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THE ADMIRALTY CASE ON APPEAL IN THE FIFTH CIRCUIT

Alvin B. Rubin*

Think of the music not the notes.**

Just as the musician must know and follow the composer's notes, the appellate advocate must know and follow the Federal Rules of Appellate Procedure and the local circuit rules, but the virtuoso advocate does more than follow the rules. He plays the music of persuasion that leads the court to the result he seeks. This paper offers a few suggestions for appellate virtuosity.

Although possessing the tongue of Demosthenes and the compendious legal knowledge of a computer, the advocate, in half the appeals filed, will not have an opportunity to display these traits to the Fifth Circuit Court of Appeals. For over a decade this Court has disposed of half of its cases without oral argument.¹

This procedure was adopted because the court can dispose of a greater number of cases if it considers some of them only on the briefs. If the court heard oral argument in each case, it could not cope with the ever-increasing number of filings and deal with the resultant growing backlog, which once became so large that the wait for oral argument exceeded two and one-half years. By July 1982, the process had demonstrated its utility: the court was current in scheduling oral arguments and in deciding cases not scheduled for argument, a trend which continues even today. Oral argument has not been curtailed because it is held in low esteem; the court realizes that oral argument is invaluable, both to litigants and to judges. Oral argument

1. See 5th Cir. R. 18. Data from the Fifth Circuit reveals the following:
   Percent of cases disposed of without oral argument
   
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<th>Year</th>
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* Circuit Judge, United States Court of Appeals for the Fifth Circuit; Adjunct Professor of Law, Louisiana State University. The author expresses his sincere appreciation to Sabrina McCarthy for her assistance.

** Pablo Casals.
has been dispensed with only out of absolute necessity. Had such a move not been made, the backlog on civil cases would now be five years or more. Most summary dispositions are affirmances, as are most dispositions after oral argument. The Fifth Circuit affirms in 84 percent of its decisions. Indeed, the district courts or the appellate courts or both would be deficient if a large percentage of appeals resulted in reversal. The court initially assesses the need for oral argument on the basis of the appellant's brief. Sometimes the appellant may demonstrate such a patent error by the district court that oral argument will not be useful because reversal is inevitable. But in most cases of summary disposition the result is affirmative and the first exercise for the appellant is eluding the summary process. Conversely, the appellee's brief should be designed to destroy his opponent quickly by showing that the district court committed no reversible error and that oral argument would not be helpful in reaching a decision. This is the path to winning a speedy affirmance.

THE BRIEFS

The brief is an advocate's premiere appearance before the court. The briefs in each case are reviewed by a screening panel of three judges who work together as a team for one year. Four panels work simultaneously. The cases are assigned to panels in sequence. Each case assigned to a particular panel is first sent to one of the judges on that panel. Each judge serves in turn as initiating judge, that is, the first judge to review the case. But unless the parties waive oral argument, the summary process can be used only if the three judges agree unanimously without concurrence or dissent on how the case is to be decided, on the exact rationale of decision, and on the fact that oral argument would not be helpful. If they do not agree on all three aspects, the case is scheduled for oral argument. If a case is decided summarily through the screening process, the briefs will be the lawyers' exclusive contact with the court. The briefs do not lose their importance when oral argument is scheduled. In the Fifth Circuit, each of the three judges on the oral argument panel reads all the briefs before oral argument. Each also may have a memorandum, called a bench memo, prepared by one of his law clerks, summarizing the issues in the case and the applicable legal principles. Thus oral argument will be before a "hot" bench, one familiar with the facts.

2. For a thorough explanation of the screening process see Isbell Inter., Inc. v. Citizens Casualty Co. of N.Y., 431 F.2d 409, 410-14 (5th Cir. 1970); Hugh v. Southern Pac. Co., 417 F.2d 526, 527-30 (5th Cir. 1969); Murphy v. Houma Well Serv., 409 F.2d 804, 805-08 (5th Cir. 1969). See also INTERNAL OPERATING PROCEDURES rule 4g (5th Cir., Oct. 1, 1981) (permitting concurring and dissenting opinions if no party has requested oral argument).
and the legal issues and prone to ask questions about an advocate's position. Because most of the judges were lawyers for at least two or three decades before their appointment to the bench, they likely will form some view of the merits of the cases from the briefs, even before the argument is called. Moreover, to look ahead, when a judge commences writing an opinion a few days or a few weeks after oral argument, he likely will turn to the briefs again.

It is, therefore, impossible to overemphasize the importance of the brief. The first impression that the judges will get of the case will be from the briefs. The last things they will read before writing the opinion will be the briefs and the authorities cited in them. The appellate advocate must give the brief his very best effort. This means that research must be started early, the day notice of appeal is filed, not one week before the deadline for filing. If the brief is finished before the due date, remember there is no penalty for early filing, only one for being late. Analyze the issues thoroughly. The research should be exhaustive. The Fifth Circuit is a court of final resort in 96 percent of the cases filed; the Supreme Court reviews only about 4 percent of the Fifth Circuit's cases. As one would in composing music, the appellate advocate should pick a theme. This is particularly important for the appellant, who will choose the issues to be raised and thus dictate the course of the appeal. Some lawyers write a brief as if they were running a record shop. They carry a little bit of everything. If the judges don't like jazz, perhaps they'll like country and western or classics or disco or a medley containing a little of each. These lawyers brief a multitude of issues indiscriminately. But if they cannot win on their three or four strongest issues, they surely will not prevail on a host of weak ones. Hence the advocate should pick the best issues and omit the rest. Justice Robert H. Jackson gave the same message:

One of the first tests of the discriminating advocate is to select the question, or questions that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. Of course, I have not forgotten the reluctance with which a lawyer abandons even the weakest point lest it prove alluring to the same kind of judge. But experience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.3

Review the record thoroughly, then write a succinct, fair, chronological summary of the facts. If there is contradictory evidence on an issue, say so, summarizing the opposing testimony and indicating why the version that favors you is more credible. It was said of the British barrister William Murray, later to become the great judge, Lord Mansfield, that when he finished his statement of the facts, the argument became superfluous. Strive for that lucidity and persuasiveness. There are two steps in a counsel's task. Ultimately, he hopes to convince the court. But before he can convince, counsel must inform, making his position clear to the court. It is not enough that counsel understands perfectly what is said in his brief. All efforts are vain unless the court understands as well.4 As Chief Judge Godbold, of the Eleventh Circuit Court of Appeals, has written,

[е]very appellate advocate must state facts and law candidly and accurately. "The mark of really able advocacy is the ability to set forth the facts most favorable within the limits of utter and unswerving accuracy." Every sentence must shine with the whole truth. Even when it has been misled the Court may find the correct path, but the attorney who is inaccurate or less than candid interferes with the objective of persuasion. He comes to the Court saying "please believe me and be persuaded." If it is revealed that what he says or writes cannot be believed, he forfeits the confidence which he seeks to create. The Court's distrust of him may taint his next appeal as well.5

Remember that, although the Fifth Circuit decides more admiralty cases than any other circuit court in the nation, not all of its judges had knowledge of, let alone experience in, maritime cases before their appointment. Explain nautical terms in footnotes or in the text. What is port-to-port passing and how is it signalled? What is a monkey board? a widow maker? a kevel? A sketch, either in the body of the brief or in an appendix, can be more graphic than a page of words.

Start the brief by stating briefly the applicable standard of review. The nature of the particular issue determines the standard of review. Indeed, one case may involve several standards. For example, an error of law in instructing the jury, if prejudicial and if properly objected to, suffices for a new trial.6 The same case, however, may involve an alleged error in qualifying a witness as an expert; here the stan-

5. Godbold, supra note 4, at 816-17 (footnotes omitted) (quoting F. Weiner, Briefing and Arguing Federal Appeals 49 (1967)).
6. McCullough v. Beech Aircraft Corp., 587 F.2d 754, 759 (5th Cir. 1979). If no objection is made to erroneous instructions, however, the standard of review is "plain error." Whiting v. Jackson State Univ., 616 F.2d 116, 126 (5th Cir. 1980).
standard is abuse of discretion. There also may be an alleged error in admitting evidence; the test for this is prejudice to a substantial right of the party contesting the admission, coupled with timely objection. If appealing the factual decision of the judge in a bench trial, persuade the court that the judge was clearly erroneous. If seeking to overturn a jury verdict or to upset a directed verdict, persuade the court that the evidence, viewed most favorably to the opposing party, points so strongly in favor of your client that reasonable jurors could not arrive at a verdict contrary to his position.

Reading these standards of review is not merely a help to the court; they also indicate the decibel level at which the appellate advocate must play to catch the judicial ear. Determine the standard applicable and state it for the benefit of the court—and yourself. Do not rely on your memory of the rules or merely follow a copy of a brief used three years ago. Study an up-to-date copy of the Federal Rules of Appellate Procedure, the Local Rules of the Fifth Circuit, and the Fifth Circuit's Internal Operation Procedures (I.O.P.). Write the brief in conformity to these rules.

Here are a few more things to do:

1. Refer to standard treatises, texts, and leading law review articles as well as the cases.
2. Complete exhaustive research of Fifth Circuit cases.
3. As the rules require a statement of the jurisdictional basis for the appeal, recheck to be certain both that the district court had jurisdiction of the case and that the appellate court has jurisdiction of the appeal.
4. Indicate whether oral argument is desired and why, as the rules require. (If neither side asks for oral argument, the case may be disposed of summarily without the unanimity required for screening.)
5. Unless the Fifth Circuit rule is fixed, indicate what rule other circuits have adopted.

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12. A copy of these Local Rules and the I.O.P. can be obtained by writing to the Clerk of Court, 600 Camp Street, New Orleans, Louisiana 70130.
6. Shepardize or autocite every citation.

7. Proofread the brief. (How can the judges be impressed that the legal research and the transcript references are accurate if the brief is full of misspelled words and bad grammar?)

Here now are a few things not to do:

1. Do not give long quotations from other cases.

2. Do not write more than is necessary. A Fifth Circuit judge reads at least 2,500 to 3,000 pages for every sitting, sometimes much more. Repetition and prolixity are abhorred.

3. Do not use jargon and avoid hyperbole. Use terms that are as simple and as easily understood as the subject matter permits. Remember the story told of General Stonewall Jackson. Pressed for an explanation of why he kept on his staff a not-too-bright officer, he replied: "When I have written a field order, I have him read it. If he can understand it, anybody can understand it." Write and talk that way to judges. Some are brilliant, some are bright, some are pedestrian, but all want to understand, and understanding is the condition precedent to persuasion.¹³

The best brief is like a good song. It plays a melody the judge will remember and hum when he writes the opinion. Never be satisfied with the first draft. Rewrite it until it is the best you can do. While engaged in rewriting, ask another lawyer to read the draft and comment on it. Then ask a lawyer, your spouse, or a friend to read it for clarity. Strive for a style that is persuasive, not oratorical. Courts want candor and soundness, not harangue. Play a simple theme, not a soaring cadenza. Avoid sarcasm, disparagement, and ad hominem attacks—especially on the trial judge and opposing counsel.

The appellee, for his part, should not wait until receiving the appellant's brief to start reading the record and doing research. The appellee should know where he will attack. He should be ready to start work on a reply as soon as he receives the appellant's brief.

Keep in mind Justice Marshall's comment:

[I]t is the brief that does the final job, if for no other reason than that the opinions are often written several weeks and sometimes months after the argument. The arguments, great as they may have been, are forgotten. In the seclusion of his chambers, the judge has only his briefs and his law books. At that time your brief is your only spokesman.¹⁴

¹³ Godbold, supra note 4, at 811.
Upon receiving notice that his case has been assigned for oral argument, the appellate advocate should start thinking. Whether appellant or appellee, he should consider the reasons for the case's selection for argument. What issues concern the court? The advocate then should prepare for oral argument. He should first plan what to say. Questions from the bench will take a good part of the time, so a twenty-minute talk should not be planned. Further, time must be saved to reply to opposing counsel. Plan your remarks carefully and make an outline of the argument. You may wish to write a draft of the argument—provided the manuscript stays hidden while in court. Nothing is less apt to catch the ear of the court than counsel's reading from a paper. The advocate should speak from the outline, and he must not read to the court from the brief—except perhaps one sentence from a controlling case. The oral argument should be practiced in advance. No musician would play the simplest tune without rehearsal. The lawyer presenting a major case impromptu, relying on quick wit, is apt to stumble. The appellate advocate should argue the case at least once before two lawyers from his office, asking them to challenge the position taken, to criticize the presentation, and to ask every question they think the court may ask. These questions should raise both legal and factual issues. The advocate also should argue the case before a layman, videotaping the argument to see himself as a court would. Oral argument is the chance to participate with the court as it arrives at a final decision. The court wants light, not heat. The advocate should welcome questions, even those that appear hostile. This is the last chance to affect the court's decision. If the advocate does not understand the question, he should say so: "Your Honor, I'm afraid that I do not fully understand the question." He should be certain to answer all questions. The only way to argue before a "hot bench" is to be flexible. An appellate advocate must not himself get heated. A "hot bench" oral argument is in the nature of a conference between court and counsel. If the brief has been properly prepared, the argument already has been presented to the court in writing. Ideally, in the oral argument, counsel wants to induce the court to indicate, even in the form of questions, something about its view of the case. Only in this way can the advocate take advantage of the opportunity to dispel erroneous or unfavorable impressions and suggest a solution to the problems troubling the court. The appellate advocate should arrive at court in time to watch someone else argue before the same panel, even if this necessitates arriving a day early, for only in this manner can he get the "feel" of the court. He should
know the name of each judge. The advocate thus will be able to con-
sider how to present his argument to three specific persons, not an
assemblage of fungible jurists. Rarely are two players better than
one. Time should not be divided with a co-counsel. The better advocate
should present the entire case. The better advocate is not the one
with the best presence, but the one who knows most about the case.
Make notes during the argument of opposing counsel. If opposing
counsel makes an important point, address it. The advocate must not,
however, let the opposing argument throw him off the track. He must
not descend to a debater’s level by trying to reply issue by issue.
If a question was asked opposing counsel that was not answered or
was answered unsatisfactorily, the appellate advocate should answer
the question in his remarks. The appellate advocate should open
effectively. He should plan and replan his first few sentences until
he knows them by heart without ever having consciously memorized
them. He should stimulate the court’s interest and state plainly in
a sentence or two the main issue or issues to be argued. The advocate
should not say, “This is a tort case.” He should think of a way to
catch the judges’ attention and single out his case. For example, in
an admiralty case, the appellant focused on the issue and dramatized
his case by stating:

May it please the Court. The lower court held that a helicopter
equipped with pontoons that enabled it to land on water was a
vessel when it crashed into the sea from a height of 2,000 feet.
The appellant contends that this is clearly erroneous in fact as
well as mistaken in law.

In a recent criminal case, a mediocre advocate might have started
by saying, “The issue in this case is whether the defendant had due
process.” An excellent advocate took the case out of the chorus and
put it in the special artist class by beginning: “When John Doe was
tried for murder, due process took a holiday. Let me tell you why
I make that statement.”

The most important parts of oral argument are the first two
minutes and the last two minutes. The first two minutes should be
used to arouse the court’s interest and to focus attention on the main
issues in the case. The last two minutes also must be used effectively.
This is the time to give the court the finale. The appellate advocate
should plan in advance what to say in closing and cut short the rest,
if need be, in order to impart this final message. The finale must be
succinct, but it can be dramatic.

**POSTMORTEM CRITIQUE**

Whether he thinks he did well or poorly, counsel should conduct
a postmortem critique of his presentation of the appeal. What counsel
learns will help him the next time. Beethoven's Fifth is a great com-
position, but some musicians play it badly. The case was "composed"
before counsel became the advocate, but how well did counsel pre-
sent it? What themes were played that should be repeated in the
next appearance? What should be omitted from the next program?
The judgment of the court is not the applause of the audience. It
is a judgment on the merits of the case, not on the advocate. The
advocate must grade his own performance.