to articulate a point. The challenge at oral argument is to devise the absolutely best and shortest way to do it.

An appeal is distilled not for distillation's sake. One purpose of distillation is to enable the appellate advocate to be more persuasive. Succintness and clarity are the touchstones of persuasiveness. Persuasiveness is not about obfuscation, but it is about clarity. It is not about exaggeration, but it is about accuracy. It is not about hyperbole, but dispassionate, rational discourse. Persuasiveness is about using the art of rhetoric, both spoken and written. Cicero said, "Be clear, so the audience understands . . .; be interesting, so the audience will want to listen . . .; be persuasive, so the audience will agree . . . ." These rhetorical principles apply to preparation of the record, brief writing and oral argument.

Clarity begins with the record. Generally trial materials should be arranged in chronological order. Page numbers and filing dates should be easily readable. The index should contain accurate descriptions of the various materials, descriptions that not only assist the court in finding parts of the record but also give the court some understanding of what happened below and the order in which it occurred. Instead, for example, of listing an item in the index as "Order", list it as "Order Allowing Defendant's Motion for Summary Judgment" or "Order Denying Plaintiff's Motion in Limine" even if the official caption is only "Order." Transcripts of

testimony and trial exhibits not included in the printed record should be clearly identified in the printed record with brief descriptions, including transcript page numbers and exhibit numbers.

Clarity, accuracy and persuasiveness should be the hallmarks of every brief and oral argument. The importance of a clear, succinct and accurate statement of facts in the brief cannot be overstated. The statement should contain the basic facts, usually undisputed, stated non-argumentatively. This does not mean unpersuasively. Almost always the facts of any case can be marshalled in such a way as to make the court desire a certain result. This can and must be done without sacrificing accuracy.

The facts, moreover, are what make any appellate case interesting. They make the case unique. State them in an interesting way. Let them tell a story. Let them tell the story you want the court to hear. If the facts engender the court's interest in your case, it will at least want to see what else you have to say about the matter.

The argument sections of the brief should begin with a statement of the legal point in the fewest possible words. Work on this statement of the point. Revise, rewrite, edit. State it so that it is both readily understood and impels the answer you want.

Develop the point syllogistically. State it; give the facts which underlie, or give rise, to it; state the law applicable to it; and apply the law to the facts to arrive at the conclusion. In the argument sections of the brief, facts and legitimate inferences from the facts may be stated argumentatively. There are the basic facts in every case, and there are "argumentative" facts. An argumentative fact is something in between a basic fact, which is usually not disputed, and a contention. Argumentative facts, like contentions, may be disputed.

The conclusion of the brief might contain a short restatement of your arguments which justify the relief you are seeking from the court. Space permitting, do more than write, "For the foregoing reasons," etc. Summarize your arguments. Be clear about the relief you want from the appellate court. Is it a reversal of the judgment below, a new trial or a remand for further proceedings?

For oral argument prepare not only for the case you want to make but also for questions the court may ask. Using your opponent's arguments and your own understanding of the case, conjure in your mind the most difficult questions the court may ask of you and prepare a succinct, persuasive answer for every question you can think of.

During oral argument, welcome the court's questions. Take them as a sign of the court's interest in your case and as an expression of the court's concerns about your position. Oral argument is the only opportunity the court has to express its concerns directly to counsel and the only opportunity counsel has to assuage them. Make the most of this most excellent opporunity.

If the court appears to be struggling with your arguments and asking difficult questions, hang in there. Sometimes the court really wants to decide for you and is giving you an opportunity to show it how. Or the particular questioner may be giving you an opportunity to

convince another member of the court who has raised the same questions in the court's informal discussions of the case.

Watch, though, for every opportunity to make oral argument short and sweet. Do not be hesitant to finish before your time is up. If the members of the court are consistently nodding in approval and not asking questions, take it as a sign they are agreeing with you and sit down as soon as you get to a good stopping point, or maybe even before you get there. When counsel says, "Your honors, I believe you have my points and if there are no further questions, I will sit down," it is music to the ears of an appellate judge, especially if it comes near the end of a day near the end of a week during which the court has been sitting.