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## ESSAYS

### APPELLATE ADVOCACY: SOME REFLECTIONS FROM THE BENCH\*

THE HONORABLE LAWRENCE W. PIERCE\*\*

*In this Essay, Judge Pierce explores historical and modern attributes of appellate advocacy and provides insightful guidance on some relevant considerations for effective advocacy on the appellate level. Judge Pierce discusses methods which advocates may utilize to improve their proficiency at brief writing and oral argument, but also cautions advocates that the appellate process begins at the trial level in preserving issues for appeal. Judge Pierce also reflects upon his experiences in over 21 years on the federal bench when examining some of the strategic, practical, and ethical considerations, as well as persuasive methods, for successful appellate advocacy.*

#### INTRODUCTION

THIS annual lecture series is a fitting tribute to John F. Sonnett, who was a highly respected public servant, a greatly admired senior partner at Cahill Gordon & Reindel, and one of Fordham's most distinguished alumni. As a federal appellate judge, I am especially pleased to discuss the topic of appellate advocacy, particularly in light of John Sonnett's renowned reputation as a master appellate advocate in both the public and private sectors.

In preparing these comments, I have drawn upon personal observations and experiences as both a circuit and a district judge. I will begin with a short discussion of some historical features of advocacy, followed by a brief overview of some modern-day considerations facing present-day appellate advocates. I will discuss some strategic, practical, and ethical considerations relevant to my topic.

#### I. HISTORICAL OVERVIEW OF APPELLATE ADVOCACY

##### A. *Ancient Origins*

A brief glimpse at a few historical features illustrates how much the processes of appellate advocacy have developed over time.

It has been suggested that appellate review first originated with the ancient civilizations of the Mediterranean Sea area.<sup>1</sup> For example, in an-

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\*\* Judge, United States Court of Appeals for the Second Circuit. The author wishes to thank Joseph Cuomo, Jacqueline Guenego, Dwight Aarons, and Ben Carmacino for their assistance in the preparation of this essay.

1. See Robert J. Martineau, *Modern Appellate Practice: Federal and State Civil Appeals* § 1.1, at 2 (1983).

cient Athens, there existed a right to appeal decisions of the magistrate.<sup>2</sup> Some appeals were made to an assembly of as many as six thousand citizens—a majority of whom determined the outcome.<sup>3</sup> In a modern-day context, this would be akin to arguing an appeal before a capacity crowd at Radio City Music Hall.

Under our country's present court system, the United States Supreme Court is our highest level of appellate review. As far back as the ninth century, however, "appeals" were regularly made to an even higher authority. Although not formally considered "appeals" as we know them today, trial by ordeal and trial by battle were denominated as "appeals to the judgment of God."<sup>4</sup>

Trial by ordeal took several forms. For example, with the Ordeal of Iron, an accused might be required to carry a one pound piece of red-hot iron in his hands for nine paces.<sup>5</sup> Thereafter, the hands of the accused would be bound. If after three days the wound had healed cleanly, the accused was determined to be innocent; if not, he was found guilty.<sup>6</sup> The outcome was thought of as God's judgment.<sup>7</sup>

Trial by combat worked on the same premise as trial by ordeal—namely, that "[t]he presumption of law [wa]s that God w[ould] give victory to him that hath right [on his side]."<sup>8</sup> When an accused party chose to prove his case through trial by combat, he had the option of hiring a professional champion as a stand-in, as did his accuser.<sup>9</sup> Then, according to a strict code of procedure, both parties would battle from early morning until dusk.<sup>10</sup> If, "before the stars appeared," the accused or his stand-in had been vanquished, the accused was hanged on the spot.<sup>11</sup> If, on the other hand, the accused or his stand-in was successful in his defense, the accused was acquitted.<sup>12</sup> This manner of bizarre dispute resolution was not officially abolished in England until 1819.<sup>13</sup>

2. See Robert J. Bonner, *Lawyers and Litigants in Ancient Athens: The Genesis of the Legal Profession* 35 (Benjamin Blom 1969) (1927).

3. See *id.* at 35-36; Douglas M. MacDowell, *The Law in Classical Athens* 30, 35-37 (1978). Although occasionally the whole body of heliasts, as they were known, convened, the usual course of action was to break the mass of people into sections known as "'dicasteries,'" which were smaller panels consisting of 501 individuals for criminal cases and 201 individuals for civil cases. See Bonner, *supra* note 2, at 36.

4. A.T. Carter, *A History of English Legal Institutions* 200 (Fred B. Rothman & Co. 1986) (1902).

5. See Dick Hamilton, *Lawyers and Lawbreakers* 3 (Dorset Press 1991) (1979).

6. See *id.*

7. See *id.*

8. M.J. Russell, *Trial by Battle and the Writ of Right*, 1 J. Legal Hist. 111, 111 (1980) (quoting Co. Lit., fo. 294b. *Staunton v. Prior of Lenton* (1329), *Dudg. Orig.* 68, by Scrope J.).

9. See Julius J. Marke, *History in the Law Books*, N.Y. L.J., Sept. 15, 1992, at 4, 4.

10. See *id.*

11. *Id.*

12. See *id.*

13. See Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* 13, 14-15 (1986); Marke, *supra* note 9, at 4; Russell, *supra* note 8, at 128.

Although we have obviously come a long, long way since those times, I am sure that many attorneys consider the arguing of an appeal today to be a very distinct ordeal, albeit of a clearly different order.

Under our present system, if an appellant files an appeal, it is the responsibility of the opposing party, the appellee, to defend the underlying decision. Historically, that was not always the case. Prior to 1272, under England's judicial system, the judge whose decision was being challenged had this responsibility.<sup>14</sup>

Looking back to the historical origins of our own federal appellate system, the Justices of the Supreme Court were at one time called upon to ride circuit.<sup>15</sup> Although the Justices served primarily as trial judges in this capacity, they did have appellate authority in certain cases.<sup>16</sup> The position of Supreme Court Justice in those days was by no means as dignified as it is today. Riding the circuit was rigorous work. Travel by road, by carriage, or by boat was slow, tedious, and oftentimes dangerous; accommodations could be bug-ridden, frequently dirty, and the food miserable.<sup>17</sup> No doubt, the trial and appellate attorneys involved also found it necessary to endure similar travails as they travelled to present their cases.

### B. *Modern Appellate Advocacy*

While these historical features and the problems inherent in them no longer exist in our time, there are other aspects associated with our present-day system that merit reflection.

For example, the number of appeals has increased dramatically in recent decades. Just in the past forty years, the number of petitions for writs of certiorari to the United States Supreme Court has more than quintupled,<sup>18</sup> although the number of justices has remained unchanged. In the federal courts of appeals, the number of appeals filed has increased almost ten-fold in approximately the last three decades.<sup>19</sup> But, at least during that time, the number of judges in our courts of appeals has more than doubled.<sup>20</sup>

There are various theories as to the causes for this dramatic increase in

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14. See Martineau, *supra* note 1, at 3.

15. See Robert L. Stern, *Appellate Practice in the United States* 5 (2d ed. 1989).

16. See *id.*

17. See Jeffrey B. Morris, *Federal Justice in the Second Circuit: A History of United States Courts in New York, Connecticut & Vermont 1787-1987*, at 25-26 (1987).

18. Compare *The Supreme Court 1951 Term*, 66 Harv. L. Rev. 89, 177 (1952) (1207 disposed; 146 remaining on docket) with *The Supreme Court 1991 Term*, 106 Harv. L. Rev. 19, 382 (1992) (5825 disposed; 945 remaining on the docket).

19. In the federal courts of appeals, the number of appeals filed increased from 3900 in 1960 to 35,000 in 1987. See Robert L. Stern, *Remedies for Appellate Overloads: The Ultimate Solution*, 72 *Judicature* 103, 103 (1988).

20. See *id.* (From 1960 to 1987, the number of circuit court judges "slightly more than doubled."); see also Richard A. Posner, *The Federal Courts: Crisis and Reform* 357 (1985) (chart indicating that federal circuit judges numbered 63 in 1953, 66 in 1960, and 127 in 1983).

appeals. One popular notion is that our society has become more litigious.<sup>21</sup> On the other hand, my colleague on the Second Circuit, Chief Judge Thomas Meskill, believes that the increase in the number of appeals flows directly from the initiatives of the United States government.<sup>22</sup> He has in mind governmental initiatives such as OSHA,<sup>23</sup> ERISA,<sup>24</sup> and Title VII.<sup>25</sup> He informs us that these and other federal acts have served to increase the number of cases litigated and, in turn, account in part for the increasing number of appeals filed in the federal courts.<sup>26</sup>

Whatever the causes, our courts of appeals, in an effort to deal with the ever-increasing number of appeals filed each year, have responded in a variety of ways. One approach to speeding along the proceedings has been to limit the time allotted for oral argument. The Second Circuit allows oral argument in almost every appeal, although severe time restrictions are usually imposed.<sup>27</sup> Other circuits also have turned to time limitations and impose still other restrictions on when oral argument will even be allowed.

One common approach to achieving timely dispositions of appeals is the use of summary orders.<sup>28</sup> Summary orders are an effective means of more promptly disposing of many of the cases on appeal. The Second Circuit, for example, used summary orders more often than any other device to dispose of appeals decided during the year ended June 30, 1991.<sup>29</sup> A summary order is most often accompanied by a succinctly written statement of the court's reasoning. It is almost invariably unanimous, and as the rule states, "Since these statements do not constitute

21. Cf. Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit 1-2* (1991) (arguing that the United States is in the thralls of a litigation explosion that has been disastrous).

22. See Thomas J. Meskill, *Caseload Growth: Struggling to Keep Pace*, 57 *Brook. L. Rev.* 299, 300-01 (1991).

23. Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1988 & Supp. II 1991).

24. Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1988 & Supp. II 1991).

25. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1988 & Supp. III 1992).

26. See Meskill, *supra* note 22, at 300-01.

27. The Second Circuit's Local Rules have been amended as follows:

The judge scheduled to preside over the panel will set the time allowed for argument by each party after considering the appellant's brief and each party's request for argument time. Normally, ten or fifteen minutes will be allotted to each side. Parties on the same side of an appeal may be obliged to divide the time allotted to their side. Arguments in pro se appeals are normally five minutes per side. The clerk will notify counsel and pro se parties of all such time allotments.

2d Cir. R. 34(b) (effective Jan. 1, 1993).

28. Summary orders are succinctly written opinions with no precedential value. See Daniel Wise, *Circuit Court's Backlog Cut by 10 Percent; Appeals-Per-Panel Up: Week Added to Term*, N.Y. L.J., July 5, 1991, at 1, 3.

29. See *id.*

formal opinions of the court and are unreported and not uniformly available to all parties, they [may] not be cited or otherwise used in unrelated cases before [the Second Circuit] or any other court."<sup>30</sup>

Another approach that could be utilized by our courts to deal with the increased volume of appeals is the filing of more per curiam, as opposed to full-blown, opinions. A per curiam opinion is usually a short opinion issued by the appellate panel as a whole, and thus, it does not bear the name of an individual judge as the writer. Per curiam opinions tend to be fairly succinct; oftentimes they deal primarily with a single, discrete issue. But, unlike summary orders, they *do* have precedential value.

Unlike summary orders and per curiam opinions, rulings from the bench, which at one time accounted for at least a small percentage of the court's dispositions, are rarely used today in the Second Circuit.

## II. PROCESSES OF APPELLATE ADVOCACY IN THE AMERICAN LEGAL SYSTEM

Of the two methods of appellate advocacy—the written brief and the oral argument, some have criticized oral argument in recent years as being nothing more than an expensive habit that needs to be kicked.<sup>31</sup> This belief is strongly associated with Professor Robert Martineau, a highly respected academic, who disputes the view that oral argument plays an important role in the administration of justice in the appellate process. Professor Martineau maintains that if additional information is needed, there is no good reason why appellate judges cannot present written questions to counsel to gain the necessary insights.<sup>32</sup>

Not surprisingly, quite a few practitioners, scholars, and judges do not subscribe to this view. Indeed, the proponents of oral argument regard the opportunity to be heard as an essential element of the appellate process.<sup>33</sup> As Justice Brennan observed, "I have had too many occasions when my judgment of a decision has turned on what happened in oral argument, not to be terribly concerned for myself were I to be denied oral argument."<sup>34</sup>

Proponents of oral argument point out that it serves as an important conduit for the exchange of information between judges and counsel. Judges are given the opportunity to discuss with counsel the issues they consider dispositive or particularly troublesome—issues that may not

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30. 2d Cir. R. O. 23.

31. See Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 Iowa L. Rev. 35, 35-36 (1986) (characterizing Professor Martineau's attack on oral argument).

32. See Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 Iowa L. Rev. 1, 32 (1986).

33. See, e.g., Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 240 (1960); Frederick B. Weiner, *Oral Advocacy*, 62 Harv. L. Rev. 56, 58 (1948).

34. Commission on Revision of the Fed. Court Appellate Sys., *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 254 (1975) (quoting Justice Brennan's comments at the 1972 Third Circuit Judicial Conference).

have been briefed or at least not briefed fully. Counsel, in turn, are given the opportunity to gauge the judges' reactions to a particular line of argument and to modify their strategy, if that should be indicated. As Chief Justice Rehnquist has explained:

"You could write hundreds of pages of briefs, and, you are still never absolutely sure that the judge is focused on exactly what you want him [or her] to focus on in that brief. Right there at the time of oral argument you know that you do have an opportunity to engage or get into the judge's mental process."<sup>35</sup>

While the controversy over the merits of oral argument continues, and as argument time is increasingly whittled away, the significance of the brief becomes even more apparent. For example, in the Second Circuit, oral argument usually lasts not more than a half-hour. As a practical matter, in that period of time, counsel can actually address only a few points. The briefs, on the other hand, arrive in chambers approximately one month before oral argument is scheduled to be heard, and resort to them may occur for months after oral argument has ended. Therefore, it should be evident that the language used in a brief should be concise, cogent and convincing, such that the evidence supporting the facts "sing[s] out as clearly and simply as possible,"<sup>36</sup> and the legal discussion of the issues must be concentrated and persuasive.<sup>37</sup>

### III. STRATEGIC, PRACTICAL, AND ETHICAL CONSIDERATIONS FOR SUCCESSFUL APPELLATE ADVOCACY

With these considerations in mind, I now turn to what I believe are some of the means that counsel might employ to make an appellate performance a more persuasive one.

Too often, attorneys forget that the potential for success on appeal *begins* at the pre-trial preparation stage, *continues* during the trial phase (and perhaps post-trial phase) and generally *concludes* with the submission of one's brief and oral argument on appeal. If appellate and trial counsel are one and the same person, then it is essential to view what transpires at the trial through a prism of appellate considerations. If they are separate counsel, then it strikes me that, on occasion, it may be wise for appellate counsel to be associated with trial counsel both before and perhaps even during the trial to see to it that a proper record is made in the event that an appeal becomes necessary. That this course of action can have merit seems borne out by the fact that, more often than one would expect, cases are lost on appeal due to the failure of counsel at the

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35. Bright, *supra* note 31, at 36-37 (quoting remarks of Chief Justice William H. Rehnquist at the *Jurists-in-Residence Program*, St. Louis University School of Law (Apr. 8, 1983)).

36. Irving R. Kaufman, *Appellate Advocacy in the Federal Courts*, 79 F.R.D. 165, 166 (1978).

37. *See id.* at 169.

trial level to make a proper record, or to raise arguments or objections, or to submit requests to charge for the judge's consideration in jury trials.

Developing a proper record can also be important in a case in which a pre-trial dispositive motion has been made—e.g., a motion that seeks dismissal of a complaint for failure to state a cause of action or seeks a grant of summary judgment. Often, it is a wise course to have appellate counsel peruse such pre-trial motion papers before they are submitted or before a response is filed.

On occasion, an attorney may find it difficult to make a satisfactory record at the trial level despite counsel's best efforts. Sometimes a busy trial judge will direct an attorney who is seeking to make a record, to "move along, counsellor." What then? Of the various steps that might be pursued by counsel at that point, in order to preserve an issue for appellate review, one option is to prepare a very short memorandum of law, for example by way of an offer of proof, and to hand it up to the judge that afternoon or the next morning, with a copy handed not just to the opponent, but also to the courtroom deputy for docketing and filing. Even if rejected, the trial transcript may reveal, especially if counsel makes it a point to insist upon it, that an attempt was made to make a record of the issue. This might well suffice to preserve the issue for appellate purposes.

Once at the appellate level, it is obvious that the briefs in even the most interesting case can become bogged down in a morass of technical issues and procedural points, such that the reader must struggle to "see the forest for the trees." This problem is particularly endemic to brief writing rather than to oral argument since time limitations imposed on oral argument can have the beneficial effect of winnowing out superfluous arguments.

Commonly, an appellate advocate will identify numerous issues that can be raised on appeal. When the issues are numerous, however, a wise course of action is to divide them into major and minor issues and then to elaborate only upon those that cry out to be addressed. Although good strategy may warrant developing one or two minor issues,<sup>38</sup> since they may represent just the needed additional tipping of the scales in one's favor, it is imperative that counsel avoid using an "everything but the kitchen sink" mentality in brief writing. While no one would dispute the importance of identifying relevant issues on appeal, few judges are apt to be impressed with a brief that asserts a half-dozen or more key points of error. In the words of the late Judge E. Barrett Prettyman, on the whole, "[t]rial judges make relatively . . . few errors."<sup>39</sup> When they do, such mistakes are frequently harmless in light of all the other evidence presented. Consequently, by asserting numerous grounds for re-

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38. See E. Barrett Prettyman, *Some Observations Concerning Appellate Advocacy*, 39 Va. L. Rev. 285, 294 (1953).

39. *Id.* at 287.

versal—some of which are not particularly strong—the court's attention may be needlessly diverted from the more compelling grounds, and the chance that the court will be convinced on any ground decreases significantly. As Judge Abner Mikva of the District of Columbia Circuit Court writes:

Asking attorneys to highlight the meat and potatoes of the case[ ] does not mean that the spices included in the entrée[,] or the dessert that follows[,] should be taken off the menu. But it does suggest that serving eight different vegetables will detract from the main course.<sup>40</sup>

From a practical standpoint, a more concise, cogent brief presenting the strongest points and arguments usually makes the most sense. Appellate court rules may permit the filing of a primary brief of up to fifty pages, and may allow an appellant to file a reply brief of up to twenty-five pages.<sup>41</sup> But consider that if one counts the number of appeals scheduled to be heard by a panel of judges on a particular day, and if one multiplies that by one brief for each party, plus a joint appendix, a reply brief, and an occasional sur-reply brief, in addition to the applicable cases and statutes, one can readily calculate the enormous amount of reading with which a judge and a judge's staff are faced to prepare for each sitting day. One may agree that it is better to have a shorter brief that will be read and studied in preparation for argument than a longer one that is skimmed and put aside for future study.

Not only is it important to select the issues to be presented on appeal with great care, one's phrasing of the selected issues is also tremendously important. Framing the issues often provides the opportunity to place emphasis or sharpen focus as to the questions presented. This calls for a thorough knowledge of the relevant law, as well as the adroitness to identify those portions of the record on appeal that are most likely to support your position. Counsel should accomplish this through the use of felicitous modes of expression.

It is important that one take care not to twist the record and issues out of shape. When judges see or hear mischaracterizations, they are left with the impression that the advocate is either unfamiliar with the case or is attempting to skirt issues on which counsel is vulnerable. To compound the problem, either the court or one's opponent will usually challenge or contradict mischaracterizations—and such challenges or even clarifications can diminish the persuasiveness of counsel's argument on appeal.

It should be evident that a clear discussion of the case is critical whether the case is criminal or civil, for each can present complicated fact patterns and still more complicated legal issues. If complex cases have been difficult for counsel to understand, they can be equally difficult

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40. Abner J. Mikva, *Counsel Lack Selectivity in Appellate Advocacy*, *Legal Times*, Nov. 15, 1982, at 10.

41. See Fed. R. App. P. 28(g).

for the judges and their staff to comprehend, at least initially. It is counsel's responsibility to reduce all segments of an appeal to understandable terms. I recall a patent attorney jesting that, before presenting a complicated patent case for trial or appeal, she would argue the case before her husband on the assumption that if he could understand it, anyone could, including the judges.

In my experience, in the course of writing an opinion, there tend to emerge both predictable and unpredictable hurdles that must be surmounted by the judge who is the opinion writer. A wise advocate may anticipate such hurdles and can often assist the court by suggesting ways of breaking through any such Gordian knots. For example, an appeal may be presented where the issue of whether there is jurisdiction is problematic, and yet, a careful review of the merits may reveal that there simply was insufficient evidence to support the outcome in any event. In such a situation, an appellate advocate may find it advantageous to suggest to the court that, if feasible, the court assume jurisdiction *arguendo*, and then undertake to show the court that if the merits were to be reached, the outcome would quite clearly be in his or her favor. This is sometimes referred to as the "even if" approach.

What about using creative and expressive language in appellate arguments? One of the great tools lawyers utilize in preparation for an appeal is to study selected opinions of judges. In this regard, certain judges have very distinctive writing styles, the imitation of which might serve lawyers well in capturing the essence of an appeal. For example, the late Judge Irving Kaufman<sup>42</sup> believed that, in arguing appeals, appellants in particular should strive to tell an eloquent tale, in order to surmount what he called the appellate court's "natural disinclination" to reverse the district court's resolution of the controversy.<sup>43</sup> Frequently, it was Judge Kaufman's personal style to begin an opinion with strikingly expressive prose that in many ways placed the legal and factual issues in quite sharp focus.

For example, in one case, members of a religious organization sued the managers of the Nassau Coliseum, alleging First Amendment violations after persons were arrested there for distributing leaflets.<sup>44</sup> The attorney for the appellants summarized the issue tersely as follows: "The issue presented below was whether the plaintiffs have a First Amendment right to distribute non-commercial literature on property owned by the County. To resolve this issue it must be decided what type of forum that property represents."<sup>45</sup>

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42. Prior to his death, Judge Kaufman served on the United States Court of Appeals for the Second Circuit, was the court's chief judge for many years, and was a distinguished Sonnett Lecturer. For an article based on Judge Kaufman's Sonnett Lecture, see Irving R. Kaufman, *Prison: The Judge's Dilemma*, 41 *Fordham L. Rev.* 495 (1973).

43. See Kaufman, *supra* note 36, at 167.

44. See *Paulsen v. County of Nassau*, 925 F.2d 65, 66-67 (2d Cir. 1991).

45. Brief for Appellant at 19, *Paulsen v. County of Nassau*, 925 F.2d 65 (2d Cir. 1991) (No. 90-7675).

In an opinion upholding the district court's issuance of a preliminary injunction, Judge Kaufman chose to frame the issue this way:

From the time of the founding of our nation, the distribution of written material has been an essential weapon in the defense of liberty. Throughout the years, the leaflet has retained its vitality as an effective and inexpensive means of disseminating religious and political thought. Today, when selective access to channels of mass communication limits the expression of diverse opinion, the handbill remains important to the promise of full and free discussion of public issues. For those of moderate means, but deep conviction, freedom to circulate fliers implicates fundamental liberties.<sup>46</sup>

Judge Kaufman was not alone in his expressive and expansive approach to opinion writing. For example, Judge Richard Cardamone<sup>47</sup> also has developed a distinctive writing style. He tends to utilize analogies and aphorisms to focus the issues and facts sharply. For example, in a recent criminal case,<sup>48</sup> a defendant moved to suppress post-arrest statements on the ground that the authorities had violated *Miranda v. Arizona*<sup>49</sup> in obtaining such statements.<sup>50</sup> In an opinion upholding the district court's suppression order, Judge Cardamone used mythology to make his point. He wrote:

After the defendant was given the prophylactic warnings and said he understood them and did not need a lawyer present when questioned, the arresting officer should have been satisfied that he was about to obtain a voluntary confession. But, like Semele who was not content with what she had, and used trickery to obtain more proof, the arresting officer in his eager pursuit of a confession also employed trickery to browbeat defendant into making a statement.<sup>51</sup>

By Judge Cardamone's reference to Semele, he used a character from classic mythology to make his point, for it was Semele who loved the god Zeus but was not content with his human guise and thus tricked him into revealing his god-like nature and wound up herself destroyed by his lightning.<sup>52</sup>

Even judges who have not adopted this expressive form or style of opinion writing may find themselves more sharply focused by an advocate's creative characterization of the issues on appeal. This especially may be the case at oral argument. It is precisely at this time that counsel should seek to give the appellate panel members a specific focus, setting forth as clearly as possible the heart and soul of the case.

Commonly, when an opinion is to be written regarding difficult or

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46. *Paulsen*, 925 F.2d at 66-67.

47. Judge Cardamone serves on the United States Court of Appeals for the Second Circuit.

48. *See United States v. Anderson*, 929 F.2d 96 (2d Cir. 1991).

49. 384 U.S. 436 (1966).

50. *See Anderson*, 929 F.2d at 96.

51. *Id.* at 96-97 (footnote omitted).

52. *See id.* at 97 n.1 (citing C.M. Gagley, *The Classic Myths* 71-72 (rev. ed. 1939)).

close issues, we send for, and listen to, the tapes of the arguments made on appeal. Occasionally, we listen to the arguments repeatedly. Some of our judges *always* listen to the tapes while engaged in the writing of an opinion.

Playing the tapes of the arguments can be the denouement of the writing process. By this point, the judge and the judge's law clerk have studied counsels' arguments in the briefs and have read the relevant cases and statutes. The re-introduction of the oral argument into the process, via the tapes, can be pivotal. One can listen for the nuances and for where counsel has placed emphasis. If counsel has been able to weave into his or her argument a Judge Kaufman- or Judge Cardamone-type expressive phrase, analogy, or aphorism of the key issue presented, it can have its greatest impact when the tapes are replayed. Creative expression can trigger important insights that assist the judge in carrying out his or her decision-making role.

Thus, although oral argument lasts a relatively short time, its importance should not be underestimated. Indeed, in the words of Judge Prettyman, it is a formidable task to "propel . . . other human minds into a certain channel to a certain result,"<sup>53</sup> yet oral argument can be particularly effective as a means of painting a picture for the judges. Those advocates who succeed in painting a clear and expressive picture may find that the judges more readily grasp and retain the position counsel is urging upon the court.

Most opinions filed in the Second Circuit are unanimous decisions. Appellate panel members, however, are not always of like minds in their views. Occasionally, a panel member will write a separate opinion from that of the majority. Such opinion either concurs with the majority's disposition of the case, but seeks to preserve a collateral, relevant argument for possible future development, or dissents to express disagreement with the majority.

To advance an argument on appeal that fails to convince the majority, but nevertheless is adopted in a minority opinion, may in itself be a significant achievement. For example, in seeking further appellate review, the advocate may be in a much stronger position in arguing the point in question if he or she can cite to a concurring or a dissenting opinion that agrees with the advocate's argument.

Moreover, if one is able to gain support for a position in a dissenting opinion, although the appellate court based its decision on the majority's contrary reasoning, an advocate may be in an improved posture in settlement negotiations. This is particularly true if the dissenting judge's views coincide with the views of other appellate courts or with perceived appellate court tendencies.

There are occasions when strategic considerations may prompt an appeal despite the expectation of an unfavorable outcome. A case may pose

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53. Prettyman, *supra* note 38, at 285.

issues of first impression for the appellate court, and counsel may perceive that the facts of the particular case place the court at the cutting edge of an issue with broad implications.

Such an issue was presented in a recent appeal to the Second Circuit where the question was whether the statute of limitations in a securities case should be governed by the analogous state statute of limitations or whether the court should adopt a uniform federal statute of limitations, and, if so, for what length of time. The Second Circuit panel, in *Ceres Partners v. GEL Associates*,<sup>54</sup> adopted the uniform approach.<sup>55</sup> This was a cutting edge issue on which the circuits were in conflict. Ultimately, this issue was resolved by the Supreme Court in a later case.<sup>56</sup>

In deciding whether to make a thrust into the appellate process when faced with novel or controversial issues and in plotting strategy, one must consider several factors, including: decisions in other circuits; dicta in prior cases; the overall reputation of the appellate court's tendencies; comments by lawmakers in the legislative history; discussions in treatises and law review articles; and reasoned speculation as to the current stance of the Supreme Court. These same considerations will also suggest the route to follow with respect to petitions for rehearing and suggestions for in banc review—although the odds for success on the in banc front are not great. Finally, in assessing whether to press an appeal on a cutting edge issue, the advocate should gauge the likelihood of support from potential *amici curiae*.

One of the serious mistakes counsel can make while arguing an appeal is becoming defensive when questioned by a panel member who appears to be persuaded by the argument of his or her opponent. Often, the judge simply may anticipate being assigned the responsibility of writing the opinion and may be testing the strength of counsel's positions. Such questioning should be viewed as an excellent opportunity to deflate an opponent's arguments while advancing the strong points of one's own position. Indeed, some judges make it a practice to direct tough questions to the side that appears to have the better argument in an attempt to ensure that the envisioned outcome of the appeal is the correct outcome.

From a practical standpoint, an appellate advocate should make eye contact with each judge on the panel. It may be particularly desirable to make certain that this includes eye contact with female and minority panel members, since a male, majority-group attorney will sometimes incredibly make his presentation almost exclusively to a panel member of the same gender and race. While this invariably is inadvertent, it is a needless shortcoming.

Finally, while it is an attorney's duty to zealously represent his or her

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54. 918 F.2d 349 (2d Cir. 1990).

55. See *Ceres Partners*, 918 F.2d at 364.

56. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991).

client, the attorney must be mindful to do so within the parameters of professional ethics guidelines.<sup>57</sup> There is an Ethical Consideration that states:

[w]here a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.<sup>58</sup>

While the Ethical Considerations are “aspirational” in nature,<sup>59</sup> a similar, mandatory Disciplinary Rule<sup>60</sup> sets forth a minimum level of conduct below which “no lawyer can fall without being subject to disciplinary action.”<sup>61</sup>

While bringing an adverse ruling to the court’s attention might seem like the last thing a zealous advocate would want to do, to fail to come forward with this information may be the equivalent of shooting oneself in the foot. Ofttimes, loss of credibility with the court can do more to undermine one’s case than the adverse ruling—not to mention leaving the attorney vulnerable to sanctions. Indeed, appellate skills shine through most brightly when an advocate is able to distinguish or make a cogent argument as to why a seemingly adverse ruling is not apposite to the case at hand.

The first time I encountered a clear-cut instance of such candor by an attorney was during my first year as a district judge. In the middle of the criminal trial, it became necessary for me to hold a side-bar conference. Both the defense attorney and the government attorney presented their arguments on the point being discussed. As I was about to rule on the matter, the defense attorney spoke up and told me that he wished me to know that a recent Second Circuit case had ruled adversely to his position. I no longer remember how I disposed of that issue, but now, more than twenty years later, whenever that attorney argues an appeal before me, I remember that occasion, and I respect his views as likely to be completely forthright.

#### CONCLUSION

In closing, it is important to keep in mind the words of the late Judge Kaufman: “Advocacy is not an end in itself, it is the means by which the judicial process attempts to arrive at truth and justice.”<sup>62</sup> With that in mind, I hope others have found some interest in the overview that I have presented as I have seen it through my eyes.

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57. See Thomas R. Newman & Steven J. Ahmuty, Jr., *Maintaining Credibility with the Court*, N.Y. L.J., Mar. 12, 1991, at 3, 3.

58. N.Y. Jud. Law app. EC 7-23 (McKinney 1992).

59. See N.Y. Jud. Law app. Preliminary Statement (McKinney 1992).

60. See N.Y. Jud. Law app. DR 7-106B(1).

61. See N.Y. Jud. Law app. Preliminary Statement (McKinney 1992).

62. Kaufman, *supra* note 36, at 172.

