High Pressure Cookery: Warm Counsel and Hot Bencher

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It is interesting to me that the words describing the higher functions of the human species unfold like an umbrella. Activities like eating, drinking, breathing, sweating have words that fit them rather tightly. But words like "love," "pray," "muse" resist crisp definition. The phrase "oral argument" similarly covers a host of activities in which humans vocally endeavor to persuade others of their point of view.

The Golden Era

Perhaps the paradigm of the classic form, subsequent to Demosthenes and Cicero, was to be found at the lectern in the Supreme Court in the nineteenth century. Take an exemplar of the paradigm, Daniel Webster. As former Deputy Solicitor General Stephen M. Shapiro writes:

Webster's style of argument appears from the records of his speech in Trustees of Dartmouth College v. Woodward, 4 Wheaton (17 U.S.) 518 (1819). In that four hour argument, Webster challenged a New Hampshire statute which altered the charter and governance of his Alma Mater. Despite the limitation of the Supreme Court's jurisdiction on writ of error to federal constitutional issues, Webster argued that the New Hampshire statute infringed both state and federal constitutions. After briefly stating the case and the constitutional questions, he presented an argument woven from a multitude of separate strands, including the following: invocation of English tradition, citation of English common law, textual analysis of the provisions of the Constitution, logical reasoning, extended quotation from legal treatises, reference to common understanding in the United States, citation of lower court decisions in America, citation of past Supreme Court decisions, reference to Roman law, recollection of abusive practices of English monarchs, reference to the Federalist papers, prediction of grave dangers to society from acceptance of the lower court's decision, emotional appeals to sympathy, interjection of fiery rhetoric, and recital of a famous peroration:

> It is Sir, as I have said, a small college. And yet there are those who love it . . . Sir, I know not how others may feel, but, for myself, and when I see my Alma Mater surrounded, like Caesar in the Senate-House, by those who are reiterating stab upon stab, I would not, for the right hand, have her turn to me, and say, Et tu quoque mi filii! And thou too, my son!

The Age of Brass

If that was the golden era of appellate advocacy, this might be called the age of brass. Here are some recent examples. A young woman prosecutor sent me this from Philadelphia. Defendant's counsel rises when his case is called in municipal court:

"Yes, Your Honor. I don't see anyone who was here during the trial, [only] some new law clerks and someone new from the City, and I sat out yesterday for a few minutes and tried to figure out how you argue a case where the Judge has done everything to hurt your clients and you for the last five years, when the law is in your favor and the facts are in your favor, and I

figure there's nothing I can do.

So, Your Honor, if you want to be a mensch, rule for my client. If you want to do what you've done for years, rule against her."

A for candor, but B for brass. Then, on appeal we have the young lawyer who informs us that his senior has allowed him to argue "for experience" -- he might also inform us that he didn't try the case below and thus was not responsible for the mess made there. Next is the veteran who, after wasting 12 of his 15 minutes, had to be admonished to get down to his legal issue. He identified it as the ineffective assistance of trial counsel. He disarmingly prefaced his remarks, "I have no malice . . . sometimes I feel I'm incompetent -- even after 30 years." Another counsel, an appellee, asked why he didn't brief an alternative ground for the trial court's decision in his favor, replied, "I didn't put much stock in it."

In one case we wondered why counsel had chosen to stress in oral argument one of a dozen points buried in his long brief at about page 40. The reply, "I like to put my nuggets in at the end." Finally, after the court had to admonish counsel that her time had expired, the reply: "Oh. You distracted me."

My latest example, just last month counsel was arguing that we should rule on an issue as the Ninth Circuit has. Here is the subsequent colloquy:

> Court -- But not only five other circuits but our own, in a case you didn't cite, have ruled squarely the other way.
>
> Counsel -- Yes, your Honor. What I am doing is rowing my own boat.
>
> Court -- Upstream.
>
> Counsel -- Well, let me move on. I'm also raising an issue over the jury's verdicts.
>
> Court -- What are you complaining about? The jury found for you in four out of 12 indictments. That's a 333 average. The Red Sox would be happy with that.
>
> Counsel -- I have a feeling I'm not going to do that well.
>
> Court -- Are you court appointed?
>
> Counsel -- No. I'm only doing this as a favor for a lawyer friend.

If you're not allowed by the pressure of time to be a Daniel Webster and don't want to shoot yourself in the foot, is there any advice that is useful to the aspiring advocate? I think there is but it's not the sort of stuff that works in a hornbook.

Pride in Advocacy

The first legacy I would bequeath to you is an attitude or mind set that distinguishes the superb appellate advocate from the merely adequate. It is that, although the opportunities may come infrequently and other parts of practice may be far more remunerative, the excellent oral advocate relishes the chance to practice before a choice audience one of the cherished and classic crafts of the profession. He or she will lavish time and energy on the record, the brief, and the argument that in many cases will far exceed what can be charged the client. Why? Because that advocate takes pride in doing his best in this finely tuned, highly visible performance before judges whose favorable evaluation he or she values. As one lawyer said to me recently, the opportunity of arguing an appeal is a "luxury."

This relish for the process is combined with an acute sense of its limitations and demands. Both can be highlighted by contrasting our oral and written advocacy from the British

model. There the barrister's "brief" will usually be at most a list of cases he may wish His Honors to read; but his time for oral argument will endure for hours, perhaps days, until the court has a full grasp of the facts, has read all the cases, and has reached conclusions which the judges then dictate to the reporter. In contrast, our reliance on a carefully organized researched and written "brief," which is seldom brief, is a major improvement on the British model. Our reliance on a foreshortened, telescoped oral argument is a change, if not an improvement, arising out of sheer necessity. Oral argument today has its severe time constraint but also its priceless opportunity. It is a 15-20 minute opportunity to engage the complete attention of judges, who are clearly informed about the facts and the issues. This is the stage that has changed most dramatically in two decades. Oral argument is no longer a leisurely, structured oral address. The occasion is no longer really adversarial. Your major concern is not your opponent but three or more inquisitor judges. The process, more familiar in civil law jurisdictions than common law ones, now places judges in the very vortex of your presentation.

A second bequest I would make to you is to forget everything you've seen of lawyers on television. And take comfort in the perception that our basic appellate machinery is drawn from the 18th century. It is the last preserve of individualism. The machinery is manually -- or cerebrally -- operated by one individual communicating with several others. True, research and brief writing are susceptible to computers. Lexis and Westlaw perform some functions usefully but I share the sentiments of a leader of the Puerto Rican bar who recently confessed: "I still prefer the library." And word processors enable briefs to be redone with up to date record references. But they can also be instruments of torture. Recently I was told that a lawyer with an oversized brief was told by the Supreme Court of Puerto Rico to reduce it by several pages. He simply went back to his office, told his word processor to do 12 letters to the inch instead of 10 -- and came back with a more slender . . . and more unreadable brief.

But when we come to oral argument itself, there is no mechanization. Strange and wonderful it is that in a world increasingly organized, bureaucratized, systematized, mechanized, automated, there remains one important enclave of decision making where only the individual counts.

So in a sense you have to forget everything you've been taught and retrogress a century or two. Forget about technology, about delegation, task forces, teams, specialists. Remember only that the great leveler is preparation, and that a prepared individual in oral appellate advocacy is more than a match for a clutch of counsel from the big firm, where the juniors anxiously make notes at the counsel table while the senior partner proceeds to blow all their billable hours with a few ill chosen words.

This is all you need to know: that you are part of an unrivaled system for the excision of important human error and the stimulation of both consistency in and evolution of doctrine; that the arena is designed not for the team but for the individual; and that there is room for almost any style and idiosyncrasy so long as it is brigaded by the most painstaking preparation.

I have just said that the great leveler is preparation -- of the case, of witnesses, of exhibits, motions, memoranda of law on anticipated issues at trial, requested instructions. If preparation is the leveler among attorneys, the escalator is preservation. By that I mean that your chances of rising on appeal from an adverse decision depend upon making and preserving your record -- beginning before trial, enduring through trial, and continuing after trial.

As you put in your evidence, make your objections, have conferences at the side bar, request instructions, make motions, are you looking over your own shoulder to see how the cold record will look to a reviewing court? Remember that the first concern of most appellate judges

is whether you gave the trial judge every opportunity to understand your position and to correct any error that you think he or she made.

The Decision to Appeal

I can say no more here about preservation, but want you to burn it into your minds. What I do want to address in more detail is an area of appellate decision making that is treated with malign neglect. It is the simple question, often unasked: should my client appeal? Lawyers have developed sophisticated approaches to deciding whether and why going to trial is a good bet. They know how to make their clients see all the pros and cons. But one has the impression that once one has lost a case at the trial level, there is little rational discussion between lawyer and client. Too often the marching order seems to be: Damn the torpedoes; full speed ahead!

This appeal-at-any-cost syndrome seems odd in light of the statistics. Usually around 80 percent of all appeals are unsuccessful, most decisions being unanimous, no matter how ideologically varied the panel of judges might be.

The result is that lawyers spend a great deal of unrewarding (if remunerated) time; clients spend a great deal of unprofitable money; judges invest a great deal of scarce time on causes that ultimately are found to be free of significant error; and litigants in more worthy causes find their day in court considerably delayed.

Legitimate reasons include (but are not limited to):

-- The judge, the jury, or both committed serious error.

-- There is a question of law, important to the future conduct of your client's business, that should be settled. There is now a split of authority, within or beyond the jurisdiction.

-- It is important to try to narrow the trial court's holding; or to change the remedy.

-- You and your client may feel that existing law -- which the trial court had to follow -- should be changed.

Illegitimate reasons:

-- Keeping the client out of jail as long as possible, or allowing your client to continue polluting as long as possible or to continue non-recognition of a bargaining unit.

-- Using delay as a bludgeon for settlements.

-- Realizing a very favorable rate of interest on money owed the successful plaintiff.

-- Appeal solely to avoid being accused of giving ineffective assistance to your criminal defendant client.

There is a new urgency to winnow out the illegitimate reasons. This is one decision point where the rules of the game have changed. No longer can the lawyer take a laissez-faire position. So precious are court resources that sanctions against parties and even attorneys are becoming more familiar. In sum, abuse of the appellate process has been recognized as a new misdemeanor.

For the practicing attorney this indicates one mandatory exercise: discussing with your client not only what he, she, or it hopes to gain or lose by appeal but how the court may view the merit or lack thereof and what it may do to him, her, or it -- and him or her self.

What one attorney calls "client control" is being recognized as a new discipline for the lawyering craft. It also gives rise to a new set of ethical problems. For example, if your long time valued client insists on your pursuing a frivolous appeal, failing which, he or it will seek other counsel, what should you do? This subject is too new to be taught in the law schools, but it will play a part of increasing importance in your practice, not merely to protect you and your client against sanctions, but to enhance your own credibility as an advocate who usually has a serious case to argue.

In our brief time together, I cannot cover such vital appellate operations as assembling the record, identifying and prioritizing issues, and writing the brief. In the time remaining, I want to talk about oral argument. First let me give you what I call the four R's of preparation.

Preparation for Oral Argument

Realize the context. John Davis gave this first place in his decalogue: "Change places with the court." This is your big moment -- but only a moment. Your argument is but one side of some 25 cases. Each judge has thus read 50-60 briefs, 1,000-1,200 pages. And your time is 15 minutes out of 699-800 minutes ... a fat 2 percent. And, as we shall note, you can't hope to control more than half of that. This means that the more you can focus on the one or two most essential points, the better.

Refresh your memory of the record and briefs. Tab key references.

Hold your own retreat.

(1) Back away, think anew; develop a theory of the case. This means not only going for your opponent's jugular but exposing and dealing with your own. You have an arsenal of tools. Marshalling facts; weight of precedent; legislative history; logic; policy; procedural rules. Choose the one or ones that need emphasis.

(2) Your major objective is to get the court to want to help you -- to keep your verdict; or, if not, to upset the judgment below entirely, at least to narrow the holding, change the remedy. Your brief tells it how to help you. Getting the court to change its initial views gives the advocate his liveliest challenge. The odds are against you but not by too much. In a ten month period two judges in the Eighth Circuit kept book. One said that oral argument changed his mind in 30 percent of the cases; the other, 17 percent.

(3) Justice Frankfurter once said that one seldom wins a case by oral argument, but can easily lose one. This means that one of the major jobs of the appellate advocate is preventive maintenance:

-- clearing up the facts; correcting a judicial misperception of the issue, the facts, or the law;

-- confirming and strengthening favorable judicial impressions; giving ammunition to the judges who seem to be on your side.

Rehearse in two modes:

(1) If the court says nothing: organize and speak out what you would say -- as succinctly and clearly as possible.

(2) If the court is "hot": think of all possible questions -- e.g., line drawing, distinguishing cases, what happened at trial . . . then have a peer or two test you.

If you have done everything we've touched on from building a clear trial record to thinking through your case on appeal, you've done 90 percent of the job. You know your strengths and weaknesses; you have all the confidence your case deserves and the basis for being candid with the court.

Oral Argument -- The Importance of Control

There is little point in rehearsing here the typical catalogue of do's and don'ts of oral argument. In my Lexicon of Oral Advocacy I have tried to characterize all of the ones I think worth noting. I would rather spend our time together in talking about the third major characteristics of the master advocate, in addition to the confidence and candor that flow from careful preparation. That factor is the ability to retain some residual control of one's limited time for argument. It has in my view become the biggest problem facing even the best prepared advocates as argument time has telescoped and judges have become more inquisitorial.

You want to be flexible, resilient and accommodating to the judges. But there is such thing as being too flexible. It so happens that not every question is a good one. I cannot begin to count the arguments where, after starting impressively, counsel seems to wither visibly as he or she wanders down judicially created blind alleys.

I wish I could give you a guaranteed formula for retaining reasonable control over your fifteen minutes. Here are my modest suggestions:

First -- Be acutely conscious of the court's level of comprehension. If you have sat through several arguments you'll have a pretty good idea of the court's preparation and interests. If not, or even if you have, it may be a good idea to ask if the court has in mind the facts and procedural posture. Then listen and guide yourself accordingly. Continue to listen as judges question both yourself and your adversary. Often you'll detect an incorrect assumption that you should expose. In any event you will have saved some time in talking about unnecessary things.

Second -- Determine the job you have to do. Analyze your predicament. If you are for the appellee and view your case as pretty invulnerable (e.g., if the issues are factual and you have a jury verdict), be relaxed and content to deal with the court's questions. When the judges are finished, ask if there's anything else. If not, sit down. But if you are for the appellant, or if you are a vulnerable appellee, you must identify the job you have to do and, sooner or later, get to that issue -- the case to be distinguished or hammered home, the fact, the ruling, the policy to be explained, defended, attacked.

Third -- As you begin, state the three or four issues you intend to cover; this may prompt some judges, when twelve minutes have expired on a colloquy with another judges on issue No. 1, to give you a chance to touch the others.

Fourth -- You probably can count on the first three minutes as your own, while the court is getting oriented. Use these to get your most important message across.

Fifth -- Don't be afraid, when a judge asks a question, to say you're going to come to it, satisfying the immediate question with a precis of your answer.

Sixth -- After 10 minutes, remind the court of the issues you still hope to cover. Don't be afraid to say, "I'm afraid we have not yet gotten to the core issue."

Seventh -- If you have been continually peppered with questions, ask for 2 or 3 extra minutes.

Finally -- Remember that in trying to keep or regain control, you may offend one judge, but you are likely to have two or more quiet supporters who are applauding your efforts.

Perhaps better than any such precepts aimed at keeping some residual control over your time is my list of trade secrets. I reveal them to you at some peril. I have found that these are the most common gambits resorted to by appellate judges. The practitioner is well advised to have them in mind.

Before your argument is fairly off the ground, you are likely to face one of the following:

How did you get here, procedurally? Do you have a final judgment . . . on all issues? Aren't you premature?

Why are you here, jurisdictionally? Where's the diversity? Why isn't this case moot?

Where in your complaint (or your answer) have you raised the issue you argue here?

If you surmount those hurdles, and are able to talk about the merits, you may encounter the following questions:

Specifically what facts are disputed?

Did you make a specific objection below? When? What ground did you advance?

Did you make a specific request for instruction? After the judge's charge did you renew

your objection?

Did you renew your request for directed verdict at the end of defendant's case?

When you were surprised at trial by evidence or a witness, did you ask for a continuance?

Did you bring the authority you cite to us to the trial court's attention?

Did you raise this issue with the trial court? How? At what page in the record?

Those are pretty standard questions. Here are some trickier ones:

If I understand your argument, you are relying entirely on _____ v. _____.

What is your best case?

What is your weakest case?

Why didn't you deal with your brother's third argument?

How do you distinguish _____ v. _____?

Why didn't you cite our case of _____ v. _____?

What is the policy behind your argument?

How would you deal with this hypothetical? If we hold for you, then won't we have to hold for defendant in the hypo? Where do we draw the line?

You are arguing for an exception to the general rule. How do we do this on a principled basis? Help us conclude this sentence, "Despite the general rule barring this claim because of the statute of limitations, appellant is entitled to proceed because . . . ."

If we disagree with the court below, do we reverse or remand for further proceedings?

What remedy should we order?

Should we (if this is a federal court) certify this question of law to the state court?

Should we hold up our decision until the Supreme Court has acted on _____ v. _____?

Now if you can handle all those questions and still complete your outlined argument in fifteen minutes, you, my friends, will make a fortune with <u>your</u> book on appellate advocacy.