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Words to the Wise: David C. Frederick's Supreme Court and Appellate Advocacy

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BOOK REVIEW

WORDS TO THE WISE*

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Oral argument in the Supreme Court was once a political and social event of the first order, a contest of rhetoric and oratory that bore a greater resemblance to Cicero's speeches in the Roman Forum than to the high-speed volley of question and answer that marks most arguments in today's Supreme Court. Arguments in the early Court were also tests of stamina. In *McCulloch v. Maryland*, the arguments of counsel spanned nine days, in *Gibbons v. Ogden*, the lawyers argued for five, and in *Charles River Bridge v. Warren Bridge*, William Dutton, counsel for the petitioner, began his argument on Thursday and did not conclude it until Saturday.[1] Throughout, the Justices largely sat silent, leading Chief Justice Marshall to quip, perhaps

* *See* David C. Frederick, *Supreme Court and Appellate Advocacy* (West Group 2003).

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1. *See* Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 Iowa L. Rev. 1, 10 n. 59 (1986) (discussing oral argument in *McCulloch v. Md.*, 17 U.S. 316 (1819)); William H. Rehnquist, *Oral Advocacy*, 27 S. Tex. L. Rev. 289, 292-93 (1985) (discussing oral argument in *Gibbons v. Ogden*, 22 U.S. 1 (1824)); Charles Warren, *The Supreme Court in United States History* vol. 2, 22 (Little, Brown & Co. 1922) (discussing oral argument in *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837)).

apocryphally, that the "acme of judicial distinction means the ability to look a lawyer straight in the eye for two hours and not hear a damned word he says."[2]

While the form and length of oral argument in the Supreme Court has certainly changed dramatically over the years, one thing has not: Oral argument remains an essential feature of the appellate process in the Supreme Court. Sadly, this is not so true of other appellate courts—federal and state—which have increasingly sacrificed oral argument on the altar of "efficiency."[3] Indeed, in 1999, a Senate Subcommittee report chastised the Second Circuit for continuing its long tradition of granting oral argument in most non-*pro se* appeals in which the parties request it; the report urged the court to become more efficient by adopting the approach of other circuits, which (the report noted with approval) limit oral argument.[4]

The disappearance of oral argument in federal and state appellate courts is surely lamentable. Many have written of the value of oral argument,[5] but the Chief Justice may have summed it up best:

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2. G. Edward White, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, The Marshall Court and Cultural Change, 1815-1835*, vol. III-IV, 182 (Macmillan Publg. Co. 1988).

3. In 1996, Judge Richard Posner estimated that only forty percent of appeals in the federal circuits were orally argued. Richard A. Posner, *The Federal Courts: Challenge and Reform* 160 (Harvard U. Press 1996). According to the Administrative Office of the United States Courts, only about thirty-three percent of all cases decided on the merits by the federal courts of appeals during the 2001-2002 time period were orally argued, though this figure undoubtedly includes appeals involving *pro se* litigants. Administrative Off. of the U.S. Cts., *2002 Annual Report of the Director: Judicial Business of the United States Courts* 37 tbl. S-1 (U.S. Govt. Printing Off. 2002) ("U.S. Courts of Appeals—Appeals Terminated on the Merits After Oral Hearings or Submission on Briefs during the 12-Month Period ending September 30, 2002," showing totals calculated without data for Federal Circuit). *See generally* Joe S. Cecil & Donna Stienstra, *Deciding Cases Without Argument: An Examination of Four Courts of Appeals* (Fed. Jud. Ctr. 1987).

4. *See* Subcomm. on Administrative Oversight & the Cts., Sen. Jud. Comm., *Chairman's Report on the Appropriate Allocation of Judgeships in the United States Court of Appeals* (Mar. 1999) (noting in § E of its *Analysis of the Second Circuit* that "the Second Circuit could implement procedures to limit the number of oral arguments they hear," for "it makes little sense to remain the only circuit to cling to the practice of allowing oral arguments in every single appeal").

5. *See e.g.* Frank M. Coffin, *On Appeal—Courts, Lawyering, and Judging* (W.W. Norton & Co. 1994); Posner, *supra* n. 3, at 160-61; Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 Iowa L. Rev. 35, 36-37 (1986); Stanley Mosk, *In Defense of Oral Argument*, 1 J. App. Prac. & Process 25 (1999). *See also*

> First of all, oral argument offers an opportunity for a direct interchange of ideas between the court and counsel. From my own experience, I know that there are only two times when one can be certain that all nine members of the Court are considering a particular case at the same time: one is during the hour allotted to the two attorneys who are to argue the case, and the other is during the conference discussion of the case.
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> Second, . . . oral argument serves a function over and above its usefulness in adding to the presentation of the briefs of the parties. It has the value that any public ceremony has. The lawyers and the clients, if they are present, are brought face to face with the judges who will consider and decide their case. The judges are brought face to face with the lawyers who have written the briefs on either side.[6]

Equally important, the Chief Justice added, is the truth that

> [t]he sense of immediacy and involvement—the three-dimensional experience—one gains from such a proceeding is especially important to the judges. . . . "Oral argument is important as a means of giving the judges a continuing awareness of their relationship and dependence on others; without it, the judges are isolated from all but a limited group of subordinates."[7]

The poor quality of oral advocacy in our appellate courts is sometimes cited as a reason for the decline in the number of cases set for argument; some appellate judges privately grouse that oral argument is a waste, both of their time and the litigants'

Martineau, *supra* n. 1 (acknowledging oral argument's importance, but proposing revisions to its structure, frequency, and format).

6. William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 Mercer L. Rev. 1021, 1021-22 (1984).

7. *Id.* at 1022 (quoting Paul D. Carrington, Daniel J. Meador & Maurice Rosenberg, *Justice on Appeal* 17 (West Publg. Co. 1976)). A state supreme court justice has echoed the Chief Justice's sentiments:

> For me, without the regular dialogue with counsel and my colleagues, I would feel like a faceless bureaucrat, dispensing justice, as one judge described it, like a machine in a cafeteria. Instead, I am reminded with each oral argument that behind every brief there is a case with a life of its own, played out by real people who have invested a great deal of themselves in expressing to the court their deepest convictions, their fear of loss, and their hope for a just and fair outcome.

Linda K. Neuman, *Oral Advocacy: In Step with the Times?* 34 S.D. L. Rev. 236, 243 (1989) (footnote omitted).

money. Of course, the mere fact that the lawyers do not perform as well as some judges would like does not necessarily diminish the importance of oral argument to the appellate process.[8] Moreover, while lawyers certainly bear responsibility for the quality of their appellate advocacy, there is a certain circularity in such arguments. For as judges reduce the number of cases they set for argument, they also necessarily reduce the opportunities for lawyers to hone their skills and become better oral advocates. The art of oral advocacy is mastered, like any other art form, by repeated practice. And the opportunities to practice that art are becoming ever more infrequent in both federal and state appellate courts, including the Supreme Court itself, given its currently reduced docket of merits cases.

Ironically, while the opportunities to practice oral advocacy are diminishing, the literature on how to conduct an effective oral argument is not. Indeed, there appears today to be an inverse relationship between the number of books, articles and seminars devoted to appellate advocacy and the cases actually argued in appellate courts. That may not be as surprising as it may sound. Young lawyers who are fortunate enough to spend time in the Solicitor General's Office or with state solicitors' offices will continue to have the chance to argue orally in the Supreme Court and other appellate courts. But for many of today's novice appellate advocates, the opportunities to argue are so few and far between that they may be forced to learn their craft principally through how-to articles, seminars, and demonstrations.

Many of these increasingly frequent articles on effective appellate advocacy follow a familiar pattern. Experienced advocates set forth lists of "Dos and Don'ts," often phrased as abstract principles (for example, "Effective Oral Arguments Begin with Thorough Preparation"), along with a narrative elaboration of each concept. Often, however, these articles contain no real-life examples to illustrate, or to provide substance to, the points the authors are trying to drive home. Instead, readers are left to wonder or intuit precisely how the principles listed are applied in practice. I will not embarrass any

8. *See* Posner, *supra* n. 3, at 160-61 ("Although the average quality of oral argument in federal courts (including the Supreme Court) is not high, the value of oral argument to judges is very high.").

of the authors by citing examples of this particular genre. However, I will confess to having committed this sin myself.[9]

David Frederick, an accomplished Supreme Court advocate and author of a splendid new book, *Supreme Court and Appellate Advocacy*, has (happily) chosen a different path. We are all the wiser for it. As Frederick says of his work in his preface,

> I have tried to mix practical advice with illustrations, on the theory that this is not a paint-by-the-numbers exercise, but rather an art form that should vary in its execution. For me, the illustrations from real cases serve as a reminder of the humbling nature of the experience and the inspiring ways in which advocates can perform when at their best.[10]

His illustrations are indeed both humbling and inspiring. For by cleverly mixing solid practical advice with illustrations of good, and not so good, advocacy in the Supreme Court, he has produced a work that amply satisfies his stated goal "to instruct on the best principles of oral advocacy . . . and to make the book readable and accessible."[11]

Until now, a lawyer wanting comprehensive advice on oral argument in the Supreme Court, coupled with illustrations from actual arguments, needed to find a copy of Frederick Bernays Wiener's *Effective Appellate Advocacy: How to Brief and Argue a Case on Appeal, Including Examples of Winning Briefs and Oral Arguments,* published by Prentice-Hall in 1950, and now out of print.[12] Although Frederick's new book does not address brief writing, it is a fitting successor to Wiener's classic text on appellate advocacy. Any lawyer, whether novice or expert, who has an argument in the Supreme Court or any similar "hot" appellate bench will want to consult this book. As Justice Ruth Bader Ginsburg rightly observes in her Foreword, "Frederick's step-by-step analysis, his account of the components of oral

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9. *See* Mark R. Kravitz, *Oral Argument Before the Second Circuit*, 71 Conn. Bar J. 204 (1997).

10. Frederick, *supra* n. *, at xii.

11. *Id.*

12. *See also* Frederick Bernays Wiener, *Briefing and Arguing Federal Appeals* (BNA 1967); Frederick Bernays Wiener, *Oral Advocacy*, 62 Harv. L. Rev. 56 (1948).

argument, can arm an attorney to perform to best effect before any of our nation's multi-judge courts."[13]

Frederick's book begins with a useful discussion of the role and theory of oral argument in the appellate process—how courts and parties use oral argument—along with a brief and illuminating history of oral argument in the Supreme Court. The author then proceeds systematically through each phase of argument preparation and each aspect of the argument itself, in the process dispensing sound practical advice that will benefit all advocates. For example, he includes an extensive discussion of moot courts—whether to conduct a moot court; how to do so, and importantly, how not to do so; the different goals of formal and informal moot courts; how long moot courts should last; when they should occur in relation to the argument; and the goals of each moot session before argument.[14] He also includes advice regarding one's "podium notebook," with a useful example of a page from a podium binder in a Supreme Court case.[15]

However, as Justice Ginsburg notes, Frederick shines best when he breaks oral argument down into its constituent parts and provides illustrations from actual arguments regarding each aspect of an oral argument. For example, he describes the goals of an appellate opening, tells the reader how to construct one, and gives examples of actual openings in Supreme Court cases.[16] Frederick clearly thinks highly of Deputy Solicitor General Michael R. Dreeben, and he includes a number of Dreeben's well-crafted openings from Supreme Court arguments. Here is an example, taken from Dreeben's argument in *United States v. Scheffer*:[17]

> Mr. Chief Justice and may it please the Court: Polygraph evidence is opinion evidence about credibility. Based on inherent doubts about the reliability of polygraph evidence and the burdens of litigating about polygraph results, it has long been banned from courtrooms in a majority of the states. In 1991, the President adopted the same rule for

13. Frederick, *supra* n. *, at viii.
14. *Id.* at 119-138.
15. *Id.* at 64-69.
16. *See e.g. id.* at 61-62, 165-66.
17. 523 U.S. 303 (1998).

> military courts martial. Exercising delegat[ed] authority from Congress, the President promulgated Rule 707, which makes polygraph evidence per se inadmissible in military courts martial[]. That determination is constitutionally valid for three main reasons. First, the reliability of the polygraph remains unproven. Second, polygraph evidence is not necessary to help the trier of fact perform its core function of determining credibility of witnesses, and third, the costs of litigating about the reliability of polygraph evidence on a case-by-case basis outweigh any limited probative value that the polygraph may have.[18]

Frederick dissects this and several other openings point by point, telling his readers precisely what the advocates were seeking to accomplish with each word and each sentence that they chose for their openings, and showing how they used these openings to good effect later in their arguments.[19]

Other portions of the book address the types of questions that appellate judges typically ask, and provide examples of how to respond—and just as importantly, how not to respond—to such questions. There are sections on "Questions About the Parties Involved," "Questions About the Record," "Questions About Legislative History," and "Questions About Precedent," among many others. Frederick also includes a discussion of a staple of any article on appellate advocacy, the hypothetical—how to anticipate them in preparation and handle them at oral argument. However, Frederick also includes subjects that are not covered by much of the existing literature on appellate advocacy. For example, he includes a useful discussion of how advocates use analogies to good effect, and he includes specific examples of advocates' use of analogies in Supreme Court arguments.

A particularly enlightening chapter is entitled "Common Mistakes in Oral Arguments."[20] Here, Frederick catalogs in detail "Speaking Style Errors," "Errors in Citing Materials," "Decorum Errors," and many other common mistakes, giving readers real-life examples. But he does not stop there. He also tells his readers how they might properly handle the particular

18. Frederick, *supra* n. *, at 165-66.

19. *E.g. id.* at 166-69.

20. *Id.* at 189-227.

question or issue, along with further examples from actual arguments to illustrate the right way to deal with each such situation.[21]

I had only one criticism of the book, and it is a mild one at that. In his commendable effort to use examples from Supreme Court arguments, Frederick quite often singles out the same few members of the Supreme Court Bar, rightly praising their performances and techniques. At times, however, this repeated praise of a relatively small group of advocates (on occasion offered without any illustration from an actual argument) begins to give the book the air of a personal tribute to the members of an exclusive club. That minor criticism aside, however, this is a book packed full of excellent advice and instruction. It should be read by all who wish to improve their advocacy skills, whether they are experienced or not, and regardless of whether they have a case, or ever even hope to have a case, in the United States Supreme Court.

Toward the beginning of his book, Frederick quotes this advice on oral advocacy from William Wirt, a premier advocate in the early Supreme Court: "[M]aster the cause in all its points, of fact and law; . . . level yourself to the capacity of your hearers, and insinuate yourself among the heart-strings, the bones and marrow."[22] Oral argument may have changed dramatically since 1815, but Wirt's advice to the advocate is as timely and as sound today as it was then, and Frederick's *Supreme Court and Appellate Advocacy* will undoubtedly help appellate advocates achieve those lofty goals.

21. *See e.g. id.* at 223-24, 250-51 (discussing both appropriate and inappropriate uses of humor at oral argument).

22. *Id.* at 20 (quoting Joseph Pendleton Kennedy, 1 *Memoirs of the Life of William Wirt* 386 (Lea & Blanchard 1849)) (emphasis omitted).