

19 TIPS FROM 19 YEARS ON THE APPELLATE BENCH*

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I am now, like the Oldest Living Confederate Widow, the most senior judge on the D.C. Circuit—edging our present Chief Harry Edwards out by nine months or so. To be the oldest living anything is an awesome responsibility, indeed, but one that must be gotten used to, the alternative being what it is. Unlike the O.L.C.W., however, who took some 1,000 pages to spill her secrets, I will try to do it in 19 tips, memorializing each year of my tenure. The 19 tips, incidentally, are distilled from about 2,600 appeals I have sat on and the 800 majority or dissenting opinions that I have written during my 19 years on the bench.

TIP 1

The first hurdle for an appellate lawyer these days in our circuit is “getting there”—not to the circuit court as an institution, but to the judges as individual decisionmakers, the realpolitik of judicial review as it were. The D.C. Circuit has one of the least overwhelming of all dockets, in numbers, that is—in fact there has been some sentiment in Congress and even among colleagues on our own court that we don’t need to fill our 12th judge vacancy at all. Although we hear many complex and important cases, we dispose of far fewer total cases on the merits than other circuits. Of the 25.8 thousand federal appeals terminated on the merits during the year ending September 30, 1997, the D.C. Circuit accounted for only 732, the second lowest of all courts. (By comparison, the Ninth Circuit terminated 4,800, the Fifth and Eleventh over 3,000; even the First

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bottomed out at 696.) But even so, we dispose of over 40% of that relatively small number in summary fashion. That means a panel of three judges, sitting for a few months at a time, assembles itself once every two weeks and proceeds expeditiously, some might even say whips, through 20-30 cases in a morning. If your case is so channeled, candidly, it means the three judges are more likely than not to follow the recommendation of the memorandum written up by the staff counsel; only rarely do the judges read the briefs in full, as they always do for cases on the argument docket. If one judge does evidence some concerns, the case will be kicked over to a regular panel, and then three judges do read the briefs and listen to argument as well. But the bottom line is if you don't make it past that initial barrier reef onto the regular calendar, your case is processed and even perceived in a different light. That can be good or bad, depending on whether you are the appellant or appellee.

Now mind you, I personally don't think many injustices result from the two-tiered system. If anything, the young staff counsels' hearts bleed more profusely than do the counterpart organs of battle-scarred judges. But there is always a longshot that if a judge really reads your eloquent and elegant stuff, she will be caught up in its drama and impressed by its taut logic and realize this case deserves more than garden-variety analysis or gumball-machine reasoning. That is extremely unlikely to happen, though, if one of the staff counsel screens your appeal out for summary disposition. When I came on the court 19 years ago, less than 5% of cases went that route; now it is over 40%. Back then it happened only to small one-on-one civil cases; now it includes many criminal appeals and administrative agency appeals as well.

As I said, if you're counsel for the appellee, the shift is good news (except maybe fee-wise). The case may be all wrapped within 9-10 months from filing and after one brief. (This is to be compared with about 15 months for a fully argued and briefed case.) For an appellant counsel the going is rougher, your burden greater, to get onto the argument track where you can try to engage the judges' interest and empathy on your client's dilemma or in the development of circuit law. It's clear to me, however, that we have little alternative to our tracking

procedures if we are to give adequate time to the more complex and precedent-setting cases—unless of course we adopt Judge Steven Reinhardt’s approach and let a thousand federal judges bloom. Nationally, 60% of federal appeals terminated on the merits get no argument. In 9 of the 12 circuits, the paper route is over the halfway mark; 4 circuits are at or above the 70% mark. The trend is probably irreversible, as numbers grow and judicial resources stay the same or even decrease. But at the same time, I’d be surprised if inevitably a truncated process doesn’t mean we make some wrong calls, and dispose of some cases by a staff-drafted memorandum that might come out differently with more dialogue and a deeper level of thought from the judges themselves.

An appellate counsel’s—particularly an *appellant* counsel’s—first and often most critical job is to get to us, the judges, in a forum where we can give your case careful, individualized attention. This may mean that you should personally write or at least edit and meticulously supervise the initial brief in any case you care about, so that it fully reflects the novelty or the seriousness of the case and its worthiness in terms of the time and effort three judges must spend reading the briefs and listening to argument. Once you’re consigned to the summary docket, unless your case is so clearly right it’s a slam-dunk, and that’s why it’s there, your chances of winning (though by no means impossible) are much slimmer.

TIP 2

This one is about appellate brief-writing. The more paper you throw at us, the meaner we get, the more irritated and hostile we feel about verbosity, peripheral arguments and long footnotes. In my 19 years on the court we have by judicial fiat first shortened main briefs from 70 to 50 pages, then put a limit of 12,500 on the number of words that can go in the brief, and in complex, multi-party cases our staff counsel threaten and plead (we get into the act ourselves sometimes) with co-counsel to file joint or at least nonrepetitive briefs. It’s my view we can, should and will do more to stem the paper tidal wave. Repetition, extraneous facts, over-long arguments (by the 20th page, we are muttering to ourselves, “I get it, I get it. No more for God’s

sake”) still occur more often than capable counsel should tolerate. In our court counsel get extra points for briefs they bring in under the 50-page limit. Many judges look first to see how long a document is before reading a word. If it is long, they automatically read fast; if short, they read slower. Figure out yourself which is better for your case. Our politicians speak often of judicial restraint; I say let it begin with the lawyers whose grist feeds our opinion mills.

The worst example of the judicial sore-eye phenomenon in the D.C. Circuit is the intervenor’s brief. You won at the agency level; the agency is defending its ruling on appeal; but you may think you as counsel for the winner below can say it nicer than the overworked agency counsel. Please don’t. Ninety percent of intervenor briefs in my experience add little or nothing; a very few may provide some additional vantagepoint that for some institutional reason, the agency doesn’t care to use. But from the court’s point of view, if the agency and intervenor counsel can agree on a brief, that’s nirvana; even if they can’t, the intervenor should isolate the new idea or extra facts in 4-5 pages. The full 50-page treatment of the same facts and issues the agency has already addressed makes sense for only one real-world reason, which I won’t even state out loud. It never carries the day and the burden of reading, storing, and even eventually destroying 40 copies makes it just plain inefficient.

With the docket the way it is—and growing (federal court appellate filings went up again last year)—we judges can only read briefs once. We cannot go back and re-read them, linger over phrases, chew on meanings. Your main points have to stick with us on first contact—the shorter and punchier the brief the better. And yet—this may seem inconsistent—everything that counts has to be in there. Our court, at least, has gotten ever more strict with the passing of time in its waiver doctrines as to what you can raise at argument or even in a reply brief, if you didn’t raise it in your main appeal brief. Afterthoughts and new opportunities at oral argument—even if provoked by a judge’s questions or comments—are seldom tolerated. The same goes for raising issues for the first time on appeal, unless, of course, they are jurisdictional (whatever that means) or there has been an intervening hit from the Supreme Court just on target.

Confident counsel should almost always go for broke and rely on their one or two best arguments, abandoning the other 9-10 wish-list entries. There is, of course, always some small risk of dropping an argument that might appeal to one or two judges, but I can assure you in the vast majority of cases that possibility is theoretical only, and the fewer arguments you make the more attention they will get from us in preparing and disposing of your case. We tend to engage ourselves more intensely with a few strong issues than with a strung-out list of 10 reasons why the decision below needs to be reversed. Judges become euphoric on encountering a brief that begins, “The *only* issue in this case is” On the other hand, with the top 10-type brief, the presumption in favor of the decision below kicks in when you reach Nos. 3 or 4 and with each succeeding argument, you have a higher psychological threshold to surmount.

TIPS 3-7

Tips 3-7 are quickies on brief-writing.

3. Visualize the whole before you begin. What overriding message is the document going to convey? What facts are essential to the argument? How does the argument take off from the facts? How do different arguments blend together? Better still, if it’s a brief, visualize the way the judge’s opinion should read if it goes your way. (Too many briefs read as if the paralegal summed up all conceivably relevant facts, and then the lawyer took over with the legal arguments, and never the twain doth meet.)

4. Make the facts tell a story. The facts give the fix; spend time amassing them in a compelling way for your side but do not omit the ones that go the other way. Tackle these uncooperative facts and put them in perspective. (Too many times the judge reading both briefs will not recognize they are about the same case.) If you’re appealing, make it seem like a close case, so any legal error will be pivotal. Above all, be accurate on the record; a mistaken citation or an overbroad reading can destroy your credibility vis-à-vis the entire brief. Describe what happened low-key (“Just the facts, ma’am”) with no rhetorical or judgmental flourishes—well done, the facts should make your case by themselves.

5. Think hard before writing what the “Issue” is. This provides the lens through which the judge-reader filters the rest of the brief. Avoid abstractions; make it a concrete, easily understood question to which the answer is inevitable after you read the upcoming “Fact” section. (If your facts are terribly unsympathetic, you may be driven to describing the issue in abstract, formalistic terms, but do so only as a last resort.) Use neutral words; don’t mix it up with argument or rhetoric; be especially fair in stating the real issue.

6. Be sure and tell why it is important to come out your way, in part by explaining the consequences if we don’t. The logic and common sense of your position should be stressed; its appropriateness in terms of precedent or statutory parsing comes later, i.e., the state of the law *allows* this result, rather than *requires* it. In complex cases, you need to fully understand the real-world dispute to write accurately or convincingly about consequences; more cases are decided wrongly by judges because they don’t understand the underlying problem than because they read cases badly. Perceived confusion or ignorance on the part of counsel about “what really happened” can be fatal.

7. In the same vein, don’t over-rely on precedent; few cases are completely controlled by it. If yours isn’t, don’t pretend it is. Precedent can be indicative of a trend or persuasive in its reasoning, but concentrate on saying why rather than declaring victory on the basis of a 1967 opinion. Judges like a “novel question”—it makes them feel more important.

There is another caveat about precedent I will mention. Some judges like certain precedent and intensely dislike other precedent. How can you know which precedent is which ahead of time? Well, it’s certainly not worth some big shark hunt, but over time you may glean from opinions which judges on other circuits, or even which circuits, or which past or present judges in their own circuit, certain judges like or don’t. For example, some of our D.C. Circuit judges admire Seventh Circuit precedent very much and appear quite skeptical about many products of the Ninth. Where this kind of knowledge is at your fingertips, it’s useful because judges have an institutional interest in nourishing and propagating precedent they like and in starving and diminishing that which they don’t like. I’m not

suggesting manipulation or brazen omission—if a case is on point either way you should cite it. But conversely if it's not essential to your case and you know the judge doesn't approve of it, you may not wish to cite it. Nowadays in our circuit, citing Judges Bazelon's or Wright's decisions on standing, defendants' rights, or criminal responsibility is not the sure route to success. On the other hand, a solid Leventhal precedent can go a long way. He is, not surprisingly, the most frequently cited ghost of judges past in our circuit's opinions.

As for citing the judge's own precedent back to her, you have to be careful there too. First of all, if she has been on the bench as long as I, she probably won't remember what the case was about or even which way it held. Second, it can be overdone and look like pandering. However, to cite other judges' rulings on a relevant point and leave out the sitting judges' own contribution can create irritation. In general, analogizing to liked precedent—even if a bit removed—and distancing from unliked precedent—unless it's squarely on point—makes the most sense.

TIP 8

My advice on short, punchy briefs clearly raises a dilemma for those of you who handle the mammoth regulatory cases that wind up on our special complex track. Every year, about a dozen cases—those with the longest records, the greatest number of issues, and the most parties—get put on that track. A special panel is then assigned to the case, briefing runs to the thousands of pages, oral argument goes on all day and sometimes into the next, and the panel members inevitably split up the opinion-writing task, which itself runs into hundreds of printed pages. For instance, in a recent FERC opinion on review of Order 636, which radically restructured the natural gas pipeline industry, there were 529 parties to the agency proceedings below, 151 in our court; the order under review took up 339 small-type double-column pages of the Federal Register, 1,000 briefing pages and our opinion was 170 pages long. In that setting it is not so easy to be brief and punchy, so we, the court, and you, the counsel, have no alternative but to buckle our seat belts and take off.

However, perspicacious counsel should always be on the alert for how the internal processing differences associated with the special complex track panel can subtly affect their chances of success. Although typically in our circuit every judge does his or her own preparation for a regular case—no bench memoranda or even comments on the cases are exchanged beforehand—that is not true for these monster cases. For them, we usually divide up the bench memoranda between chambers so that we all feed off of the same clerk work before argument like the members of the Supreme Court do on their clerk pool for certiorari petitions. And, at the other end, the dimensions of the opinion-working task are so great that there is demonstrably a stronger pull toward consensus. You will note few dissents in complex cases; basically we stand or fall down together from fatigue. Thus, if you are the appellant in one of these three-ring circuses, you must usually have a very strong case against the agency; the close calls will be made for the agency, and the likelihood of a strong dissent leading the way to an en banc or even certiorari granted is near-zero. The Supremes are too smart to take one of these babies. Your challenge really has to stand out among the 30 or 40 others being simultaneously argued, any or all of which might merit its own dialogue had it been heard alone in a separate case. Agencies must love the complex track, but caveat petitioners.

There is also the risk in these day- or days-long arguments with so many counsel that each issue and counsel will get a very small allotment of time for argument—5-10 minutes, on the average, sometimes as little as 2-3 minutes. Up/down, up/down all day long; it's hard to make your cameo appearance memorable in those circumstances. I'm surprised—maybe I'm not—that more counsel don't join forces and let one of their ranks take on several points in a decent block of time. But perhaps the clients would not understand. Anyway, the government, which generally has only one or two counsel argue the entire case, gets an advantage in continuity and flexibility here when confronted with 12-15 private counsel on the other side. Don't think the David/Goliath analogy is lost on the government—or possibly even on the court.

TIP 9

While we're on special proceedings, let me talk a bit about en bancs. They spell cruel and unusual punishment for all concerned. Think before you ask for one. We get hundreds of petitions but grant on average less than six a year. The Ninth Circuit led with 16 in 1997, and the Fifth was second with 15. Federal Rule of Appellate Procedure 35 says that en bancs are disfavored and ordinarily will not be ordered except when necessary to secure uniformity or for a question of exceptional importance. Those have not been the de facto criteria in my experience. En bancs most often occur when a majority feels strongly that the panel is wrong about something they care a lot about or which may be precedential outside the confines of the immediate case. Every judge writes panel opinions (or dissents) in the shadow of an en banc and when there is the threat of one, panel majorities will often try to conciliate opponents or temper rhetoric in a supplemental opinion on rehearing; they may pull back from excessive rhetoric, too-broad holdings, or clarify the scope of the original opinion. En bancs usually follow a strong dissent, but can also be provoked by a unanimous panel composed of a philosophical minority on the court. I once sat on a now-notorious panel that had three unanimous decisions en banc-ed and one reheard by the panel to forestall an en banc. One of the en bancs went on to the Supreme Court, I might add, which reinstated two-thirds of the original panel opinion. That is what can happen in a conflicted court. *The Washington Times* opined at great length about why the panel could not have been chosen at random (it was) because the chance of having those three judges get those particular issues (gays in the military, a notorious libel suit against *The New York Times*, and the FCC's indecency rules) in one sitting was greater than being struck by lightning or being kidnapped by terrorists while vacationing in Europe.

At any rate, remember four things about en bancs before you jump to ask for one when you lose before a panel:

- (1) They take a long time, often up to two years before the court can assemble itself and get all the opinions written. If your case is really hot, you could be up on certiorari long before, and chances are either you or your opponent will go for certiorari

anyway afterwards. As court of appeals dockets go up, the Supreme Court's steadily declines—only 86 cases argued last year.

(2) There are apt to be many en banc opinions written—likely a plurality and several other unclassifiable opinions rather than just a majority and dissent—so that the law is not necessarily the clearer or cleaner for the exercise.

(3) An en banc is like a constitutional convention. Everything—in circuit law—is up for grabs. The decision may emerge on grounds argued by neither party and desired by neither party. Advocates lose control since judgepower is at its zenith; except for Supreme Court precedent, the decision can go anywhere. You, the counsel, no longer hold the road map.

(4) Since en bancs so often occur in fundamental value-conflicted cases, astute counsel can pretty well predict the outcomes on the basis of past positions taken by the judges. If you don't have a shot at winning an en banc, all you do is risk an even stronger set of nails in your coffin.

Oral argument, which I'll speak about generally later on, in an en banc is an especially perilous undertaking. The mere fact that an en banc has been commenced usually means that the court is divided and panel members in the majority are already unhappy. Many more of the judges' questions in en banc arguments seem to be motivated by the desire to establish rather than explore positions or to defuse the positions of other judges. The counsel is often the woman in the middle of an intramural contest. She may not be aware of the real reason why the en banc was voted or what the court thinks is really at stake. The judges may have their own agendas as to what precedential underbrush the en banc will clear out or even what brand new doctrinal formula it will encapsule into law—with or without aid of counsel. It's also harder to control the flow of questioning from 11 judges than from 3. More judges means more interruptions, cross-conversations between judges, and attempts to bind counsel to or divorce him from another judge's articulation of the issue or the acceptable resolution of it.

In sum, more is not always better, so think before en bancing. A really important case will likely go up anyway; a really wrong decision is worth a preliminary try at the en banc, but most of the rest bring much hassle and little success.

TIP 10

Oral argument. The importance of oral argument has always been in contention. I think it is very important in close cases. A judge's physical presence in the courtroom alongside the counsel with the opportunity to engage in a one-on-one dialogue (or more accurately a three-on-one dialogue) produces a qualitatively different stimulus to the judge's creative juices and perceptions of the issue than the isolated experience of judge alone with cold briefing text. I don't mean to get metaphysical about it, but I do think argument affords the talented counsel a real second chance to make his case. It is not unusual for a judge to come to conference after an argument saying, "I came into the courtroom with a tilt toward the appellant (or appellee); now I'm not so sure at all." And that's it in a nutshell. Oral argument seldom brings you 180 degrees around, but if your tilt is, say, 50-49%, it can make a big difference. For one thing, it allows the judge to pin counsel down on points or casual comments they gracefully glided over in the brief. It allows the judge to make sure her understanding of the facts is right, and it requires counsel to explain why he omitted something that bothers the judge. Forthright and persuasive counsel can often carry a judge over the 50% edge; slippery or unprepared counsel can push her further away from the brink.

Of course you are aware that in many countries, Anglo-Saxon and Continental, counsel may argue to their hearts' content, and it is written submissions that are limited. In our own country I often hear older counsel nostalgically complain that the time for oral argument has diminished over the years until it is now totally inadequate. They are right; the time has gone down, but I think they are wrong in claiming they do not have time to make their case. It is interesting that in the complex cases I spoke of where the total amount of time for each side is much greater, counsel often don't use up their full allotment and we come in under the line. In addition, because at least in our court we rarely if ever cut counsel off when he is answering judges' questions, I have seen skillful counsel parlay 10 minutes into a half-hour by keeping the court engaged. Generally,

however, the argument just peters itself out within the assigned time limit.

TIP 11

No matter how much time you are allotted, a “hot bench” may use it all up in what the judges want to talk about, leaving counsel no time to make his neatly organized and focused presentation. The worst-case scenario is the “seduce and abandon” technique of some judges who keep counsel skewered on some peripheral line of argument, which when the opinion comes down turns out to have had no relevance at all. That’s the paradigmatic “life is not fair” case. We once had a petition for rehearing (from a pro se-er) complaining that he never got to make his argument because the judges asked so many questions. Ordinary counsel would not have dared to say it, but he had a point. It’s an intensely frustrating experience and even the judges themselves have no notice when one of their members is going on a verbal bender. The only advice I can give is to ask at the end for a minute or two to sum up the key points you didn’t get to make. Often the other judges will be sympathetic to your plight and let you have it. And, of course, you may never prophesy how a close case will come out by the way the judges act at argument. After all, that one week a month in court is the only recreation an appellate judge gets from the paperwork and she will likely act up, play devil’s advocate, lead you down primrose paths and pounce at the dead end. Later in conference she will say she was having some fun, testing the waters, seeing how far you would actually go on a point.

Which leads to the even more ticklish problem of judges who abuse counsel from the bench. Some do. They denigrate, demean, belittle, and yell, knowing counsel cannot answer back. Lamentable, yes; unfair, yes; avoidable, no. It’s scant comfort to beleaguered counsel to know that their colleagues on the bench often do worry abusive judges a bit afterward, though I must admit the intractable ones are practically unrehabilitatable. You just have to stand your ground, keep your dignity, don’t stoop to their level; again, their colleagues will respect you for it. Actually, I think that’s why lawyer evaluations of judges are probably a good thing; every judge ought to read how those on

the other side of the bench perceive her judicial temperament. Verbal abuse of counsel is like spanking a child; the adult may think he is acting for the child's benefit, but the relative bargaining position of the participants is so basically unfair, it rarely accomplishes anything but hostility.

TIP 12

Tip 12 is a sidebar. Making concessions at oral argument (or in briefs) is a two-edged sword. If they are not critical, they can increase your credibility with the judges. Abandoning a losing argument doesn't hurt you much; it's better than looking like King Kong batting away a hundred one-engine planes on the top of the Empire State Building. But always remember, there is a recorder in the room, as well as three busy law clerks taking notes, and any concessions you make will be picked up and may be cited against you in the opinion. That is why you often see one judge on a panel engaging in a rescue mission of counsel from some answer he gave to a question by another judge that will predictably be used by that judge as a quotable concession. Think hard about the predicates of judges' questions—your implicit acceptance of them is often more dangerous than any answers you will give to the main question.

I sometimes think that there ought to be a rule like the FTC issued for door-to-door or telephone solicitations. Counsel gets 48 hours in which to renege on concessions made under pressure in the courtroom. But there isn't, so the best I can say is be careful.

TIP 13

Apart from an acceptance of the "life is not fair" motif to oral argument, probably the most important thing for an appellate lawyer is to "know the record." It is not good enough that the paralegal or the associate who drafted the brief knows the record inside and out; the lawyer who argues the case must. I concur with Chief Justice Rehnquist's lament about oral advocates who depend too heavily on their subordinates in writing the brief, and who cannot answer questions about the basic case or the record. The more arcane the subject matter (at

what temperature does ICPD vaporize is the food on which the D.C. Circuit beast feeds), the more intimate with the record the advocate needs to be. All the questions of fact and expert opinion that the brief may have raised in the judges' minds will surface at argument, and nothing frustrates a bench more than a lawyer who does not know the answers. Your credibility as a legal maven spurts as soon as you show familiarity with the facts of the underlying dispute. *Chevron I* and *II* will get you only so far, even in our court.

Admittedly, in some of our complex regulatory cases, the record is tough going. The Department of Justice lawyers who argue for the EPA or other agencies are sometimes at a handicap themselves; generally, they keep an agency counsel at close range for the expertise-oriented questions. But when a lawyer cannot smoothly answer a question securely rooted in his knowledge of the record, the specter of a remand for inadequate explanation by the agency comes quickly to the fore. If you watch, we don't ask you so many questions about the meaning of precedent as we do about the underlying dispute in the case: What is it really all about? Why does one party care so much about a few words in an agency rule? Of course counsel can always offer to submit record cites after argument, but inability to locate them onsite definitely detracts from the image of her being in complete control of the case.

An aside on the importance of a well-developed record: Many—if not most—appeals are won or lost in the trial court or the agency, where the record is made in the first place. I have personally seen several worthy constitutional issues forfeited because the challenging parties were so anxious to get to their brilliant legal arguments that they pushed prematurely for summary judgment, stipulating problematical facts in order to get there. Those stipulations in turn decidedly influenced the way the constitutional issue was decided on appeal—usually to their detriment. Few statutory or constitutional issues are really so pure that they can be decided completely apart from their contextual moorings. Factual concessions made or factual issues not disputed below can be fatal on appeal. A fully-developed record is like a warm, woolly comforter to an appellate lawyer; you can wrap yourself up in it in all sorts of ways, and store many goodies in its folds. A summary judgment Statement of

Material Facts Not in Dispute is often a thin and threadbare substitute.

TIP 14

If your court is divided philosophically, and on our court most panels are, your best bet is to strive for a narrow fact-bound ruling that will not force one or two judges to revisit old battles or reopen old wounds. “This case is not like . . . ,” the banner goes. “It is all by itself; it will not require overruling old precedent, or breaking new ground.” You want to win unanimously; you do not want a messy dissent to provoke a petition for en banc or even certiorari. On a divided court, big forward or backward (depending on your point of view) leaps in the law come usually only in en bancs, or if they do come in a panel, often end up in en bancs. Take your narrow, “for this case only” holding, hug it to your bosom, and run.

TIPS 15-17

15. These next three tips are on style, a subject about which I may be unqualified to speak because Judge Posner says I have none. Nonetheless, as a general principle, your brief is better with it than without. The well-turned phrase in a brief can capture a judge’s attention, which tends to wane after 60,000 words of legalese; the surprising allusion can set her thinking along different lines. In argument, too, though a serious manner is usually *de rigueur*, an occasional witticism or comparison with some other aspect of life—sports, movies—can lighten the somber atmosphere and even create a kind of commonality between judge and counsel. Pepper your briefs or argument with relevant metaphors or quotations and I can guarantee the best ones will reappear in the judges’ opinions. But strained attempts at humor or passion usually end up embarrassing everyone. And the worst of all is to misquote or misattribute a quotation and have the judge correct you. You can’t sink much lower than that.

16. Don’t engage in unanchored accusations or swipes at your opponent’s work-product; if you have a gripe, tie it to a specific mistake or miscite. Examples of “no-nos” taken from a recent brief include general allegations that the author’s

opponent “misstated issues and arguments raised by appellants,” “made selective and incomplete statements about the evidence,” “distorted the causation issue.” Judges’ eyes glaze over as we read that kind of prose.

17. And lastly, proofread with a passion. You cannot imagine how disquieting it is to find several spelling or grammatical errors in an otherwise competent brief. It makes the judge go back to square one in evaluating the counsel. It says—worst of all—the author never bothered to read the whole thing through, but she expects us to.

TIPS 18-19

These final two are philosophical:

18. Fight like the devil but be prepared to lose, especially if you are the appellant. Last year we reversed or remanded in less than 15% of our terminated appeals—that number has been going down recently. In less than 3% of our total appeals and in less than 11% of our published opinions was there even a dissent. In less than 38% of our cases was there even a published opinion. In the 1997-98 term, the Supreme Court took seven of our cases and affirmed our court in five. Think about those odds before starting the appeal ball rolling. Yours may of course be the *pièce de résistance* of our next term, but do a reality check anyway.

19. On the way up, consider settlement or mediation or whatever peaceful processes are available for resolving the underlying dispute. The old shibboleth was cases don’t settle on appeal—the winner below has no incentive to settle; the loser has nothing more to lose; and the expenses of appeal are relatively low and so present no impediment to forging ahead. Government lawyers particularly have no fee problems and see no gain in not going for broke. That’s not the way it has turned out, however, in our government-litigation-dominated court. We are mediating 60-70 cases annually, one-third of them involving the federal or local government. About one-third of all mediations end in the appeals being dismissed, many of them class actions and involving lots of money. It is worth remembering that in a majority of wins on appeal, the victory is not clean; the case is only remanded for a new trial or a new

agency determination. The ultimate result remains at risk. The common wisdom around the court is clients like mediation; lawyers not so much, maybe because litigation is in our blood. But think about the “less travel’d” path and whether it won’t bring you home faster in some cases.

CONCLUSION

Somehow it seems prosaic to count the passing of the years by the things you have learned about how an able advocate should present a case. Yet our legal system is based on the notion that two sides of any issue well argued will permit an impartial judge to rule justly. It may be an imperfect theory, but it’s all we’ve got. Justice, like the rest of life, is becoming increasingly complex; courts have less time for even the fleeting contact that oral argument entails. Much more emphasis has to be put on making one’s case stand out enough that it will actually engage the judge in reading your brief to begin with; debatable as the concept has become, there is, inevitably, creeping bureaucratization of the judging process—special panels, law clerks, staff counsel. In most cases those shortcuts will not change the result or corrupt the development of the law. But it is the unusual, the aberrational, the special case that counsel and judges live for, and it is in both our interests that that case not be smothered in the heap. I hope my 19 tips—never mind my 19 years on the court—will contribute a little to making sure that doesn’t happen to any of you.

