The Journal of Appellate Practice and Process

Volume 1 | Issue 1 Article 2

1999

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THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

ESSAYS

FROM WEBSTER TO WORD-PROCESSING: THE ASCENDANCE OF THE APPELLATE BRIEF*

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I am presently reading an excellent biography of Daniel Webster by Robert Remini.[1] Daniel Webster was probably the greatest appellate advocate of the nineteenth century; he argued somewhere around 200 cases before the Supreme Court, and countless more in other federal and state courts. He undoubtedly contributed greatly to the decisions in some of the great cases he argued before the Supreme Court, but this was by reason of his oral advocacy, not by reason of his briefs. Until 1821, the Supreme Court did not even require briefs from the parties. Unfortunately, though his oral arguments are reported by the Reporter of Decisions, they are all paraphrased, and if one compares them with other orations for which he is famous the inescapable conclusion is that much is lost as a result of the paraphrasing. The effect is similar to a journeyman painter copying Vermeer's *View of Delft.*

* Remarks given to the Appellate Practice Institute of the American Bar Association, Ritz-Carlton Pentagon City, May 29, 1998.

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1. ROBERT REMINI, DANIEL WEBSTER (1997).

But Webster was not just an appellate advocate; he was an orator—an orator in a century that prized oratory. He was a member of the House of Representatives for several terms, and a perennial senator from Massachusetts. His legislative career was interrupted on two occasions by service as Secretary of State. But his name was never connected with any particular piece of legislation, because he never drafted any important bill. He is instead remembered for his oration on the fiftieth anniversary of the Battle of Bunker Hill, his reply to Senator Robert Hayne in 1830, and his seventh of March speech in support of the Compromise of 1850. His century was a century of orators, and the changes from that time to the present show how appellate advocacy has likewise evolved.

When, in 1821, the Supreme Court for the first time required the parties to submit a brief, it was not anything like the brief that we know today. The brief was to contain "the substance of all material pleadings, facts, documents, on which the parties rely, and the points of law and fact intended to be presented at the argument."[2]

The early brief was also quite short—usually no more than three or four pages in length. For example, in December of 1854, the Supreme Court heard three forfeiture cases: *United States v. Sixty-Seven Packages of Dry Goods*,[3] *United States v. Nine Cases of Silk Hats*,[4] and *United States v. One Package of Merchandise*.[5] Attorney General Caleb Cushing—a very gifted advocate himself—filed a seven-page brief in the first case. In the latter two, he filed one-page briefs that simply referred the Justices to the longer brief. Nine pages of briefs in three cases suggest that appellate practice in the early nineteenth century placed more of a premium on oral argument than it did on written briefs.

In 1884, the Supreme Court for the first time mandated that all briefs include argument. Besides identifying the questions involved in the case, briefs to the Supreme Court were to state the points of law and relate these to the relevant authorities,

2. SUP. CT. R. XXX, 19 U.S. b (6 Wheat.) (1821).
3. 58 U.S. (17 How.) 85 (1854).
4. 58 U.S. (17 How.) 97 (1854).
5. 58 U.S. (17 How.) 98 (1854).

statutes, and pages of the record. With these new requirements, the modern brief was born.

Meanwhile, the Supreme Court and, I suspect, other appellate courts too were gradually cutting down on the time for oral argument. In great cases such as *Gibbons v. Ogden*,[6] in 1824, and *Charles River Bridge v. Warren Bridge*,[7] in 1838, at least two counsel for each side argued for several hours, so that the court spent four or even five days listening to oral argument. In 1849, the Supreme Court adopted a rule limiting oral argument in each case to two hours per side, but exceptions were still made for very important cases. In *Ex parte Milligan*,[8] for example, argued in 1866, the oral arguments continued for six days. But emphasis, at least in the ordinary case, was gradually shifting from oral argument to the brief.

By the turn of the century, the new form of legal argument was firmly entrenched. Today, as you all know, appellate courts around the country rely heavily on written briefs, even to the point of routinely deciding cases without oral argument. Yet as recently as Harlan Stone's becoming a member of the Supreme Court in 1925, briefs were not circulated to the members of the Court until the case was about to be argued. So well into the twentieth century the members of our Court derived their principal first impression of the case from the oral argument of counsel.

But today, briefs are distributed long before the case is orally argued, so the first impression that a judge gets of a case is the one he gets from the briefs. It would seem that inside of a hundred years the written brief has largely taken the place that was once reserved for oral argument. For that reason, an ability to write clearly has become the most important prerequisite for an American appellate lawyer.

Our Court regulates the contents of briefs in some detail: first a statement of the basis of jurisdiction, then a statement of the case, then a summary of the argument, and then the argument itself. I cannot think of any better way to convey the importance of the brief than to say that in many cases that we hear, some if not all members of our Court will come on the

6. 22 U.S. (9 Wheat.) 1 (1824).
7. 36 U.S. (11 Pet.) 420 (1838).
8. 71 U.S. (4 Wall.) 2 (1866).

bench with a tentative view of the merits based on a reading of the briefs. And it would be strange if this were not so—after all, the briefs are supposed to state and argue the opposing contentions of the parties. This is not to say that oral argument is not important for developing the nuances of each side's position in response to frequent questions from the bench, or for lending a good oral advocate's personal force to the essential ground on which a party relies. But rarely is good oral advocacy sufficient to overcome the impression made by a poorly written brief.

If oral advocacy is an art, brief writing can be called a combination of art and science. When a case first lands on an appellate lawyer's desk, it more often than not is a confusing and complicated jumble of facts, lower court rulings, procedural questions, and rules of law. The brief writer must immerse himself in this chaos of detail and bring order to it by organizing—and I cannot stress that term enough—by organizing, organizing, and organizing, so that the brief is a coherent presentation of the arguments in favor of the writer's client.

When I was in private practice, I drafted the appellate briefs in cases that I was to argue, with some help from a partner or associate. This is the best way to assure that the brief and the oral argument are completely in sync, so to speak—that the oral advocate knows everything he should know about the case. I know that in large firms, and in offices such as that of the Solicitor General, the responsibility for drafting the brief must often be divided up. Although this system of divided responsibility *need* not be a disadvantage, it *can* be a disadvantage.

If Daniel Webster was the premier advocate of the nineteenth century, surely John W. Davis was the premier advocate of the twentieth century. It is said that when he had to argue a case orally before the Supreme Court, he would gain his entire acquaintance with the case by discussing it with a trusted associate and reading the briefs on the train from New York to Washington—the train taken on the day that he was to make his oral argument in the Supreme Court. But John W. Davis was an extraordinarily gifted advocate, and those who would try to follow in his footsteps by preparing for an argument the way he did must be sure they are equally as gifted. For ordinary mortals

there is a real danger that one who has played little part in the drafting of the brief will not do a good job of arguing the case.

When I was in the military in the Second World War, we learned to fire carbines by firing at a target on a shooting range. But we were also required to learn to take a carbine apart and reassemble it—a task at which I proved to be notably deficient—because if something happened to go wrong with the gun when we needed it, we had to know more than just how to shoot it.

There is an analogy here to the relationship between a brief and an oral argument. The questions you get in an oral argument are often ones that are not squarely covered in the brief—indeed that is probably the reason for the question from the bench. So an advocate who has not gone beneath the surface of the brief to understand how its parts fit together into a coherent argument will be at a considerable disadvantage. Even an advocate who has all but memorized the brief will be at this kind of disadvantage, if he has done no more than memorize it.

But the real disaster is an oral advocate who seems actually unfamiliar with his client's brief. It does not happen often, but it does happen in our Court, and I therefore assume it must happen in other courts too. The attorney general of a state, the senior partner of a law firm, the head of a department, despite having done no work on the case in the lower court and being too busy to participate in the drafting of the brief, nonetheless "designates" himself to argue the case. This advocate apparently thinks that an outward air of confidence and experience in a number of oral arguments are substitutes for a thorough understanding of this particular case.

The impression on the Court presented by this sort of advocacy is, to say the least, a disquieting one. The brief may have been very good, but the advocate may actually detract from it by his presentation, or even contradict some part of it. Instead of a feeling that the brief and the oral argument are both parts of an integrated appellate presentation, the impression given is more like that of a horse in a children's play—the horse being the simulated skin of the animal draped over two children, one providing the front feet, and the other providing the back feet. It looks fine until it begins to move, and then it is clear that there

are two separate beings involved, often pulling in different directions.

So, in conclusion, while there is a considerable difference between the skills required of a good brief writer and those required of a good oral advocate, both must be harnessed together in the common purpose of clearly and forcefully stating the client's case. With the shift over time from exclusive emphasis on oral advocacy to the much-increased emphasis on the written brief, the brief writer has come into his own. But his labors may be set at naught by a prima donna oral advocate who has not really familiarized himself with the case.