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AND PROCESS
ESSAY

MY FIRST APPELLATE ARGUMENT: IT CAN ONLY GET BETTER

Jon O. Newman*

The engaging series of articles on first arguments in the United States Supreme Court, in a recent issue of this Journal, reminded me of my first appellate argument—a story that might amuse some readers.

On January 11, 1961, I was scheduled to argue a nondescript (and not especially meritorious) civil appeal in the impressive seventeenth-floor courtroom at 40 Foley Square in Manhattan, the building now known as the Thurgood Marshall Courthouse. The three-judge panel was presided over by Chief Judge J. Edward Lumbard. To his right sat the revered Learned Hand, then a senior judge, but still vigorous at age 89. The third judge was Charles E. Clark.

The composition of the panel and the imposing setting added considerably to the anxiety of a 28-year-old lawyer from Hartford, Connecticut, about to argue his first appeal in any courtroom. When my case was called, I hurried to the lectern to begin my allotted ten minutes of argument.

* Judge Newman is a judge on the United States Court of Appeals for the Second Circuit. In June 2004 he marked twenty-five years on that Court, after seven and one-half years on the District Court for the District of Connecticut.

"May it please the Court . . .," I managed to say before being startled by the commotion occurring at Judge Hand's end of the bench. The great man was obviously looking for something. With an energetic wave of his arms, he dove into the pile of papers in front of him, scattering them and muttering his disappointment at not finding what he sought. The years had not muted his tendency toward occasional irritability.

Seeing and hearing Judge Hand's evident upset, I paused in the hope that a momentary storm would pass. "No, no," said Chief Judge Lumbard, "you go right ahead with your argument."

I did, or at least I tried. As I labored to make a reversible mountain out of an insurance-coverage molehill, the commotion on my left grew louder and more distracting. The papers flew, the muttering increased, reaching a crescendo of exasperation.

Seven minutes into my limited time, Judge Hand turned to Chief Judge Lumbard and, in a stage whisper that rebounded off the back wall of the chamber, exclaimed, "Say, Eddie, what's the name of this case, anyway? Is it Newman against McCarthy?"

"No, Judge," replied Lumbard, "those are the lawyers."

I'm two-thirds through my presentation, and the great Hand doesn't even know what case I'm arguing!

I staggered on to the red light of the finish line, mumbling something about the reasonableness of ordering a new trial. Several weeks later, a brief opinion was issued, rejecting my suggestion in favor of a well-deserved affirmance.[1]

There could not have been a less auspicious start to a career of appellate advocacy that would return me to that rostrum more than forty times during my later stint as United States Attorney for the District of Connecticut.

Last words. Eleven years later, as a newly inducted federal judge, I had the honor of speaking on behalf of the new district judges at dinner during the Second Circuit's annual Judicial Conference. After recounting my first appellate argument, I assured the Court of Appeals judges in the audience, "Having started my career before you with that unnerving episode, I can assure you that the prospect of a mere reversal holds no terror at all!"

1. *Farm Bureau Mut. Automobile Ins. Co. v. Bascom*, 287 F.2d 73 (2d Cir. 1961).