Pressure Points in the Appellate Process

University of Maine Law School
February 20, 1986

Honorable Frank M. Coffin
U.S. Circuit Judge and
Adjunct Lecturer

In this short time with you I have to make a choice. It's something like teaching youthful Gawaines and Guineveres how to be a knight. After all, an oral advocate is something like the knight errant of old. Well, there are two levels of knowledge a knight should have. The first has to do with such things as how best to mount your steed in full armor; what to do when you are fully mounted and off to the tournament and either a flea is riding with you under your breastplate or, worse, you have to respond to a most urgent call of nature. Now these how-to-do-it's are important. They can even be decisive. But a one hour session wouldn't make a dent.

Instead, a knight lecturer in King Kinvin's court might well confine himself to such questions as: how do you go about choosing a quest, or distinguishing between windmills and giants? what is the proper state of mind for extracting a sword from a stone? or a rabbit from a hat?

Opting for this latter course I want to

1. Engrave indelibly three mind sets to which all else, like all philosophers since Plato, are footnotes.
2. Dwell in some detail on six pressure points that precede oral argument.
3. Talk about good and bad oral argument, and focus on the biggest single problem even the best prepared oral advocate faces in today's appellate courts.

I. Three Mind Sets for the Appellate Advocate

A. The first attitude that distinguishes the superb appellate advocate from the merely adequate 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".

B. The second attitude, undergirding the first, is an appreciation of the uniquely exquisite machinery our appellate process is.

This goes a bit beyond Professor Fuller's definition of appellate courts in the Spelunkean Explorers as a band of rogues riding down from the hills after the battle is over and shooting the wounded. Building on and improving on, the English model, we have the following features:

1. A tradition of independence and objectivity;
2. The sifting of facts and issues by a judge or administrative body, resulting in a crystallized record;
3. Conventions:

-- The substantive principles of constitutions, statutes, cases;

-- The "palace guard" rules of procedure and jurisdiction (what and who can have access to court, and when);

-- The rules of evidence.

4. The constraint of putting reasons on paper;

5. A collegial decision requiring a writing judge to seek a consensus and ensuring that three or more judges and their law clerks will be ferreting out both law and facts;

6. Intimate "hands on" involvement by each judge;

7. The perspective protected by the buffers of time and distance;

8. The antibiotic of prolonged indecisiveness and shifting biases in graduated decision-making, and

Where you come in,

9. Structured advocacy by adversaries, involving both the oral mode (the legislative style) and the written mode (the executive style).

Both oral and written advocacy differ drastically from the British model. 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.

It is this active involvement of pre-conditioned judges that is at once your opportunity and your problem.

C. The third -- and to me the most comforting perception -- is 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.

II. Critical Pre-Argument Pressure Points

Everything I am talking about today will be of little use if the foundations for an effective appeal have not been laid. There are three time frames for laying these foundations. Within these there are probably as many ways to affect a later appeal as there are varieties of human ingenuity. In our class on the Appellate Process we have identified some 40 of the more common ways.

1. Before trial. The first step affecting the appeal is of course the complaint. Then follow motions to dismiss, for summary judgment, and other pleadings. The pre-trial order, stipulations, and requests for admissions are all occasions for either preserving or waiving an issue for appeal. The experienced appellate advocate will think about, do research on, and prepare memoranda on evidence problems, motions, offers of proof, and requests for instruction. This will be a head start and a sizeable part of any later appellate research.

2. During trial. The time you took before trial to think ahead will serve you during trial, when there is little or no time to think. Your case on appeal will often depend on the timeliness and specificity of your objections to exhibits, testimony, or argument; of your offers of proof; of your various motions, whether limited in scope or potentially dispositive of the whole case; of your requests for instruction.

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. More specifically, everything you do is informed by your picture of yourself some 10 months or a year from now answering such questions from your panel of appellate judges as these:

-- did you call this to the trial judge's attention?

-- what did you say?

-- after he replied, did you point out what he had missed or misunderstood?

-- when he made a ruling you think was wrong, did you move for reconsideration, giving your reasons?

3. After trial. One type of motion tries to clean up untidy messes. Often it gives one a second bite at the apple. It seeks reconsideration, clarification, a statement of reasons, an amendment of a pleading to avoid a technical problem, or a judgment notwithstanding the verdict, a new trial, or a remittitur.

A second type looks forward to the appeal: it seeks to stay a decree or enjoin a party pending appeal; bail; expedition of appeal; summary reversal or affirmance; dismissal for untimeliness or lack of appellate jurisdiction.

4. Deciding whether to appeal.

a. The problem.

This is, as Chief Judge Godbold of the 11th Circuit has said, a most neglected issue, a terra incognita. 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.

b. 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.

c. 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.

d. The new urgency. 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.

5. Assembling the record, identifying your priority issues, and writing the brief. I lump these three activities together because they all go on at the same time. As one goes over pleadings, motions, exhibits, affidavits, depositions, and transcript, he is constantly on the lookout for issues that may have been overlooked and for signs that some issues are no longer

valid or important. Likewise, decisions on issues will affect what goes into the record. And this entire process is really the first step in the writing of the brief.

6. Preparing for oral argument: The four R's

a. 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, 1000-1200 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.

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

c. 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;

-- confirm and strengthen favorable judicial impressions; give ammunition to the judges who seem to be on your side.

d. Rehearse in two modes:

(1) If 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.

III. The Oral Argument

Introduction -- There are so many things to say about oral argument. . . that I have to do what a lawyer making an oral argument has to do: select surgically. Cut out all you can.

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.

There are only three other things I would advise you to keep in mind.

A. The importance of sensing 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.

B. The importance of keeping in mind this Bill of Wrongs.

1. The VV's -- Vocal Vicissitudes

-- Too loud, too low [the chronic offender]; too slow [Tortoise]; too fast [Hare].

2. The GG's -- Ghastly Gambits

-- Opening with a joke or jocular familiarity.

-- Squandering 3 minutes correcting a citation in your brief. Instead, submit errata sheets.

-- "I didn't try this case below."

-- "My client and his family are in the first row."

-- "To be honest with your Honors."

3. The AA's -- Asinine Antics

-- The pacer.

-- The dancer

-- The bouncer

-- The orchestra conductor

-- The sculptor

-- The scribbler

-- The backbencher

C. The Importance of Control.

This, given confidence and candor, completes the trilogy of fundamentals. 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 15 minutes. Here are my modest suggestions:

First -- As you begin, state the three or four issues you intend to cover; this may prompt some judges, when 12 minutes have expired on a colloquy with another judge on issue NO. 1, to give you a chance to touch the others.

Second -- 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.

Third -- 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.

Fourth -- 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."

Fifth -- 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.