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Tips From An Appellate Lawyer

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Tips From an Appellate Lawyer

Get It Right The First Time

Feature

By Myron Moskovitz

Trial lawyers usually learn from other trial lawyers, but what can an appellate lawyer teach them? I've been a trial court advocate, but for the past several decades (during my teaching career), I've done mostly civil appellate work. The bulk of my hours are spent reading many thousands of pages of transcripts. I read clerk's transcripts, which contain lawyers' motions, memos of points and authorities, trial briefs, and the like. And I read reporter's transcripts, which contain testimony and oral arguments presented by lawyers. You can't read that many pages without noticing some common lawyering mistakes. So here's my list.

1. The Golden Rule of Advocacy

There is a Golden Rule that all advocates should follow: Put Yourself in the Shoes of the Decider. Your goal as an advocate is to persuade the Decider. Therefore, when you think about what words to write and what words to utter in court, imagine you are the Decider and then imagine the impact of your words.

Sometimes you know a lot about the Decider, and sometimes you know very little. But start with some assumptions. First, assume the Decider does not see the world and your case exactly the way you do. If you are wrong about this, great-you'll win easily, no matter what you do (well, almost). But if your assumption is correct (and it usually is), you must anticipate and address the Decider's likely concerns. Second, assume the Decider doesn't know anything about your case at the outset and probably doesn't know much about the area of life (medicine, construction, business, etc.) from which the dispute arises. Third, assume your case is not the Decider's top priority. The Decider has other cases, other needs, other interests. If you don't make it easy for the Decider to understand your position, the Decider might not do the mental work needed to meet you halfway.

Although all this might seem obvious, I've seen innumerable violations of the Golden Rule. Not a good idea-it's counterproductive.

2. Tell the Story

A judge who is asked to rule on a motion wants the story. She went to law school and knows some law, but she knows absolutely nothing about the facts of your case. It should be pretty easy to write a little story for her, but I'm often amazed at how difficult that is for many lawyers.

Often lawyers can't tell a client's story without throwing argument into it. For example, "On March 2, Defendant drove his car down Main Street at 35 miles per hour, a speed which was clearly negligent and without due care." Save the negligence argument for later in the brief. When argument is mixed in with the basic story, the reader just gets confused, so neither the story nor the argument has any persuasive impact.

Sometimes lawyers tell too much. Many factual "summaries" I see are so cluttered with unimportant dates and details they are rendered unreadable-I am forced to reread them several times to extract the guts of the story. A judge doesn't like doing that-maybe she won't bother and will just turn to your opponent's brief for an easier way to find out what happened.

Remember to include details that might affect the outcome of the case, but be careful to leave out the immaterial. Factual overload is often due to what's commonly called the CYA syndrome: If I leave anything out, my opponent might nail me with the omission later. Nonsense. There's no rule of law that says that if you summarize the facts for a judge, you're "estopped" from filling in blanks later when it's appropriate.

And some lawyers don't tell enough. The brief uses words or mentions concepts that the average reader might not understand without a short explanation. The case might involve securities, mechanical engineering, ballet, computer software, or some other field that the judge (a former prosecutor, probably) knows little about. When you think of it, you knew very little when you started working in this specialized area, but you've had a lot of time to learn how it works and to become familiar with some of the vocabulary it uses. The Decider, presumably, knows none of this. If you don't

explain it, what you write (or say) will be just a blur to her.

Remember to include a factual summary in just about every brief you submit. If you file a demurrer early in the case and another law and motion matter later on, don't assume the judge (who has handled many cases in between) will remember the facts of your case.

3. Focus on the Decider, Not Your Opponent

In the transcripts I read, many lawyers seem more intent on crucifying opposing counsel than on convincing the Decider. They denigrate their adversary's arguments with nasty adjectives, harp on minor procedural improprieties, play gotcha! with petty mistakes, and demean their opponent's intelligence. Judges find this unprofessional and-more important-they feel ignored. The judge's job is not to decide which lawyer is better but which client's cause is the legally correct one. You are not helping the Decider decide the issue your way by blasting your opponent.

If your opponent's arguments are misguided, then show this with facts and law. If you are right, you don't need nasty adjectives. If you are wrong, nasty adjectives won't make you right. Try understating how weak your opponent's argument is. Instead of calling it "absurd," call it "puzzling," "troubling," or simply "mistaken." If you then show with facts and law that it is worse than that, the Decider might be pleasantly surprised at how civilized you are. And your brief will stand out from those peppered with the kinds of invective judges see every day.

The canons of ethics require zealous advocacy for the client. Some lawyers apparently believe this requires them to zealously snipe and sneer at their opponent. But what it really means is putting your energy and skills into persuading the Decider.

During trial, some lawyers focus less on the Decider (judge or jury) than on winning arguments against witnesses, especially experts. The lawyer means to prove that he knows more or is smarter than the witness. But the jury might not understand either one of them. I've seen transcripts where lawyer and witness fight a private little battle - with dialog that might be intelligible to them but is unintelligible to an onlooker (i.e., a juror) who doesn't have the expertise to follow the spat. Often the two combatants throw technical terms back and forth. From where the jury sits, their exchange might as well be in Greek. When I finish reading a "brilliant" cross like that, I picture the lawyer smiling smugly at the jury-and the jurors staring blankly back at him, bored and piqued at being ignored.

4. Respect the Judge's Intelligence

A federal judge once asked me (off the bench), "Why is everything 'clear' to the lawyers when it's not clear to me?" Judges are not stupid. They know a tough issue when they see one. Telling them the answer is "clear" when it isn't just makes you less credible.

Clear, obvious, absurd, and the ever-popular *my opponent's argument is wholly and utterly devoid of any merit whatsoever*-these are words judges see and hear day in and day out. Not to mention *ridiculous, outrageous*, and worse. Ban those words from your briefs and oral arguments-they have no persuasive impact. If you can't show that an argument is "clear" or "absurd," intoning those magic words won't convince the Decider. And if you can show it, you don't need magic. In addition, those words often signal the Decider that you can't demonstrate your point and hope to bluff your way through the argument, or you are simply arrogant, saying (in effect), "Trust me, Judge. I've decided that my opponent's argument is absurd, so just take my word for it."

Tell the judge the truth. If the issue is a close one, acknowledge it openly and tackle it head on. The judge will be surprised and impressed-she doesn't see candor very often. You will appear to be grappling with the issue right along with the judge, and if you do it well, you might persuade her to resolve a tough issue your way.

5. Respect the Judge's Time

"Why do they call them 'briefs'?" a judge once asked me. "They rarely are."

It's a perennial battle. Judges want briefs short, and lawyers just can't stop writing (or talking). I see it in the transcripts I read: verbosity and repetition. Why? Sometimes it's insecurity-the fear that saying something only once (when your opponent is saying the opposite three or four times) shows that you don't really believe it. Nonsense. If you're right, you don't need to repeat yourself.

Some lawyers feel that they must load their briefs with authorities. Sometimes you should, when you're arguing a close issue in an unsettled or novel area of law. But most of the time you don't need to. If the proposition you assert is clearly established and indisputable, one or two statutes or recent cases are enough. You don't need to string-cite nine

or ten cases to support the general proposition that on demurrer the allegations in the complaint are presumed to be true.

Let's get back to the Golden Rule of Advocacy. Put yourself in the shoes of the judge. You're in your chambers, and you've set aside some time in the afternoon to read briefs. It's a nice day outside, and you'd love to leave work a bit early so you could take a walk. There's a stack of briefs on your desk. The one on top is 20 pages, and the next one is 5 pages. Which one do you want to reach for?

6. Be Nice to the Judge

A judge once told me, "When a lawyer begins a sentence with 'With all due respect, Your Honor,' I know that the next thing he says will show me no respect at all." I see transcripts of oral arguments on motions and evidentiary objections where lawyers seem to go out of their way to annoy the judge. Venting might make lawyers feel better, but I don't see how it helps their client's cause. You have a duty to advocate forcefully for your client. Judges realize this and will not hold it against you if you push your position-but only to a point. Getting angry, putting down the judge, and repeating your gripes too often do not help your client. Sure, judges are supposed to have thick skins and rise above personal feelings, but-remember the Golden Rule of Advocacy-could *you* always do it?

If you annoy the judge at the end of the case, it probably doesn't matter much (except in your next case in front of that judge). But if you do it in the middle of the case, it *can* hurt-because this judge will make further rulings on matters. "My job is to fight for my client," say some lawyers, trying to justify their conduct. Not quite. Your job is to win for your client. When employed carefully and at the right time, a combative tone with a judge can occasionally be useful. But not often. It's usually better to swallow your feelings and move on.

Making nice is particularly important during a bench trial, where the judge wears two hats: presider and fact finder. As presider, the judge rules on evidentiary objections. If you make unmeritorious objections too often, try to present inadmissible evidence too often, or argue with the judge too long over rulings, you just might be annoying the very person who will render the verdict.

One Last Thing

On appeal, the respondent usually wins, because appellate courts are reluctant to reverse their brethren in the lower courts. I hope these tips help you become the respondent rather than the appellant.

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