CHAPTER SEVEN

APPELLATE AND ADR ARGUMENTS . . . & ETHICS

ADR AND APPELLATE COURTROOM BEHAVIOR POTENTIAL FACT SITUATIONS

OMIT DRAMATICS, HISTRIONICS & LINGUISTICS:

1. Appellate advocate successfully used demonstrative evidence dramatically presented with erudition histrionics, and high flown linguistics in the trial court, and decided to stay with this winning combination in the appeals court.

Comments:

Low-key (although loud enough so we can hear), courteous, conversational presentation concentrating on essential facts and legal principles is the proper appellate approach. Helping the judges comprehend and understand the root reasons why the judgement should be in your client's favor can best be accomplished without emotional theatrics and drama. This is also the best way to seek to persuade the court to your side.

KEEP OBJECTIONS AND DISRUPTIONS ON THE BACK BURNER:

2. An attorney makes an extravagant or doubtfully correct presentation of facts during argument. The quick-

thinking counsel on the other side believed it appropriate behavior to enlighten the court by interrupting, objecting, and interjecting correction of factual errors made by his opponent.

Comments:

It is ethically improper for objections, disruptions, and interruptions to be made during opponents argument. Our court does not have a court reporter present, and you are not perfecting a record. You must patiently wait your turn to comment on the facts, and an alert presiding judge will immediately call you down if this mistake is made.

TAKE CARE IN ASSERTING CHARGES OF IMPROPRIETY:

3. Three days prior to oral argument before the appellate court, appellant files a supplemental brief with the clerk's office, and serves opposing counsel by mail. The judges on the panel have an opportunity to review the brief before oral argument, but counsel for appellee does not receive the brief until the day of the oral argument. You feel that opposing counsel has conducted himself inappropriately, and you make suggestions and accusations of impropriety against opposing attorney.

Comments:

Appellant's counsel actually has done nothing wrong, and it is borderline unethical for appellee's counsel to approach the court and accuse the other side of impropriety. It is just as improper to raise a smoke screen by an insincere charge of impropriety as to commit the alleged impropriety itself. While it may be preferable to try to be certain the other side gets the supplemental brief before argument, our rules provide that supplemental briefs can be filed any time before decision. You

must know your rules before you get to court.

WHISPERING, TALKING & READING NEWSPAPER DURING ARGUMENT:

4. Lawyer in making his first appellate argument brought his family with him to the courtroom to hear him argue. One of them tape-recorded his presentation. The lawyer admonished them to whisper and not make too much noise.

Comments:

Our Rule 8 prohibits talking, whispering, making noise, and audibly reading briefs. Whispering to clerk of court when coming into court after it convenes is prohibited. Advanced permission to use a tape-recorder must be procured from the court. Don't be one of the lawyers who sometimes violate this rule on "No noise" in the courtroom. If you want to read the morning newspaper, audibly read your brief or talk, go to the lawyers' lounge or out into the hall, provided you leave and return between arguments, and not during an argument.

DON'T CASTIGATE LAWYERS, JUDGES AND THE OTHER PARTY:

5. Appellant lawyer states: "The District Attorney doesn't seem to be here. I thought this case was important enough to take the time to argue it. Apparently the D.A. doesn't think this case is important or he would be here."

Comments:

The D.A., as any other counsel, may waive oral argument under Rule 8, and the discourteous remarks by the lawyer as to the D.A.'s absence violate our Rule 10. Don't

castigate other lawyers or belittle the Trial Judge or Appellate Judge.

ANSWER QUESTIONS DIRECTLY AND FORTHRIGHTLY:

6. When one of the judges asks a specific question, the lawyer responds by suggesting that he will cover this question or issue during the next part of the argument.

Comments:

This delay may turn off the judge who up to that time was interested. Also, the lawyer might use up his time and never get to answer the question. The lawyer must discipline himself to listen when the judge is asking the question . . . he must understand the entire question and then answer it directly and forthrightly. Don't evade the question. You can answer yes or no and then qualify your answer with appropriate comments.

DON'T BE HOSTILE TO THE JUDGE:

7. The lawyer candidly, in response to the judges' interrogation, states, "The court is in error" . . . or, "I disagree with the court. . ."; or say, "Judge Jones, I can't agree with you."

Comments:

Don't be hostile to the court. The judge is not your adversary. Speak in the third person, such as, "Appellee's position is based on that proposition, but it is rejected by the language and history of the statute." When your argument is less personal it will be more precise, pleasant, and profitable.

RECITING POETRY, SINGING ONE'S ARGUMENT IS NOT ENCOURAGED:

8. Lawyer, in order to gain court's attention, recited poetry, singing the following:

"In 1974 begins the story,
When Georgia car insurance became mandatory;
It added "no-fault" P-I-P,
And victims couldn't sue without serious injury.
X marks the spot, for optional P-I-P,
X marks the spot, we can't take any lip,
Who shot State Farm? The butler did it!
Keep up with the Joneses, your good neighbor gets it."

Comments:

As Judge H. Sol Clark admonished, Don't "Be a smart alec; humor has no place in an appellate argument." While poetry might not be per se an ethical violation, it may be better to omit it. This is said in spite of the fact that several appellate opinions are written in verse, one by Judge Eberhardt and one by Judge Evans.

PLANT A FLAG IN YOUR FURROW:

9. The appellate lawyer reasons that just as the two best baseball hitters usually bat in the 3rd or 4th position, it might be well to save his best two points in the case to 3rd or last, and, wind up by springing the best at the last minute, hoping for a home run as an impressive climax to his argument.

Comments:

Stress your strongest point first so that the court may interrogate you on your main issue. As Judge H. Sol Clark

advises, "Tell it early, tell it short, tell it plain . . . and go for the jugular." Former Chief Justice Hill has said: "Plant a flag in your furrow, and say, 'Look, here it is' . . .an Appellate Court can't find a needle in a corn field but it cannot overlook a boulder in a furrow." Put your best foot forward. Don't delay.

DON'T MISSTATE THE FACTS OR THE LAW:

10. A good lawyer should stress the facts and the law; but sometimes he superficially and simplistically stretches the facts supporting his client's position in his appellate argument.

Comments:

Don't misstate the facts or the law. If you are extrapolating a legal proposition from a case, say so, and don't represent that the case directly stands for that proposition.

"False suggestions of fact can have no more toleration at the Bar than elsewhere. That they are made at the Bar is no excuse for them, but rather the contrary, for there, if anywhere, truth of fact is essential. And truth of law is no less essential or less sacred. To fabricate law and utter it as genuine, knowing it to be forged, is quite as reprehensible as to invent fact."

YOUR CHALLENGE SHOULD BE IN GOOD FAITH:

11. The lawyer figures that about one out of every five or ten cases that come out of the Supreme Court and Court of Appeals are reversed, so even though his appeal may be a little weak maybe he can try his luck or delay the whole thing a little more, or at least pick up an additional fee while getting experience.

Comments:

Some say the courts seem to be flooded with frivolous appeals, and with dilatory and other tactics of delay. Counsel should reread Yost v. Torok (Case No. 42789, Decided June 25, 1986), and compare OCGA § 9-15-14 and OCGA § 5-6-35 (House Bill 1146), Effective July 1, 1986. Note also Court of Appeals Rule 26 (b) and Supreme Court Rule 14, as well as OCGA § 5-6-6, relating to frivolous appeals. Chief Justice Bleckley has also noted: "The only moral conditions necessarily involved are that any challenge made should be made in good faith, and for the purpose of raising a real, not a frivolous or mere sham question, and that the motive of challenge should be, not to trifle, vex or delay, but to conduct real business with business directness and dispatch. To filibuster in court is no less immoral than to filibuster in Congress or the Legislature."

STRATEGY IS O.K.; BUT LEAVE OUT STRATAGEM:

12. Don't ask for extensions or exceptions to rules without good and solid reason. Don't fabricate a reason. Seeking frivolous extensions trifles with the courts. Don't seek to cover up with cosmetics and camouflage when there is a duty to disclose. Good ethics prohibits a lawyer from asserting a position that he knows is frivolous. Bleckley has said: "The Bar is no place for sham or dissimulation, whether in speech or in action. In legal attack and defense, there is a field for strategy, but none for stratagem. Litigation, though contest, is not war but peace; its rights are pacific, and so are its methods and morality. It accepts the service of art in the sense of skill and in the sense of address, but not in the low sense of artifice, trick, trap, subterfuge or chicanery." "Truth as a whole, being divisible, we may divide it, utter some and keep back the rest, but we are not at liberty to cut it into slices

so minute that what we put forth will mislead or deceive. We are bound to give our communications bulk enough to make them rightly understood, when fairly interpreted, so far as they go. Like some drugs, truth is often poisonous in small doses. We must take care to issue it in doses large enough, if not to medicate, at least to be harmless, and, in paying all of our debts, to over-pay rather that fall short."

BE PROFESSIONAL AND RESOURCEFUL:

13. In a hurry on a rainy day to get to court, lawyer John Doe put on his rubber galoshes over his shoes, donned his raincoat, picked up his umbrella, but arrives at court without his coat and tie. He quickly sought permission to make this one-time emergency appearance without a coat and tie.

Comments:

Professional pride of an advocate demands strict adherence to our court rule of proper attire during courtroom attendance and appearance. The only exception is non-lawyer visitors and pro se parties acting as their own attorneys. Proper attire may be hard to define, but judges know it when they see it. Lawyer John Doe should leave his rubber galoshes and umbrella in the hallway and borrow a jacket and tie from other judges not on the bench or from law assistants. One's shoestring tied in a bow might pass, in a pinch, as a necktie.