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Abstract

There seems to be a prevailing assumption that advocacy before the United States Court of International Trade (CIT or the court) somehow differs from advocacy in general. I suggest that to a large degree it does not. Despite the similarities to practice in other courts, there are a few matters worth noting about practice in a court that is designed to interpret a few statutes in a uniform manner, especially statutes that are intended to be comprehensive. Now that I have stated the general rules, I would like to mention a few somewhat more philosophical considerations and exceptions.

REMARKS ON ADVOCACY BEFORE THE UNITED STATES COURT OF INTERNATIONAL TRADE

*The Honorable Jane A. Restani**

There seems to be a prevailing assumption that advocacy before the United States Court of International Trade[1] (CIT or the court) somehow differs from advocacy in general. I suggest that to a large degree it does not. The issues that arise before the court involve the full range of legal issues present in the civil arena.[2] The court faces a variety of the usual federal jurisdictional, standing, and sovereign immunity problems, as well as problems of statutory construction and application of seemingly conflicting precedents. The issues relate to administrative law, constitutional law, contracts, equity, and torts, as well as to substantive international trade law. Furthermore, "international trade law" is a hodgepodge of classification and valuation questions under the tariff laws; other laws regulating, restricting, or prohibiting importations and the import process; and, of course, laws relating to remedies for "unfair trade

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* Judge, United States Court of International Trade. These remarks were presented in large part as a speech to members of the Litigation Section of the American Bar Association in New York City, on August 12, 1986.

1. The United States Customs Court was transformed into the United States Court of International Trade [hereinafter CIT or the court] by the Customs Court Act of 1980 (CCA), 28 U.S.C. § 251 (1982), to "create a comprehensive system of judicial review of civil actions arising from import transactions." S. REP. No. 466, 96th Cong., 1st Sess. 3, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 3729. Under the CCA, the CIT was given expanded jurisdiction and the full powers of a United States District Court in order both to clarify the confusion concerning jurisdiction over international trade matters and to implement the Trade Agreements Act of 1979, 19 U.S.C. § 2501, *et seq.* *See* INTERNATIONAL TRADE REPORTER, Reference File, (BNA) 98:0101 (Sept. 17, 1986).

The CIT consists of nine Presidentially appointed judges, 28 U.S.C. § 251(a), and is located in New York, New York. *Id.* § 251(c). The chief judge, however, may designate a judge or judges to preside at a trial or hearing at any port or place within the jurisdiction of the United States. 28 U.S.C. § 256(a). Appeals from the CIT are heard in the Court of Appeals for the Federal Circuit. Federal Courts Improvement Act of 1982, 28 U.S.C. §§ 41-49 (1982). For more detailed information, see Amerine, *Jurisdiction of the Court of International Trade, One Year After the Customs Court Act of 1980*, 29 FED. B. NEWS & J. 43 (1982).

2. The court also manages to tread in the realm of criminal law or procedure occasionally. *See, e.g.*, United States v. Gordon, 10 CIT —, 634 F. Supp. 409 (1986).

practices."[3]

Despite the similarities to practice in other courts, there are a few matters worth noting about practice in a court that is designed to interpret a few statutes in a uniform manner, especially statutes that are intended to be comprehensive. Although there is a good deal of trial practice, and even jury trial practice, before the court, most of the work of the court involves motion practice. Therefore, I will direct my remarks largely to the presentation of briefs and oral argument. Accordingly, most, but not all, of my comments relate to "unfair trade practice litigation."

The general points of good advocacy have often been stated:

> (1) Do not read your argument.
> (2) Answer questions from the bench directly.
> (3) Let the judge talk. You may learn how to make your argument in a winning way.
> (4) If the judge wants to engage in a debate to test a theory, cooperate, be polite, but do not concede important points.
> (5) Do not try a shotgun approach at oral argument. Preserve your arguments in the brief, but do not burden the court or yourself with minor points during a short argument.[4]

Now that I have stated the general rules, I would like to mention a few somewhat more philosophical considerations and exceptions.

First, there is a problem in taking the shotgun approach to unfair trade cases, even in a brief. There is no such thing as a perfect agency record (or trial court record, for that matter), and no court will reverse the deciding agency[5] for a few harmless or minor errors in making factual determinations. There-

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3. The unfair trade practices at issue before the court are sale of goods at less than fair value and governmental subsidization of exports. *See* 19 U.S.C. §§ 1671-1677(g) (1982 & Supp. III 1985) (the antidumping and countervailing duty laws).

4. A recent article along these lines is Rehnquist, *Oral Advocacy*, 22 S. TEX. L. REV. 289 (1986). For a more complete treatment, see E. RE, BRIEF WRITING AND ORAL ARGUMENT (5th ed. 1983).

5. The agencies involved in unfair trade cases are the International Trade Administration of the Department of Commerce and the International Trade Commission. In cases other than those dealing with unfair trade, the United States Customs Service or the United States Department of Labor often appear before the court.

fore, do not list every sin. If plaintiff's counsel does not recognize any failure of an agency to follow the law, he or she should focus on arguments that undermine the basis of the agency's factual findings. You should note that the CIT and the Court of Appeals for the Federal Circuit have both made it clear that they will not upset an agency's factual determination just because they disagree with the determination.[6] To reverse it, the court must find the agency's decision unreasonable or, as the statute says, that the determination was "unsupported by substantial evidence."[7] On the other hand, agency lawyers and other attorneys supporting the determination at issue must be ready to examine the facts in detail. Reliance on general assertions of the legal burdens placed on the plaintiff will not carry the day.

Second, it is my opinion that no legal issue is decided without involving other legal issues, both foreseeable and unforeseeable. To the extent that one can frame the issue in a case to minimize its external impact, the easier it will be to make the relevant arguments, to predict the outcome of the court's decision, and, probably, to make a more appealing argument. Unlike Henry Friendly,[8] and to use myself as an example, not all judges can instantly relate all areas of the law to the problem at hand. Therefore, I must go through a step-by-step process to determine if the solution proposed by a party makes sense in the context of the whole body of law. Many times I arrive at the conclusion that it does not. The next step for me is to redefine the problem in its narrowest form. (One might think that this should be the first step, but I find this difficult to do until I understand the whole network of legal relationships.) After arriving at a series of narrow and manageable issues, I find that even complex cases can be decided with a minimum of frustration.

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6. *See, e.g.*, American Lamb Co. v. United States, 785 F.2d 994 (Fed. Cir. 1986) (citing Chevron U.S.A. Inc. v. National Resources Defense Council, 467 U.S. 837, 843 n.11 (1984)); Asahi Chem. Indus. Co. v. United States, 4 CIT 120, 123, 548 F. Supp. 1261, 1264 (1982) (citing Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978)).

7. 19 U.S.C. § 1516a(b)(1)(B) (1982). The court hears some cases de novo, most notably in the tariff classification/valuation and fraud areas. *See* 28 U.S.C. § 2640 (1982 & Supp. III 1985); 19 U.S.C. § 1592(e)(1) (1982).

8. *See* Leval, *Judge Henry Friendly—A Clerk's Fond Recollection*, N.Y.L.J., Mar. 18, 1986, at 1, col. 1.

In this regard, I recommend you frame your issue narrowly. I believe that judges usually wish to decide only the case immediately before the court. Of course, everyone enjoys expounding on the law occasionally, and sometimes it is necessary. But on a day-to-day basis I believe most judges, especially those faced with highly complex issues such as problems of construction of the international trade laws, do not want to write opinions that affect situations they cannot possibly envision. Because there is so little precedent in the area, many decisions of this court seem to have an importance beyond the case at issue. However, as more cases arise and later decisions clarify the law, it will become obvious that relatively few cases decide a great deal beyond their facts.

Third, thoroughly test each theory. Wonderful arguments, composed of complex, intriguing, and beautifully constructed theories, have been presented to the court. Unfortunately, if the argument collapses like a house of cards after a few "what ifs", it is not of much use.[9] Think about that one horrible case; either the court or your opponent will. Occasionally, the court arrives at a theory all its own, no doubt to the chagrin of the advocates. My practice, in this regard, is to explore it in oral argument. If the parties are baffled, possibly because the theory is defective, or if the parties are anxious to discuss the idea more fully, I allow supplemental briefing.

Fourth, be flexible. In chambers, I change my mind frequently, sometimes coming full circle, and I am often swayed at oral argument. Inasmuch as the court attempts to be flexible, your should be also. Of course, I do not mean that you should support your opponent's position, but avoid rigidity. If the court can not see it exactly your way, try an alternate approach. Presumably, the court wants to have an intelligent discussion about the case in general, and about each point in particular. That will not work if the advocate sticks to a script and does not react to the colloquy as it develops.

Fifth, do not lose sight of the big picture. You want to win the case for your client. If procedural disputes over jurisdictional issues can be avoided by having your client take a certain

9. To explain many unfair trade issues thoroughly, it is helpful to use numerical hypotheticals. *See, e.g.*, Zenith Elec. Corp. v. United States, 10 CIT —, 633 F. Supp. 1382 n.9, 1386 n.10, 1387 n.11 (1986).

action, do it. As we all know, the Customs Court Act of 1980 was intended to eliminate a great many jurisdictional disputes.[10] I sometimes wonder if the endless debate over jurisdiction could possibly have been more troublesome before 1980, because it certainly seems extremely troublesome now.

Sixth, the court is concerned with statutory language that is at times confusing, if not ambiguous. Discussion of the theory or policy behind a law aids understanding. Counsel should concentrate, therefore, on how the provision fits into the statute as a whole and how his or her interpretation either furthers the policies or aids in the efficient implementation of the act.[11] In some cases, explanation of how the statute meshes with international agreements is also relevant.[12]

Seventh, do not avoid citing adverse cases that are difficult to distinguish. If they are relevant, your opponent or the court likely will find them. It is far better to consider carefully the cases favoring your opponent's position and address them up front in the briefs than to waffle or evade questions about such cases at oral argument. In this regard, cite relevant administrative cases. Administratice practice can be reversed, but it cannot be ignored. Credibility is an enormously important asset. Do not burden the court with untenable arguments. Lack of credibility will haunt you in your next court appearance. Be absolutely accurate or admit ignorance. In this regard, do not be creative with the administrative record. Cite to the specific support in the record for your point. If it is not there, do not discuss it. You can usually make your "real world" points by discussing policy, but do not pretend facts are in the record if they are not.

All advocates have a responsibility to the court to present their arguments in a factually and intellectually honest manner. Sometimes you may wonder why a case seems to have been

10. H.R. Rep. No. 1235, 96th Cong., 2d Sess. 44-48, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 3729, 3755-60.

11. Counsel should not argue general trade policy concerns, such as the balance of trade between the United States and another country, or the possible adverse effects on U.S. exports, because such considerations are not part of the standards according to which the court must assess the decisions to be reviewed.

12. For example, the unfair trade laws were promulgated generally to meet our obligations under the General Agreement on Tariffs and Trade (GATT). S. REP. No. 249, 96th Cong., 1st Sess. 1, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 387.

decided so wrongly. Occasionally the judge was simply wrong, but other times the advocacy leads to no other result. The advocacy system requires effective counsel. In the area of international trade, there are still many issues of first impression, and we can foresee further statutory changes that will create new issues. If you do not want cases decided wrongly coming back to burden you, first make sure the court knows of the defects in your opponent's argument. Second, take time to find the best way of approaching your client's case so that your argument will help the law develop properly in this area.