Fordham Law Review

Volume 18 | Issue 1 Article 2

1949

Appellate Briefs and Advocacy

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Recommended Citation
Paxton Blair, *Appellate Briefs and Advocacy*, 18 Fordham L. Rev. 30 (1949).
Available at: https://ir.lawnet.fordham.edu/flr/vol18/iss1/2

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APPELLATE BRIEFS AND ADVOCACY*

PAXTON BLAIR†

(1)

THE diversity of the products which he must be prepared to turn out is a feature of the appellate specialist's practice calling for remark at the outset of any discussion of his work. He is like an automobile manufacturer who must be able to produce a limousine, a sedan, a truck, or a tractor as the customer demands. To vary the metaphor and turn to another phase of his work, he is like an architect who must adapt the plans of the building to the ground he is building on; and here the ground is the Record on Appeal, upon which each brief is to be built and which very definitely conditions and controls its form and structure. It is an old saying that "out of the facts the law arises"; and no argument possesses pertinence that has not some fact in the record to warrant its utterance.

There is no use consuming time in an analysis of the principal implements of research to be found in any law library. It is more important to state that a resourceful and audacious lawyer may and will carry his researches beyond the law library, and use non-legal authorities to add strength to his argument. This is common practice in cases where the constitutionality of police measures or of sociological legislation is under scrutiny. The practice is sanctioned by the fact that judges used it before lawyers thought of doing so,[1] though lawyers were quick to catch on and follow suit.[2] An article in *Fortune,* for instance, was employed to bolster up an argument that the City of New York could constitutionally employ powers of eminent domain in furtherance of slum clearance projects;[3] and to repel an argument that an ordinance requiring dealers in second-hand articles to be licensed was unconstitutional as applied to dealers in used heavy machinery, there were appended to the brief

*This article is based upon an address delivered before the New York Law School on January 27, 1948, and before the Chicago Law School on April 12, 1948. The address will be included in a forthcoming volume to be published by the former institution containing other lectures by practicing attorneys on the fields of their specialization.

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1. See Judge Vann's opinion in People v. Lochner, 177 N.Y. 145, 168, 69 N.E. 373, 382 (1904), *rev'd,* 198 U.S. 45 (1905).

2. See the brief of Mr. Brandeis (as he then was) in Muller v. Oregon, 208 U.S. 412 (1908), abstracted in the footnote to p. 419.

3. At p. 25 of the respondent's brief in Matter of New York City Housing Authority v. Muller, 270 N.Y. 333, 1 N.E. 2d 153 (1936), there will be found a reference to Fortune for February, 1932, p. 61.

for the prosecution transcripts of a dozen articles in the *New York Times* describing thefts of safes weighing up to three tons![4]

(2)

I have already adverted to the fact that an appellate specialist may be called upon to produce various types of briefs. Here are some factors of differentiation: Is the brief one for the appellant, seeking reversal, or for the respondent, seeking affirmance? Is it addressed to a court of last resort, or to an intermediate appellate court? This is an important factor, since the court of last resort can change the law of the State, whereas an intermediate appellate court cannot. If you are before a court of last resort, are you appealing from a judgment of affirmance or from a judgment of reversal? This is an important factor because on an appeal from an affirmance, the court of last resort cannot inquire into the facts; but on an appeal from a judgment of reversal, accompanied by new findings of fact, the court of last resort *may* inquire into the facts.[5] Another significant element to be noted is whether there was a free, *i.e.*, undirected verdict, or was the case taken away from the jury? It is a more serious undertaking to upset a jury's verdict than to upset a court's determination that there were no issues whatever to submit to the jury. Was the judgment appealed from entered after a trial or upon affidavits?

There are, too, special types of briefs with characteristic features, *e.g.*, briefs in support of (or in opposition to) motions for leave to appeal or petitions for (or in opposition to) writs of certiorari; briefs in support of (or in opposition to) motions to dismiss for want of jurisdiction; and briefs as *amicus curiae*. Of these more hereafter.[6]

(3)

Let us now consider some of the fundamental requirements a lawyer should possess if he is to excel in appellate work.

4. People v. Tilford, 268 N.Y. 557, 198 N.E. 402 (1935), respondent's brief, p. 24.

5. In New York, if the reversal by the intermediate appellate court has been on the law only, the court of last resort cannot inquire into the facts, for they stand affirmed. It can, in this situation, reverse the intermediate appellate court and reinstate and affirm the judgment at *nisi prius*. Woicianowicz v. Philadelphia & Reading Coal & Iron Co., 232 N. Y. 256, 133 N. E. 579 (1921); Cannon v. Fargo, 222 N. Y. 321, 118 N. E. 796 (1918). If the reversal has been on the law *and* the facts, the court of last resort can inquire into the facts; but its disapproval of the judgment of the intermediate appellate court must be followed by an award of a new trial and not by the reinstatement of the judgment at *nisi prius*. Maguire v. Barrett, 223 N.Y. 49, 119 N.E. 79 (1918); Constantino v. Watson Contracting Co., 219 N. Y. 443, 114 N. E. 802 (1916). See also TENTH ANNUAL REPORT OF THE NEW YORK JUDICIAL COUNCIL 372 (1944). See, further, Scarnato v. State of New York, 298 N. Y. 376 (1949).

6. Special purpose briefs are dealt with in Topic 13, *infra*.

First of all he should cultivate a good English style. The process is not easy. It will be comparatively easy if the lawyer has a thorough mastery of Latin and Greek. Translation from these languages into English, and vice versa, is a great aid to precision and to grace. Reading good authors is a help, and some good modern ones are listed in the footnote.[7] Nothing can ruin a man's style more readily than the reading of newspapers and weeklies to the exclusion of books.

An interesting observation on the difficulties of learning to write well is found in one of Sir Edmund Gosse's letters. He said:

> " . . . you will not think me disagreeable if I ask you whether you are not a little rash in supposing that you can, without training, at once write in such a way as to be successful. No one expects to be a painter or a lawyer or an engineer in a couple of months. These professions require long training and laborious attention: why should not literature? My own experience is that years and years of study, concentrated on the particular purpose of eventually learning to write well, are needed to result in anything like success. Now, I hope you will not be offended if I say that I was struck in your first letter to me by several indications of want of skill, of simplicity, even of correctness in the turn of the phrases. If you do not yet write a letter well, may it not be that you have not mastered the technical art of book-writing? I must not venture to say that this is the case; but if you are so very anxious to write, would it not be well to read much and study the manner of writing before you make another attempt on the publishers?"[8]

It should never be forgotten that in a law office you will find three English styles: (1) the style of a contract, a mortgage, a conveyance, etc.; (2) the style of a pleading; and (3) the style which should characterize briefs. A brief written in the other two styles is a monstrosity.

Having done a great deal of reading of scholarly works in my life, I have concluded that style has continuously declined. Read a page of John Addington Symonds[9]—he flourished in the last quarter of the

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7. Here are some: Philip Guedalla, Max Beerbohm, Charles Morgan, Lewis Mumford, W. A. Orton, D. W. Brogan, J. L. Lowes, C. H. Grandgent, E. L. Woodward, Harold Butler, J. E. Tyler, Rachel Annand Taylor, Rebecca West, Virginia Woolf, Dorothy L. Sayers. Among living judges, one might include Justices Frankfurter and Jackson of the United States Supreme Court; Judge Learned Hand, of the United States Court of Appeals, Second Circuit; Judge Edmund H. Lewis, of the N.Y. Court of Appeals; and Lord Macmillan, one of the Lords of Appeal in Ordinary.

8. THE LIFE AND LETTERS OF SIR EDMUND GOSSE, edited by Evan Charteris (1931), p. 249. See also THE UNACKNOWLEDGED LEGISLATOR, by Bonamy Dobrée (1942), p. 30; FREE MINDS: JOHN MORLEY AND HIS FRIENDS, by Frances W. Knickerbocker (1943), p. 217. Contrary views are entertained by the gay protagonist in GENTLEMEN PREFER BLONDES, by Anita Loos (1925), p. 14, but probably not by anyone else.

9. Try his HISTORY OF THE RENAISSANCE IN ITALY. Its style is superb.

nineteenth century—and then read a page of any best-seller in the non-fiction field. You will feel as though you had just put down a glass of rare old port and begun to sip a glass of ice water. English judges, by the way, have a far keener sense of style than American.

Some text-books on style are listed in an appendix.

Secondly, the appellate specialist should learn the art of arranging thoughts in logical sequence. Thus if you are writing a brief on behalf of a person who has been run down by a bus, and are trying to secure an affirmance of the judgment in his favor entered upon a jury's verdict, you would not begin with the medical testimony. You would begin with the conduct of the bus driver. You would stress his speed, and factors —heaviness of traffic, or darkness of the street—tending to show it was excessive. Perhaps there was testimony that he had just taken on passengers, and was busy making change when he should have been on the lookout for pedestrians. You would then go on to show the plaintiff's movements and to negative contributory negligence. Only after all this would it be logical to take up the nature of his injuries, and other factors bearing upon the *amount* of the verdict.

Thirdly, a capacity for selection should be developed. The brief should not be a mere abstract of everything in the record. Select the circumstances which bear directly on the correctness of the judgment below (if you are for the respondent), or select the most palpable errors in the conduct of the trial (if you are for the appellant). Avoid playing up features which common sense and experience gleaned from reading the cases tell you would not be likely to be made the *ratio decidendi* of an opinion in your favor. Mr. John W. Davis, formerly Solicitor-General of the United States, is fond of observing that lawyers should exhibit the "courage of exclusion". And it does require courage to overcome either the client's ignorant insistence on the inclusion of trivialities, or your own petty fears that the Court might pounce on something you left out. Unless you practice exclusion, there will be a dissipation of emphasis, and a foggy presentation of the issues to the appellate court.

(4)

We come now to the form and contents of the brief itself. It is a good idea, by the way, for the author to proof-read the brief himself. By this means, he will detect many defects which would escape his clerk—for instance, repeating the same word or phrase only a line or two apart, or awkward and abrupt transitions, or inaccurate cross-references, or inconsistent capitalization, or misprints too subtle for detection by a layman, such as "casual" for "causal", or "abusive discretion" for "abuse of discretion", or "agreement" for "argument", etc.

It is well upon picking up a record for the first time to skim through it rapidly, and get a general idea of the issues framed by the pleadings, the trial, the presence or absence of technical questions dealt with by expert witnesses, the result below and the sort of relief demanded by the appellant. Talk to the trial man if you wish, though this is not necessary. Then as you write the brief, begin the intensive study of the record.

The use of long-hand is advisable. It leads to greater conciseness of language, and it facilitates changes and improvements, and the citation of additional folios of the record where, for instance, a detail of one witness' story is corroborated by another witness later on, or where a narrative is not clear unless an exhibit (a map, a blueprint, a photograph) is called to the Court's attention at the same time.

The opening paragraph of the brief[10] should show how the case came up, and embody a statement of the issues in the fewest possible number of words. Here are three examples:

(a) On an appeal, to an intermediate appellate court, by a municipal corporation from an adverse verdict in a negligence case:

"The defendant has appealed from a judgment in favor of the plaintiff in the sum of $10,146.88 entered after a trial in the Supreme Court, Kings County, before Nova, J., and a jury. Two jurors dissented. The cause of action alleged in the complaint arose out of an injury sustained in the yard of a public school which the plaintiff attended, when a ball, thrown by someone, possibly another pupil, hit him in the face, destroying the sight of one eye and impairing that of the other. Negligence on the defendant's part purports to be premised on want of supervision over the children at play. The answer is a general denial."[11]

(b) On an appeal to a court of last resort from a judgment of unanimous affirmance:

"The case is here by leave of this Court. The defendant has appealed from an order of the Appellate Division, Second Department, and from the judgment entered thereon, affirming a judgment of the Supreme Court, Richmond County, entered after a trial before Norton, J., and a jury, and awarding the plaintiff damages for the flooding of cellars and other injuries to real and personal property, caused by the inadequacy of a certain drain or culvert. In seeking

10. What is here said concerning the order of the elements in the brief should be checked against the rules of the court before which you are appearing. They may prescribe a different order.

In rare instances, the whole appeal may turn on questions of fact. In that event, there need be no preliminary narrative of the facts; they may be developed under headnotes devoted to them instead of to propositions of law. See the prosecution's brief in People v. Hidden, 263 App. Div. 534, 33 N.Y.S. 2d 494 (1st Dep't 1942).

11. From the defendant's brief in Graff v. Board of Education, 258 App. Div. 813, 15 N.Y.S. 2d 941 (2d Dep't 1939), *aff'd*, 283 N.Y. 574, 27 N.E. 2d 438 (1940).

leave to appeal, we urged that the failure to file a notice of claim and of intention to sue, under Administrative Code, § 394a-1.0, should have been deemed a fatal defect requiring the dismissal of the complaint, and that compliance with this statute was not dispensed with by the circumstance that (since the trespass was a continuing one) the complaint asked for injunctive relief in the alternative. This is the only question of law in the case."[12]

(c) From the respondent's brief, where a judgment of unconstitutionality has been reversed by the intermediate appellate court:

"The petitioner has appealed from an order of the Appellate Division, First Department, which, with two Justices dissenting, (1) reversed an order, in the nature of a mandamus order, of the Supreme Court, New York County (Bernstein, J.), directing the Commissioner of Public Markets to rescind the revocation of a petitioner's license as a live poultry dealer in the City of New York and to reissue the license and to refrain from revoking it for non-payment of poultry-grading bills, and (2) directed the dismissal of the complaint. The Special Term had held that New York City Local Law No. 32 of 1942, known as the live poultry law, was null and void because not authorized by the City Home Rule Law, and because it violated the due process and equal protection clauses of the State and federal constitutions. The Appellate Division upheld the Local Law in all respects."[13]

After the opening paragraph, the order I recommend is this:

Pleadings;

Facts (or, if you prefer, "The Trial" or "The Testimony");

Statutes involved (if any);

Opinion below (if any);

Outline of argument (the point-headings all grouped together for ready reference);

The points, one after the other;

Conclusion (preceded by summary if length of brief warrants it).

(5)

As to the treatment of pleadings, the first precept is: Paraphrase them in your own language. Remember what was said about the three English styles to be found in any law office. The pleadings, when abstracted in a brief, should therefore be recast in the English style appropriate to a brief.

Adherence to a chronological order aids clarity of presentation. In

12. From the defendant's brief in Missall v. Palma, 292 N. Y. 563, 54 N. E. 2d 686 (1944).

13. From the defendant's brief in Matter of Avon Western Corp. v. Woolley, 291 N.Y. 687, 52 N.E. 2d 587 (1943).

analyzing the pleadings in a negligence action, for instance, state briefly how the accident is alleged to have occurred, and then state whether the answer is a general denial, or contributory negligence, or a release under seal, etc. Or if the action is by a seller of goods, demanding the purchase price, show whether the defense is breach of warranty, or delay in delivery, or rescission, etc.

(6)

In presenting the facts, I recommend the "mosaic" method. By that I mean that you should take each essential fact—generally in chronological order—and piece together what each witness had to say on the particular subject, so that the appellate court can have in readily comprehensible form everything that the jury had before it, and thus be facilitated in determining whether the verdict was consistent with the evidence or not. If, as appellant, you are arguing that the verdict is against the weight of the evidence and are going to conclude by asking for a reversal and a new trial, then you may analyze the stories of both the plaintiff's witnesses and the defendant's. But if, on behalf of a defendant-appellant, you are asking for a reversal of the judgment *and the dismissal of the complaint,* then you must confine your argument to what the plaintiff's witnesses said, and ignore the defendant's witnesses,[14] for the premise is that the plaintiff failed to make out a *prima facie* case. What the defendant did or failed to do is irrelevant.[15]

If on behalf of a plaintiff you are seeking to reverse a dismissal at the close of the plaintiff's case, or a directed verdict for defendant at the close of the entire case, your burden is comparatively slight. All you have to do is to show there were questions of fact which should have been left to the jury.

In the average record, you can usually discern the pattern in the carpet after reading the first thirty or forty pages of the testimony, and

14. See the brief (unsuccessful, to be sure) in McGarry Contracting Co. v. Board of Education, 289 N.Y. 706, 45 N.E. 2d 459 (1942), where I was compelled to pass over in silence some 360 pages of testimony and 70 pages of exhibits on behalf of my client, the defendant-appellant.

15. A rare exception occurs where the defendant is in a position to show that his affirmative defense was fully established and never rebutted. But in attacking the sufficiency of the plaintiff's proofs you must not forget the possibility that, if you, as the defendant's attorney, did not rest when the judge denied your motion to dismiss at the close of the plaintiff's case, the plaintiff may rely on something in your case to fill in the chinks in his own. Dixon v. Smith-Wallace Shoe Co., 283 Ill. 234, 243, 119 N.E. 265, 269 (1918); State v. Denison, 352 Mo. 572, 577, 178 S.W. 2d 449, 452 (1944); Sigua Iron Co. v. Brown, 171 N.Y. 488, 506, 64 N.E. 194, 200 (1902); Costello v. City of New York, 273 App. Div. 992, 79 N. Y. S. 2d 324 (1st Dep't 1948); 9 WIGMORE, EVIDENCE § 2496 (3) (3d ed. 1940); 6 CARMODY, PLEADING AND PRACTICE IN NEW YORK § 398 (2d ed. 1932).

you can perceive what facts are likely to have been responsible for what the court below did. You can orient yourself in the appellate court with these in mind, and, if you represent the appellant, attack their legal sufficiency to support a judgment, or, if you represent the respondent, argue for their adequacy.

Testimony hostile to your client should not be passed over in silence. You can try to palliate it by showing that the witness who testified to facts unfavorable to your position was (1) contradicted by other witnesses whose position enabled them to see more accurately what really took place;[16] or (2) distorted by interest; or (3) caught lying in other particulars.

You must exercise a capacity for selection in analyzing testimony. Do not waste the time of the court in describing factors or events having no direct bearing on the result. Confine yourself to those which will enable the appellate court to bring the issue readily into focus, and, after seeing what probably influenced the court below, to pass upon the legal sufficiency of it.

Long quotations from testimony should be avoided. Quotations should be broken up after twenty lines, and a short interpolation of your own language made before resuming the quotation, or a reference may be made to other testimony supporting, qualifying or refuting the passage quoted. The latter device is normal when you are adhering to the "mosaic" method referred to above.

References to the pages or folios of the record accompanying quotations of testimony should precede a direct quotation and should follow an indirect quotation.

(7)

When statutes are involved in the case under appeal, they should be paraphrased in the English style appropriate to a brief, with, however, a direct quotation here and there of a crucial phrase, if necessary.

Argumentative matter, such as the solution of problems of construing interlocking statutes, should be deferred to the law points of the brief.

(8)

The opinion of the court below should be abstracted briefly, dispassionately and without argumentative distortion. It is permissible, however, for an appellant to insert, either in parentheses or in a footnote, brief citations to such parts of the testimony as may be direct and powerful in their capacity to suggest error on the court's part. Never

16. When, for example, the speed of a car is in issue, the estimate of someone in a following car is less likely to be accurate than that of a person standing on the sidewalk and viewing the moving car broadside.

treat with sneers or disrespect an opinion with which you disagree. There is an *entente cordiale* among judges, and the pertinacious or indiscreet criticism of a decision in counsel's brief may inspire the appellate judges to seek out fresh grounds for affirmance.

(9)

Precept Number One, when it comes to headnotes, is: *avoid blind headnotes*. By this I mean avoid headnotes which are so unenlightening and undistinguished that they might fit any one of a hundred records, and therefore fail to give a clue to any of the propositions of law which inhere in this particular record alone and differentiate it from all others. It is bad to phase a headnote thus: "The verdict was against the weight of the evidence." Or: "The verdict was proper and should not be disturbed." Or: "The plaintiff failed to make out a *prima facie* case." Here are examples of headnotes on adequacy of evidence which do not exhibit the vice of blindness:

"The plaintiff having been caught lying in collateral matters on several occasions, and her supporting witness having told a story which was so inherently improbable and devoid of circumstantiality that it may well be doubted whether she was even present when the accident happened, the verdict in her favor was against the weight of the credible evidence."[17]

"The shocking inconsistency between plaintiff's story on the stand and the story he told the hospital attendants immediately after the accident, and the inconsistency between his own assertion of loss of consciousness and the doctors' testimony of conversations with him, show that the verdict was against the weight of the credible evidence."[18]

Or, on an appeal from a decree in equity reforming a contract:

"The complaint being premised on a scrivener's error and mutuality of mistake, it should have been dismissed when the scrivener testified he did exactly as told, and defendant-appellant testified that the writing exactly embodied her conception of the contract."[19]

Or, where the respondent seeks to justify the dismissal of a complaint in negligence where the plaintiff failed to prove notice:

"The plaintiff having failed to prove notice of the presence of the sputum on the stairway, and her witnesses having described the sputum as still wet at the moment of the accident, the Trial Court rightly dismissed the complaint for failure to prove notice."[20]

17. Schwartz v. Murray, 266 App. Div. 1025, 45 N.Y.S. 2d 278 (2d Dep't 1943).

18. Behnke v. Brooklyn & Queens Transit Corp., 263 App. Div. 737, 31 N.Y.S. 2d 28 (2d Dep't 1941).

19. Sargent v. Black, 270 App. Div. 828, 61 N.Y.S. 2d 383 (2d Dep't 1946), *leave to appeal denied*, 295 N.Y. 992 (1946).

20. Clark v. Murray, 289 N.Y. 746, 46 N.E. 2d 353 (1942).

The order of the headnotes is important and should be chosen with an eye toward sequacity or logical inevitableness. They should exhibit a tendency to follow one another as the night the day, so that when read in sequence they resound with a note of inevitability, and tend to sweep the court into agreement with counsel's contentions.

To achieve this, you must try to put yourself in the court's shoes. Look at the brief objectively, and see whether the logic is smooth or fails to show consecutiveness. Headnotes prefaced by "even if" are permissible. They sketch a secondary line of defense, and follow after the strongest headnote. Courts generally do not regard employing "even if" headnotes as a sign of weakness, but often welcome them as affording an easier way out. Such headnotes may open the door to a decision your way by permitting the court to adopt a narrow *ratio decidendi,* rather than undertake the trouble of phrasing a broad proposition of law.

Considerations of policy, and not only considerations of logic, may affect the order of headnotes. Generally speaking, state first the proposition on which it would be easiest to decide your way. Integrate this principle with the principle that courts are reluctant to decide cases on technicalities which side-step the merits. Thus a jurisdictional point should be briefed first only if clear and strong.[21] And a point urging that the complaint against a municipality be dismissed because of a defective notice of claim should normally come in last, though here, too, exceptional strength may justify pushing it up ahead.

Headnotes should not exceed four in number. That is about the limit the court can bear in mind, both during the argument and during their ensuing conferences. Loss through dissipation of emphasis ensues if this rule is violated. Only the most extraordinarily long and complex record justifies a departure. I kept within the rule on a certain occasion where I had a five-volume record, dealing with titles from 1636 to 1937.[22] If you practice that "courage of exclusion" already referred to, and avoid wasting time and words on what reflection will tell you is unlikely to be a basis of decision, compressing the headnotes into four will not be difficult.[23]

When arguments are being addressed to an appellate court, you should be alert to avoid reflections on the intelligence of the court from which (and, *a fortiori,* of the court to which) you are appealing. Reflections

21. For an example of the successful use of this device in a respondent's brief, see Matter of Board of Transportation, 272 N.Y. 52, 4 N.E. 2d 214 (1936).

22. Matter of City of New York, 275 N.Y. 456, 11 N.E. 2d 294 (1937).

23. For an extreme example of compression into four headnotes where the record was bristling with a multitude of questions of law, see my brief in McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940).

on opposing counsel are likewise unwelcome in an appellate court. It is sometimes wise to refer in a complimentary way to the zeal or industry of opposing counsel to prevent hurting his feelings with your attack on the logical soundness of what he has said in his brief.

(10)

The treatment of authorities is a difficult matter upon which to make general statements. But three principles have recognized force and pertinence:

(a) Be absolutely sure of their accuracy. If you have before you a recent case in a *nisi prius* court or in an intermediate court of appeal, do not rest content with Shepardizing it. Shepard's Citations can never be right up to the minute. Inquire at the office of the clerk of the next higher court as to whether an appeal has been docketed in the named case; and whether argument and decision have taken place.

(b) Never cite a lower court decision to a higher court. However, if you have a point which is *res nova* in the higher court but which is found among the decisions of a lower court, cite it with a suggestion of apology, viz.: "This is only a lower court decision but we feel its reasoning should commend it to this court."

(c) Go slow about relying on decisions of the Supreme Court of the United States in any but the federal field. That Court is not a court of law today so much as a court of policy. It is really the handmaid of the executive in effectuating, through judicial legislation carried beyond traditional bounds, changes in policy which the executive has been unable to persuade Congress to make. There was a time when the President went to Congress to change the law in order to circumvent reactionary decisions in the Supreme Court. Today (or up to April, 1945) the President has been, it would seem, going to the Supreme Court to have it change a proposition of law which he does not like but which Congress has not the power,[24] or else has not the disposition, to change.[25]

24. For examples of the change, by judicial fiat, of well established principles of constitutional law, see, *inter nonnulla alia,* United States v. California, 332 U.S. 19 (1947); New York v. United States, 326 U. S. 572 (1946); Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939).

25. A discerning modern author has attributed the substitution of expediency for principle in the Supreme Court of the United States to the "increasing relativization and degradation of law and ethical norms." P. A. SOROKIN, THE RECONSTRUCTION OF HUMANITY 48 (1948). I agree; but I also attribute it to the total want, in its personnel, of lawyers with enough experience in law practice to be aware of the importance of stare decisis. "What business men need is a rule of law which a lawyer can give them when they consult him, and upon which they can act with ease and certainty." J. H. Beale, *What Law Governs the Validity of a Contract,* 23 HARV. L. REV. 260, 264 (1910). And see Pound, *Juristic Science and Law,* 31 HARV. L. REV. 1047, 1053 n. 24 (1918).

The trouble with changes made by judicial legislation is that they are retroactive,[26] whereas those made by legislative enactment are prospective.[27]

(11)

Let me comment for a moment on the extent, if any, to which the remarks I have been making must be modified when you are writing a respondent's brief. You have already received the appellant's brief when the time comes to write the respondent's brief. Does this make a difference? My answer may stamp me as a heretic, but I say "No". The reason is that a respondent's brief in a court of last resort[28] must be complete in itself and must stand as solidly on its own foundation as an appellant's brief. I therefore persevere in heresy by saying that a respondent's brief should be completed in first draft from *before you even read the appellant's brief.*

Two strong considerations conduce to this result.

In the first place, the court of last resort, limited as it generally is to passing upon questions of law, does not much care what the court below did, or which side is appellant. It will weigh the opposing briefs in the scale and follow whichever most nearly accords with its views of what is, or should be, the law of the state. Identity of form with dissimilarity of contents makes the weighing process easier.

In the second place, the scope of your brief should not be affected by the scope of your opponent, the appellant's, brief. You should not get your hopes up because of his sins of omission. It is your duty to call the court's attention to a hostile case which the adversary has overlooked.[29] Furthermore, your adversary's brief reflects the learning and

26. See the dissent of Holmes, J., in Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370 (1909); and see R. H. Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision,* 18 COL. L. REV. 230 (1918).

27. An example of a change in the law made by judicial legislation and grossly unfair in its operation on the parties to the proceeding is United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533 (1944).

28. To only a slightly less extent is this true in an intermediate court of appeal.

29. In Glebe Sugar Refining Co. v. Greenock Harbour Trustees, [1921] Sess. Cas. (H.L.) 72, 74, Lord Birkenhead said: "It is not, of course, in cases of complication possible for their Lordships to be aware of all the authorities, statutory or otherwise, which may be relevant to the issues which in the particular case require decision. Their Lordships are therefore very much in the hands of counsel, and those who instruct counsel, in these matters, and this House expects, and indeed insists, that authorities which bear one way or the other upon matters under debate shall be brought to the attention of their Lordships by those who are aware of those authorities. This observation is quite irrespective of whether or not the particular authority assists the party which is so aware of it. It is an obligation of confidence between their Lordships and all those who assist in the debates in this House in the capacity of counsel." I am indebted for this citation (though he

industry in all probability of only two or perhaps three legal minds. But (if you are in the Court of Appeals) when the issues are discussed in conference, your opponent's position may be scrutinized by fourteen legal minds, *i.e.*, the minds of seven judges and the minds of seven bright young law secretaries. Therefore give your brief the strength to stand up under the powerful impact of all these minds, and not only against such forces as are manifest in the appellant's brief.

I therefore reject the advice, which I occasionally hear from lecturers on appellate practice, that when you represent the respondent, you may rest content with an attack directed toward your adversary's "jugular vein".

Of course after your adversary's brief has been studied, go back to your own and insert such passages of comment and correction directed toward his brief as may be required. Test the adequacy of your handling of what he seems to think are the strongest cases his way. But it is rare that on reading your adversary's brief you will find it proper to delete anything from your own.

It is always a good idea, in arguing before a court of last resort, to make it clear just how far the principle you are contending for should be carried. This will disarm the skeptical; and it will minimize the danger of its collision with other principles which are established and unassailable.

(12)

It is clear that ornamentation, "purple passages", imported jewels of rhetoric alien to the context, are all out of place in a brief.[30] The court

states the year of the volume incorrectly) to LAW AND OTHER THINGS, by Lord Macmillan (1937), p. 193. Note also the emphasis on candor in New York Central R.R. Co. v. Johnson, 279 U. S. 310, 319 (1929).

30. Not without pertinence in this connection are the observations of Hon. Horace Stern of the Supreme Court of Pennsylvania, in *The Writing of Judicial Opinions*, 18 PA. BAR ASS'N. Q. 40 (1947). He said (pp. 41-42): "There has apparently grown up of late a wide-spread passion for 'fine writing' but in this tendency there lurks grave evil, for, unless the pen be guided by the hand of genius, there is apt to result a sacrifice of legal sense to purely artificial verbiage. Form should fit substance, like clothes the well-dressed man which, when appropriate, never attract attention on their own account. An ornate, pretentious, grandiose style, replete with superfluous frills and rhetorical extravagances, can act only as an undesirable distraction. Nor is a judicial opinion a proper vehicle for the exploitation of pedantic learning or extraneous disquisitions." As to how good style adds power to expression, see DAICHES, A STUDY OF LITERATURE (1948), pp. 33-34 and 98-100. See also Max Beerbohm's essay on Lytton Strachey (1943), p. 21: "Let us not ignore the virtue of form in literature. It is the goblet for the wine. Be the wine never so good, is not our enjoyment of it diminished if the hospitable vintner pours it forth to be lapped up by us from the ground with our tongues?" Beerbohm's little essay is itself a fine treatise on style.

regards them as annoying interruptions, particularly when the brief is receiving the intensive study which precedes the report in conference. On the other hand, a paragraph of summary toward the close of the brief is desirable if the record has been long, and sustained close reasoning has been necessary to make the ultimate objective clear. The summary should be worked over to make it epigrammatic, to eliminate triteness, and to contrast in neat antithesis the opposing contentions between which the court must decide. We may call such well-wrought passages "punch lines", for want of a better phrase, and here are some examples:

(a) A case in which the argument required the delineation of the boundary between federal and state power where they tended to clash:

"It was error, therefore, for the Courts below so to construe the Act of 1906 and the Special Acts of 1919 and 1921 as to make the permit from the Secretary of War (issued under Congressional authority) virtually a sword with which to flout State sovereignty, instead of regarding it as a mere shield against federal prosecution; and it was error to ignore the Joint Resolutions relating to the Port of New York Authority, and to hold the defendant railroad's conduct lawful though utterly subversive of the Congressional program of co-ordination. Only by a reversal of the decree appealed from can this Court carry out the legislative intent to give in 1906 renewed vitality to the criteria in the Act of 1899, and, by leaving them unaltered, to retain concurrent authorization of bridges by Federal and State Governments as an indispensable prerequisite to their legality."[31]

(b) A case where the instinctive feelings of the court, and its sympathy, are on the side of your opponent but the law is on your side. Here a child who had been ill was taken to a public playground by her mother, but fainted when she began to use a swing, fell fifteen inches to the cinder-covered ground and suffered lacerations leading to the amputation of an arm:

"It is impossible to suppress a feeling of sympathy for the infant plaintiff. But the Trial Justice and the jury seem to have yielded too much to sentiment, and to have found negligence where none in fact or in law existed. To allow the judgment to stand would be to impose upon the City, in carrying on activities unattended by profit, a burden too severe to be borne. To fulfill the requirements of due care as interpreted by the Courts below would involve either a substantial increase in playground supervisors for each park (which would involve closing some playgrounds to counteract the extra expense), or the removal of all devices capable, in any conceivable circumstances, of causing harm to children rendered dizzy while at play. The requirements are a 'counsel of perfection', beyond reasonable human attainments, and attended by public

31. From p. 86 of the (unsuccessful) brief for the appellant in Newark v. Central R.R. of N. J., 267 U. S. 377 (1925).

disadvantages which would nullify any gain capable of flowing from their adoption."[32]

(c) A case where an industrious opponent was fighting a losing battle against the trend of recent authority:

"The development of the police power in the past two or three decades has been impressive. We have seen *People v. Williams,* 189 N. Y. 131 (1907) overruled by *People v. Charles Schweinler Press,* 214 N. Y. 395 (1915), and *Lochner v. New York,* 198 U. S. 45 (1905), criticized with a universality which makes its citation as a precedent today unthinkable. Without meaning to be disrespectful to the able advocacy of our opponent, we may say that his brief is haunted by the ghosts of departed doctrines, and is untenanted by any living principle."[33]

(d) A case where it was necessary to justify the use of eminent domain in aid of slum clearance, even though that meant advancing the police power beyond familiar horizons:

"While the power to abolish old tenements is perhaps more clearly established than the power to spend public moneys in erecting new ones, nevertheless we feel this Court should not hesitate to sustain the law in its entirety. Surely the Housing Authority, in its war on filth and disease, is not limited to a *pax Romana*—'they make a solitude and call it peace.' The power must exist to make available new homes for those whose old habitations have been destroyed; and the legislative findings of the inadequacy of private enterprise to perform the task should be respected to the extent of upholding the repose of power in the Housing Authority."[34]

(e) A case where it was desirable to defeat a petition for certiorari, directed to a federal court, and stamp out a charge of disregard of applicable state law evidenced by a lonely decision in a lower court:

"A bold attempt is made, by seizing upon an inconsiderate recent utterance of a Justice at *nisi prius* to make out either a case of conflict between the instant case and that of the State Courts, or to show that the City's power to pass the tax law in question is shrouded in doubt. But the decision at *nisi prius* which is cited purported to construe the federal Constitution alone and not the State; and, standing in isolation, it is incapable of conjuring up that degree of doubt which is a prerequisite to the granting of certiorari by this Court.

32. From p. 17 of the appellant's brief in Peterson v. City of New York, 267 N. Y. 204, 196 N. E. 27 (1935). The brief just quoted was the subject of favorable comment in P. P. Fallon, *The Relation Between Analysis and Style in American Legal Prose,* 28 Neb. L. Rev. 80, 86 (1948).

33. From p. 23 of the respondent's brief in People v. Tilford, 268 N. Y. 557, 198 N. E. 402 (1935).

34. From pp. 24-25 of the respondent's brief in Matter of New York City Housing Authority v. Muller, 270 N. Y. 333, 1 N. E. 2d 153 (1936).

"The decision referred to is what biologists call a 'sport', and would more fittingly be enshrined in the annals of teratology than of law."[35]

At the extreme end of a brief should occur a short, laconic statement of what you want the court to do. Here are some illustrations:

"The judgment appealed from should be affirmed with costs."

"The judgment appealed from should be reversed and the complaint dismissed, with costs in all courts."

"The judgment of the Appellate Division appealed from should be reversed, and that of the Trial Term affirmed, with costs in all courts."

"The judgment appealed from should be reversed with costs, and the matter remitted to the Trial Term, there to be proceeded with according to law."

"The judgment appealed from should be reversed and a new trial ordered, with costs to abide the event."

(13)

A word or two about special purpose briefs. Motions for leave to appeal should be concise, clearly focused and arrestingly phrased. They should play up such elements in the case as may serve to give it public importance. If the case presents a non-recurrent situation, of interest to no one but the litigants themselves, it is a waste of time to try to take it to a court possessing discretionary jurisdiction. These same observations hold true of petitions for certiorari addressed to the Supreme Court of the United States, but Rule 38, Section 5, of the rules of that Court gives a clearer indication of the prerequisites which a petition should possess than is found in the rules of state courts on corresponding applications.

Briefs seeking to take a case to a higher court with discretionary jurisdiction may be opposed by briefs showing the amplitude of supporting authority behind the decision below; or stressing the non-recurrent character of the questions raised; or pointing out that the decision below really turned on the resolution of questions of fact which the court of last resort could not go into even if the case were brought before it.[36]

Briefs *amicus curiae* command little attention in appellate courts save when they are filed by public law officers. They must deal only with the propositions of law present in the record, but their authors may go out

35. From p. 5 of the respondent's brief in Southern Boulevard R.R. Co. v. New York City, 301 U.S. 703 (1937).

36. Lawyers appearing for respondents are not as conscious as they should be of the readiness with which an appeal to the Court of Appeals taken as of right (because the Appellate Division was divided) may be defeated by merely showing that the determinative questions are factual, and thus beyond the powers of inquiry possessed by the Court of Appeals.

of the record to show factual situations to which the principles under debate may apply, with a view toward persuading the court either to qualify or to extend what was held below. One who files a brief *amicus curiae* should show on its cover whether it is in support of affirmance or in support of reversal.

The limited scope of briefs in support of, or in opposition to, motions to dismiss for want of jurisdiction is self-evident without further exposition.

(14)

As to oral arguments, I urge that they be made and that, generally, counsel not rest content to submit upon briefs. If you are present to argue orally, you can bring back into line a judge who, by his questions, shows he has gone off on a tangent. Furthermore, if all the judges have heard oral argument, the reporting judge in conference has to spend less time giving his brethren the background. They can proceed at once to their deliberations on the crucial questions of law and policy involved.[37]

Your very first objective, when you get up on your feet to argue, is to convince the court that you have a program, that you have thought out a logical order for the presentation of your points and that you are capable of adhering to it. This will diminish the number of questions from the Bench.

I have always held that the trial man is *not the best man* to handle the appeal, but may even be the worst. The point has been the subject of divergent views in some public law offices I have known. In the office of the United States Attorney, Southern District of New York, the trial assistant keeps the case through the United States Court of Appeals; if it goes further, the Solicitor-General takes over. In the office of the Corporation Counsel of New York City and in the office of the District Attorney, New York County, a case taken to an appellate court is handed over to what is known as the appeals division or appeals bureau, and briefed and argued by an appeals specialist.[38]

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37. One of the strongest reasons in favor of oral arguments is set forth in F. B. Wiener, *Oral Advocacy*, 62 HARV. L. REV. 56, 59 (1948): "Appellate judges, virtually without exception, say that a case should never be submitted without oral argument. . . . These expressions reflect the fact that the task of judgment is infinitely harder when counsel is not present to be questioned regarding his exact position or the limits of a principle he has argued in the brief." See also Judge Loughran, *The Argument of an Appeal in the Court of Appeals*, 12 FORD. L. REV. 1 (1943). Oral arguments are mandatory in some appellate courts. See Rule 1: 4-1 of the rules of the New Jersey Supreme Court, as reorganized under the Constitution approved by the voters in 1947.

38. I was chief of the division of appeals in the Corporation Counsel's office, New York City, from 1934 to 1943. My staff averaged eight men, and as we handled about 500 appeals a year, I had to assign some cases to competent lawyers outside of my own

There are, to my mind, overwhelming advantages in this method of handling appeals. The appeals specialist views the case precisely as does the appellate court, through the little square window of the record, so to speak, and not as something viewed from the great outdoors. The trial man's mind cannot free itself of matters which entered it during preparation for trial but which did not get into the record, either because a witness he interviewed failed to respond to a subpoena or was not allowed to testify because of failure to establish qualifications. Or if the witness did testify, some important facts may not have been established because objections to questions were sustained.

Then, too, the style of oratory a trial man develops, through his constant appeal to a jury less learned than himself, is out of place in an appellate court. A calm, conversational style is there appropriate; and his hearers' learning exceeds his own, or at least he should conduct himself as though it did.[39]

(15)

A lawyer often finds himself with several clients adversely affected by the same statute or ruling, and he may wish to take a test case to a higher court. My advice is, try to arrange to take your strongest case up first, and if you win try to get the principle extended to weaker cases. Don't take a weak case up first, for if you lose you will spend the rest of your life trying to distinguish it.[40]

Interlocutory appeals, by the way, are not to be recommended, unless a ruinous injunction *pendente lite,* or an outrageous receivership makes such an appeal unavoidable. If you lose the interlocutory appeal, you may be before the same court on appeal from final judgment, and their interest will then be diminished because they feel you are offering them a warmed-over dish.[41]

To sum up: style, sequacity, conciseness, and integrity are the qualities which should characterize appellate briefs; and he who argues orally

division. These were, themselves, often division heads—Real Property, Franchises, Contracts, Torts, Taxation, Workmen's Compensation, etc.—or sometimes just bright and reliable young men. Statistics which I kept showed that the men of the appeals division had almost twice as high a batting average in the appellate courts as their brethren from other divisions.

39. Mr. Wiener in the article cited in note 37 advocates "an attitude of respectful intellectual equality," 62 HARV. L. REV. 56, 72 (1948).

40. See in this connection ESTHER LUCILE BROWN, LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE 84-85 (1948).

41. The advisability of interlocutory appeals on questions of practice—*e.g.,* from orders on motions to strike defenses, motions to make a complaint more definite and certain, motions concerning bills of particulars—is too complex a matter for inclusion in this lecture.

must show an awareness of the atmosphere, qualities and orientation found in an appellate court (viz., dignity and learning, calmness and unhurriedness, concentration on points of law rather than fact), and of the court's want of power to consider anything that is not in the printed record, coupled, nevertheless, with an appreciation on the judges' part that they are laying down principles whose application will extend beyond the case at bar.

APPENDIX

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