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Effective Written Advocacy Before Generalist Judges: Advice From Recent Decisions

By Douglas E. Abrams

“The Law is Made by the Bar”

“The best job I ever had.”¹ That is how retired Congressman, federal circuit judge, and White House Counsel Abner J. Mikva remembers the judicial clerkship that began his career 60 years ago.

Fresh out of law school and eager to make their mark, clerks are fortunate indeed for the opportunity to learn from a judge with knowledge drawn from years of experience. But clerks are equally fortunate to learn how much judges in our adversary system of justice do *not* know. Recognizing the limits of one’s knowledge is key to success in any professional pursuit, so lessons in these limits are perhaps the most valuable mentoring of all for clerks destined to spend their careers at the bar.

From the commencement of a civil or criminal case, the limits of the judge’s knowledge reach both facts and law. Judges receiving papers typically lack the familiarity with the case that the lawyers may enjoy from having lived with it before filing. Time spent interviewing clients and witnesses, researching and writing the pleadings, and engaging in other pretrial give-and-take provides counsel a head start on fact finding before the judge enters the picture.

Judges in general jurisdiction courts also may not initially be as familiar as counsel with the substantive law that will decide the case. As American law has grown increasingly intricate and diverse in recent decades, more and more lawyers have opted for specialty practices.² Specialization means that judges may come from private or public sector careers that exposed them regularly to only some of the substantive law that now fills their dockets. Relatively few lawyers practice civil and criminal law simultaneously, and intricate administrative rules and regulations often create doctrine most familiar to specialists.

With these institutional constraints grounded in experience and the complex legal fabric, says the U.S. Court of Appeals for the 7th Circuit, “courts rely on lawyers to identify the pertinent facts and law.”³ Because trial and appellate

courts often severely limit oral argument or eliminate it altogether, identification and persuasion may depend heavily or entirely on counsel’s written submissions.

The reliance cited by the 7th Circuit is a national tradition that actually predates the recent trend toward specialized practice. Trial and appellate judges have long maintained a “symbiotic”⁴ relationship with counsel who “educate the Court”⁵ with argument tailored to the judge’s circumstances, needs and expectations. “The law is made by the Bar, even more than by the Bench,” said then-Judge Oliver Wendell Holmes in 1885.⁶ Justice Louis D. Brandeis concurred as he ascended to the Supreme Court bench in 1916: “A judge rarely performs his functions adequately unless the case before him is adequately presented.”⁷ Justice Felix Frankfurter wrote later that “the judicial process [is] at its best” when courts receive “comprehensive briefs and powerful arguments on both sides.”⁸

Two Strategies for Effective Written Advocacy

Treatises capably explore written trial and appellate advocacy, and this article makes no effort to duplicate their depth.⁹ In recent reported trial and appellate decisions, however, judges themselves highlight two core strategies of written advocacy that bear discussion here. First, advocates should orient the judge who is a newcomer to the case’s facts, and perhaps also its relevant law; and second, advocates should avoid jargon best understood by specialists, which may initially confound the court and frustrate the bond of communication between writer and reader.

Orienting the Court

The judge may not initially be as conversant in the applicable law as lawyers who have specialized in the field for years. “It is unhelpful,” says one district court, “when attorneys write briefs that presuppose specialized knowledge on the part of their readers.”¹⁰

The facts too may initially disorient the trial judge who

did not pore over drafts of preliminary papers or attend the depositions, and the appellate judges who did not preside at the trial or create and assemble the record step by step. Discussion of the facts – the bedrock of most cases, even before application of the law – should not assume the judge’s familiarity with the case. When a brief or other written submission cites to depositions, the trial transcript, or other papers in the record, advocates serve their cause best by explaining the point they mean to explain or support.

Unless the court does its own independent review of the facts and the law, counsel who fail to provide a comprehensible pathway risk forfeiting the opportunity to persuade, and may also risk forfeiting valuable time during oral argument with avoidable questions from the bench. “Dropping a judge in the middle of an alien landscape without a map and expecting him to get his bearings from fragments of testimony couched in occupational jargon to which he has not previously been exposed,” explained one federal district court, “is not conducive to informed decisionmaking.”¹¹

Avoiding Jargon

“[T]he realm of the conflicts of laws,” wrote Dean William J. Prosser in 1953, “is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in strange and incomprehensible jargon. The ordinary court . . . is quite lost when engulfed and entangled in it.”¹² Reminders like these about the law’s frequent complexity remain valuable for 21st Century advocates.

Unadorned jargon may serve a

legal writer’s purpose, or at least may not detract much from it, when the audience consists solely of lawyers trained in the writer’s specialty. But without this foundation of common understanding, warns Judge Richard A. Posner of the U.S. Court of Appeals for the 7th Circuit, “much legal jargon can obscure rather than illuminate a particular case.”¹³

In 2008, in *Indiana Lumbermens Mutual Insurance Co. v. Reinsurance Results, Inc.*, the 7th Circuit held that the parties’ contract did not require the plaintiff insurer to pay commissions to the company it had retained to review the insurer’s reinsurance claims.¹⁴ Writing for the panel, Judge Posner reported that the parties’ briefs “were difficult for us judges to understand because of the density of the reinsurance jargon in them.”¹⁵

“There is nothing wrong with a specialized vocabulary – for use by specialists,” Judge Posner explained. “Federal district and circuit judges, however, . . . are generalists. We hear very few cases involving reinsurance, and cannot possibly achieve expertise in reinsurance practices except by the happenstance of having practiced in that area before becoming a judge, as none of us has. Lawyers should understand the judges’ limited knowledge of specialized fields and choose their vocabulary accordingly. Every esoteric term used by the reinsurance industry has a counterpart in ordinary English.”¹⁶

Judge Posner’s commonsense advice – to write with an eye for the judges’ needs and expectations – is not judicial pettiness. In trial and appellate courts alike, the advice relates directly to the client’s best interests, but also to the sound administration of justice. In an age of swelled dockets and often intricate law, counsel’s

unnecessary reliance on jargon forces the court to waste valuable time demystifying avoidable obscurity. By enhancing the risk that the court will misapprehend counsel’s key points, jargon also enhances the risk that the court will “get it wrong.”

Counsel in *Indiana Lumbermens Mutual Insurance Co.*, Judge Posner concluded, “could have saved us some work and presented their positions more effectively had they done the translations from reinsurance into everyday English themselves.”¹⁷

In *New Medium LLC v. Barco N.V.*, Judge Posner again urged counsel to consider the needs of their audience before writing.¹⁸ Sitting by designation as a trial judge, he instructed the parties that “[a]ll submissions must be brief and non-technical and eschew patent-law jargon. Since I am neither an electrical engineer nor a patent lawyer, . . . the parties’ lawyers must translate technical and legal jargon into ordinary language.”¹⁹

Plain English may warrant counsel’s particular attention when the court reviews an agency decision because, according to the U.S. Court of Appeals for the 5th Circuit, veteran agency personnel may acquire “insights and experience denied judges. The subtleties . . . encased in jargon and tucked into interstices of the administrative scheme, may escape us.”²⁰ “It is the responsibilities of the parties to properly educate the court,” explains a federal district judge, “not of the court to improperly defer to an agency decision.”²¹

Conclusion: Persuading and Assisting the Court

The 5th Circuit may have exaggerated when it likened judges sometimes to “sophisticated uninitiates” when they read or hear

adversary argument.²² Advocates convey no condescension, however, when they write in a respectful professional tone using, as one federal district court recommends, language “intelligible to everyday speakers of English.”²³

As “a representative of clients [and] an officer of the legal system” under the ABA Model Code of Professional Conduct,²⁴ advocates write with dual goals. “First,” said Judge Hugh R. Jones of the New York Court of Appeals, “you seek to persuade the court of the merit of the client’s case, to create an emotional empathy for your position. Then you assist the court to reach a conclusion favorable to the client’s interest in terms of the analysis of the law and the procedural posture of the case.”²⁵

Advocates persuade and assist most effectively with the familiar quartet that marks any legal writing that strives to connect with the anticipated audience – precision, conciseness, simplicity and clarity.²⁶

Endnotes

1 Abner Mikva, *One Case At a Time*, WASH. MONTHLY, May 1, 1999, at 52 (reviewing CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999)).

2 SOL LINOWITZ, *THE BETRAYED PROFESSION*, ch. 5 (1994).

3 *In re Cont’l Cas. Co.*, 29 F.3d 292, 295 (7th Cir. 1994).

4 *Walter Oil & Gas Corp. v. Teekay Shipping*, 270 F. Supp.2d 855, 865 (S.D. Tex. 2003).

5 *Shoshone-Bannock Tribes v. Shalala*, 988 F. Supp. 1306, 1318 (D. Or. 1997), on reconsideration, 999 F. Supp. 1395 (D. Or. 1998); *Rabin v. Concord Assets Group, Inc.*, No. 89 Civ. 6130, 1995 WL 645441 *6 (S.D.N.Y., Nov. 2, 1995).

6 OLIVER WENDELL HOLMES, *THE LAW, IN SPEECHES BY OLIVER WENDELL HOLMES* 16, 16 (1934) (speech delivered Feb. 5, 1885).

7 Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 470 (1916).

8 *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring).

9 See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* (2008); EDWARD D. RE, *BRIEF WRITING AND ORAL ARGUMENT* (7th ed. 1993); BRYAN A. GARNER, *THE WINNING BRIEF* (2d ed. 2004); GIRVAN PECK, *WRITING PERSUASIVE BRIEFS* (1984).

10 *Waddy v. Globus Medical, Inc.*, No. 407CV075, 2008 WL 3861994 *2 n.4 (S.D. Ga., Aug. 18, 2008).

11 *Langston v. Illinois Bell Telep. Co.*, No. 88 C 3578, 1990 WL 129567 *6 n.8 (N.D. Ill. Sept. 3, 1990) (magistrate judge’s opinion).

12 William J. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

13 *Miller v. Illinois Cent. R.R. Co.*, 474 F.3d 951, 955 (7th Cir. 2007).

14 513 F.3d 652 (7th Cir. 2008).

15 *Id.* at 658.

16 *Id.*

17 *Id.*

18 No. 05 C 5620, 2009 WL 1098864 (N.D. Ill., Apr. 15, 2009).

19 *Id.* * 1.

20 *Watts v. Missouri-Kan.-Tex. R.R. Co.*, 383 F.2d 571, 583 (5th Cir. 1967).

21 *Shoshone-Bannock Tribes v. Shalala*, 988 F. Supp. 1306, 1318 (D. Or. 1997).

22 *Dallas Typographical Union v. A.H. Belo Corp.*, 372 F.2d 577, 579 (5th Cir. 1967).

23 *Silicon Graphics, Inc. v. ATI Technologies, Inc.*, No. 3:06-cv-00611-bbc, 2008 WL 4200359 (W.D. Wis., Jan. 30, 2008).

24 ABA Model Rules of Professional Conduct, Preamble [1].

25 Judge Hugh R. Jones, *Appellate Advocacy, Written and Oral*, 47 J. MO. BAR 297, 298 (June 1991).

26 HENRY WEIHOFEN, *LEGAL WRITING STYLE* 8-104 (2d ed. 1980) (discussing the four fundamentals).



Douglas E. Abrams, a law professor at the University of Missouri, has written or co-authored five books. Four U.S. Supreme Court decisions have cited his law review articles.

Correction

In the “Missouri Legal Trivia” quiz appearing in the Winter 2011 issue of *Precedent*, Judge Nannette Baker was incorrectly identified as the first woman to be appointed as a United States Magistrate Judge for the Eastern District of Missouri. The correct answer should have been Judge Carol E. Jackson, who became a United States Magistrate Judge for the Eastern District of Missouri in 1986.

We regret the error and any confusion it may have caused.