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THE ART OF APPELLATE ADVOCACY

*Jason L. Honigman**

RULES of practice and procedure provide technical information in regard to perfecting appeals, but they do not explain how to *win* an appeal any more than how to win a trial. Advocacy is not an exact science; the skills which contribute to effective advocacy, whether in a trial or on appeal, have long been recognized as an art. We shall here deal with these skills at the appellate level, bearing in mind, of course, the limitations of formulating rules or precepts that can adequately instruct in any art.

There is no single, prescribed method for writing a play or painting a picture. Similarly, there is no defined way to try a lawsuit or present an appeal. For the lawyer, like the artist, the approach is a matter of individual style, but there are nevertheless certain fundamental precepts. Other concepts herein asserted are the reflections of the writer based on personal experience during the course of some forty years of a practice that has been liberally sprinkled with appellate work and seasoned with a deep avocational interest in the rules of practice and procedure.

I. THE DISTINCTIVE NATURE OF AN APPEAL

Appellate and trial advocacy are by their nature essentially different. In a trial court, litigants, witnesses, counsel, and the judge are part of an action-filled, living drama. The appeal, however, is the written history of that drama. If a trial could be analogized to a living body, a record in an appeal would correspond to a corpse. Skill in appellate advocacy is largely the ability to breathe life into that corpse. An appellate lawyer must reconstruct through written words the vividness, intensity, and significance of the events portrayed by the testimony of the witnesses at the trial.

Although the arenas are different, the job of an appellate lawyer, like that of a trial lawyer, is essentially one of salesmanship. By his powers of persuasion, he must sell the merits of his cause to the appellate court. In any sales effort, the single most important element is a sound product; in an appeal, the "product" is the advocate's side of the case. If a client's cause does not have sufficient merit, the attorney can perform a great service to his client by preventing it from reaching the marketplace. Why should an attorney

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squander his client's time and money and his own self-respect trying to sell a shabby product? In all probability, it will not be salable, and therefore it would be more expedient to settle it at some point during the proceedings, whether before trial, after trial, or even while the appeal is pending.

In addition to substantive merit, the record must contain all proofs necessary to support the client's legal position,¹ and thus proper care and planning are required throughout the course of the trial. Even when the proofs are adequate, the written transcript may nevertheless be faulty. If a witness testifies that the "car went that way" while pointing to his right, the fact that he was pointing may not be recorded, and therefore the appellate court may not grasp the meaning of the witness's statement. An affirmative nod of the head may be perfectly clear in the trial court, but such an unrecorded action can result in the appearance of an unanswered question in the written transcript. A trial lawyer must constantly keep before him a mental picture of how the testimony will read in the record on appeal. Similarly, timely objection during the course of the trial may be requisite to preserve an issue on appeal.

A sound case certainly requires a supportable legal position. Legal issues should be carefully researched, since despite the many excursions of modern courts from precedent, the vast majority of decisions are still grounded in prior decisions. Indeed, the scholastic competence of one's research may well control the results.²

The principal sales device on appeal is the written brief. The oral argument on appeal is generally short and limited, and cannot carry the burden of convincing the appellate court on the merits. The persuasiveness of the brief may determine the success or failure of a client's cause.

II. THE CONCEPT OF FAIRNESS

Just as a salesman must understand his customer, a lawyer must comprehend the motivations of the judge who is hearing the case. Sound legal arguments are certainly important, but a factor of utmost significance in persuading a judge is his acceptance of the fairness or justice of a particular side of the case. The importance of this concept has received little recognition from the legal profession.

1. See generally Rall & Tone, *Some Practical Pointers on the Mechanics of an Appeal*, 50 ILL. B.J. 362 (1962).

2. See McAmis, *The Lawyer and the Court of Appeals*, 24 TENN. L. REV. 279, 280 (1956); White, *What a Judge Expects of a Lawyer*, 30 TENN. L. REV. 333, 335 (1963).

Theoretically, it is the province of a judge to uphold the law without interposing his own judgment as to the fairness of the result in the case before him. In actuality, however, it is contrary to human nature for a judge to divorce himself completely from his deeply motivated desire for fairness. He will make every effort to find a legal solution that he can equate with his own sense of justice.

The concept of fairness may frequently be intertwined with emotion. The natural desire to protect the weak and the helpless is a part of every person's mental and moral structure. Human beings are moved by emotion, even when guided by reason, and often both characteristics are required to persuade a court. A skilled advocate can inject emotional elements into his case without subjecting himself to the criticism of showing a patent disregard for the applicable principles of law.

One should not, however, assume that a truly competent judge will disregard the law. On the contrary, many decisions are rendered in support of a legal principle which the judge deems applicable despite his own contrary feelings from the standpoint of fairness. However, such a result is more the exception than the rule. Considering the flexibility available within the law for interpretation based upon the facts of an individual case, the judgment rendered is most often in keeping with dictates of justice in the sense of fairness. Whereas a trial judge generally arrives at his conclusions of fairness by being exposed to the witnesses and their story over a period of time, an appellate judge must gain his concept of fairness from the story presented by the brief. Thus, an appellate lawyer's most significant work is in effectively conveying the message that fairness requires a decision in his favor.

Some situations do not lend themselves easily to a demonstration of fairness; yet within every case there are aspects which can be used toward that end. A few examples within the experience of the writer may be helpful in demonstrating the fairness concept. All of these cases involved fixed principles of law, yet they were presented to and decided by appellate courts largely on concepts of fairness. In *Union Guardian Trust Co. v. Emery*,³ a trust company ceased operations as a result of a proclamation by the state governor ordering a so-called "bank holiday." This action left thousands of claimants, many of whom sought to establish positions as preferred

3. 292 Mich. 394, 290 N.W. 841 (1940).

creditors. The basic legal issue was whether the claimants had adequately traced their funds into the hands of the receiver. In behalf of the receiver, it was urged that all of the money on deposit with the trust company was of a "trust" nature and that all depositors should receive equal treatment. Money that came into the hands of the trustee as agent for the bond holders was fiduciary funds despite the trust instrument provisions which permitted the comingling of funds and thereby precluded the establishment of preferred claims. Moreover, large sums of money had been deposited by municipalities to meet their bond issue payments. The latter sums were public money, and in a sense were fiduciary funds although not technically qualifying for preference. It was urged as a matter of fairness that no one group of trust creditors should be preferred over the others. Of course, the specific legal issue as to the traceability of funds was an integral part of the brief. However, in its decision the court held, with but a minor exception, that no preference should be allowed, on the ground that the funds were all essentially of a like nature. The problem of tracing was not even discussed.

In *Taylor v. Standard Gas & Elec. Co.*,⁴ often referred to as the *Deep Rock* case, a subsidiary corporation had gone into bankruptcy. The parent company filed a claim as a creditor for approximately twenty million dollars; eventually this company offered to accept ten million dollars as a compromise. The compromise allowance was opposed by a committee of preferred stockholders of the subsidiary. On behalf of the latter group it was asserted that the parent had mishandled its subsidiary and should therefore be denied any status as a creditor even for amounts undisputably loaned to the subsidiary. Without even discussing legal precedent, the United States Supreme Court reversed two lower court decisions and rendered its opinion rejecting the compromise and denying the parent corporation's entire claim, largely on grounds of fairness.

The case of *Arlan's Dep't Stores, Inc. v. Attorney General*⁵ involved the validity of a Sunday closing law enacted by the Michigan legislature. The claim that this act violated the state constitution was based principally on technical ambiguities in the statutory language and the impropriety of the delegation of legislative powers to the various county boards of supervisors. The emotional preference favoring validity of the act on religious grounds emphasized

4. 306 U.S. 307 (1939).

5. 374 Mich. 70, 130 N.W.2d 892 (1964).

the need for a counterbalancing demonstration of fairness. The issues were presented to the court against the background of a struggle between the long-established department stores and the newer discount stores that sold their goods at lower profit margins and catered to the working man by keeping their stores open during evenings and Sundays and by providing adequate parking facilities. Thus, the case was presented as a dispute between two groups of competing mercantile interests, with the legislature having taken the side of the established merchants. In holding the act invalid, the majority of the court clearly demonstrated their adherence to principles of fairness.

III. PREPARATION OF A BRIEF

The structure of a brief must be planned from its inception. The subject matter as well as the order of presentation should be determined before dictating any part of the brief. The concept of fairness, whether express or implied, should be the base of the structural foundation of every brief; the principal arguments arranged in logical order form the superstructure to which the supporting contentions are attached.

To focus the reader's attention, it is vital that he know what is under discussion from the first moment he starts reading. Thus, the first paragraph should state the nature of the case, the judgment of the trial court, whether the decision was rendered by the court or jury, and whether appellant is plaintiff or defendant. If the judge understands at the outset the nature of the case before him, the story that unfolds is more meaningful. Thus, the controlling issues should appear early in the brief; absent knowledge of the issues, all facts may seem of equal significance. When facts are read in relation to a designated problem, however, the mind tends to classify the facts according to their relative importance, and the items of importance are more easily retained.

The primary issues will normally determine the fate of the case. Secondary issues distract the court from the important issues and should generally be avoided.⁶ The use of a secondary issue may be helpful, however, in a situation which offers abundant opportunities to urge fairness and which affords only a weak argument with regard to the law. Such a situation occurred in *Wilhelm v. Skiffington*,⁷ which involved the claim of an injured party who was hit by

6. See note 8 *infra* and accompanying text.

7. 360 Mich. 348, 103 N.W.2d 451 (1960).

an automobile while walking on the sidewalk. The jury rendered a verdict of no cause for action. On appeal, the basic issue was whether the verdict was against the overwhelming weight of the evidence. In keeping with its predilection against interfering with the province of the jury, the court chose to decide only the secondary issue concerning the admissibility of certain testimony. After concluding that the challenged evidence was inadmissible, the court sent the case back for a new trial. The court thereby adhered to its concepts of fairness within the limitations of acceptable legal principles. To achieve a fair result, courts will often enforce a rigid procedural requirement which might otherwise be disregarded, especially where such a ruling results in a new trial rather than final disposition of the case on the merits.

In planning a brief, one may be confronted with a number of available arguments that vary considerably in their degree of persuasiveness. In deciding which argument to use, one may well accept the precept that if the strongest points are unlikely to result in victory, then there is very little chance whatever of winning the case.⁸ By limiting the argument to the strongest points, one adds emphasis to those points and avoids the danger of diverting the court's attention. Moreover, the lesser arguments, when unacceptable to the court, may create the erroneous impression that the case depends on an argument which is intended only as an added buttress. Finally, a judge's rejection of a subsidiary argument may color his impression of the soundness of the whole brief.

If it is felt that more than one argument is necessary, obviously the strongest arguments should come first in the brief. This primary position assures greater likelihood of attention and emphasizes the importance of the major points. The arguments establishing fairness should have priority of presentation. If one can initially demonstrate the justice of his cause, the likelihood of acceptance of the supporting legal arguments will be greatly enhanced.

An important aspect of brief-writing is the need for simplicity of presentation, since the human attention span has a very limited time dimension. Everyone realizes how difficult it is to focus on a mass of reading material; as time passes, one's mind wanders. Similarly, almost any occurrence can divert the attention of a reader,

8. Many capable practitioners disagree with this view and believe in using all available arguments and issues. They contend that since the advocate cannot be sure which arguments will be convincing to the court, he should use all of them. For a view concurring with the one expressed by the writer, see White, *supra* note 2, at 335.

such as a telephone call, a secretary's intrusion, or a fleeting thought about a personal problem. When the attention span is broken, even though momentarily, the mind does not easily get back on the track. Thus, to regain a reader's attention, the text of a brief must be simple, the meaning clear, and the structure well defined. Simplicity requires the use of short words, short sentences, and short paragraphs. The less involved the language, the easier it is to read and to follow a thought.

Simplicity and brevity go hand in hand. It requires more thought and skill to condense an idea than to write a lengthy discourse. Brevity of presentation should be a constant and continuing goal. The less material a reader is called upon to read, the more likely it is that his attention span will be kept intact. In the interests of brevity, quotations of either law or fact should be as short as possible;⁹ the core of the quotation is all that is needed.

The factual presentation should precede the legal argument, and arguments concerning disputed factual contentions should be avoided in the factual statement. The factual statement should serve only to create the setting for discussion of the issues, whether of fact or law. Contentions on factual disputes should be left to the argument portion of the brief.

In reciting facts in the brief, frequent page references to the record should be made. A factual statement in a brief does not carry conviction if the judge notes the absence of a record page reference in support of the particular claim. By making a page reference, the writer assures the judge that the statement is supported by the record. Moreover, the judge can easily check it for himself. While lengthy quotations from the testimony should be avoided, short quotations are often helpful in lending authenticity to a factual assertion.

A reader's attention is much more readily gained if the subject matter is interesting. The innate difficulty of writing a brief is in conveying with mere words the live drama of the trial, and creating the image of real people with real problems. It is easier for a reader's mind to comprehend and follow with interest the story of a person whom he has seen or known than of someone who is both nameless and faceless. A brief in an automobile injury case can relate that the plaintiff was driving east on a particular street and that defendant was driving north on an intersecting street when they collided.

9. See *McAmis*, *supra* note 2, at 282.

Such a presentation, though adequate, would not be nearly as interesting as a descriptive picture. Thus, plaintiff's brief might state:

Prior to the accident, Edith Brown was a pretty, vivacious young single girl in her early twenties, and she was a graduate of the University of Michigan School of Art. Her beautiful features, blond hair, trim figure, and smartly tailored clothes made her an object of admiration among her wide circle of friends and acquaintances. Her breeding and good manners, coupled with wit and intelligence, delighted many a gathering.

Surely we would be more interested in knowing what happened to that lovely girl than to some nameless, faceless person designated merely as the plaintiff. Of course, the average plaintiff would hardly fit the foregoing description. Nevertheless, the following description might depict a typical housewife involved in an accident:

Prior to this accident, plaintiff Dorothy Brown was a housewife in her middle forties. She had been married for some twenty years to John Brown, who is employed as a lathe machine operator at Ford Motor Company. She was the mother of four children ranging in ages from ten to seventeen, whose upbringing, along with her household duties, was her major concern. She was not only an excellent cook and dressmaker, but she also found time to engage in church activities and was an officer of the local Parent-Teachers Association.

Dorothy Brown is now more nearly fixed in our minds as a person about whom we can have some interest and understanding, surely more than we gain from the arid concept of "the plaintiff." To present a situation that makes interesting reading, the evidence in the record must furnish the basis for the story one expects to unfold on appeal. Hence, during the trial the testimony should be elicited with a view toward the description that will be produced in the record and brief.

After recounting the facts, one should state the issues simply and clearly. The argument should then follow with a clear delineation of the issue under discussion. Each argument should be treated as a separate compartment containing a story that is largely complete within itself. The supporting points for each argument should in turn become minor compartments fairly complete within themselves. It should at all times be clear which minor compartment is under discussion and which major compartment it fits into.

To delineate each compartment, a heading should precede the discussion. For the major arguments, a heading consisting of a full sentence carrying a complete thought is preferable. For minor com-

partments—the segments supporting the major argument—a heading may be either a full sentence or a word or phrase of identification. Compartmentalization and delineation through headings keep the reader on track at all times. If his attention should waver, he can readily find his way back to the chain of thought. A significant aid in achieving the same end is an adequate table of contents at the beginning of the brief listing each heading with page references. Such a table of contents is helpful to a court, as it creates an outline summary of the arguments in proper relationship to each other. Likewise, a table of cases with page references will aid the court during deliberations.

While the argument should be concise in the interests of brevity and simplicity, important points deserve the emphasis of repetition. One should bear in mind that on the occasion when a particular point was first covered, the judge's mind may have been wandering into a random thought about his dinner engagement. It is not too likely that this distraction will recur the second time he is reading about a major point.

Since issues of law are created by the particular facts of a case, where possible one should combine a legal argument with a discussion of the applicable facts. Indeed, no principle of law stands alone in a case, disembodied from the facts. Thus, an advocate should demonstrate that the facts in his case fit the particular principle of law that he urges for the court's adoption.

To impress upon the court the fairness and justice of one's cause, statements or arguments that are patently unfair should be avoided. If a judge is to be convinced of the fairness of a party's claims, the latter's attorney should not damage that image by an unfair maneuver such as a patently unjustifiable contention either on the law or the facts.¹⁰ Statements and arguments should carry the aura of candor and fairness throughout; to do less is a disservice to the cause of the client as well as to the stature of the lawyer.

Relevant portions of the principal argument should be summarized at the close of each subordinate point. Likewise, one should summarize the subordinate points at the close of each major argument. At the conclusion of the brief, the major arguments should be set forth, followed by a clear statement of the relief sought from the appellate court.

To achieve excellence in a brief requires refinement of language as well as thought. Clarity of thought and language can always stand

10. See Canons of Professional Ethics, Canon 22.

improvement. One should strive constantly for interest and simplicity by pruning and polishing words and thoughts with each new draft. Improvements can be made in the second draft, and still more improvements can be made in the third and all succeeding drafts. A time lag between drafts lends perspective in appraising the work product. The only limitations on refinement of language and presentation are the limitations of one's time, ability, and patience.

IV. PROBLEMS PECULIAR TO AN APPELLANT

The foregoing discussion covers principles of brief-writing applicable to both appellants and appellees. We next deal with problems particularly applicable to an appellant. Generally an appellant must carry a greater burden than an appellee,¹¹ since the decision of one judge, the trial judge, has already been rendered against him. That decision undoubtedly will carry some weight with the appellate court, particularly on factual findings. However, the appellant, by filing the first brief, gains the opportunity for the initial presentation of the facts, issues, and arguments in a manner most favorable to his side of the case. The opportunity to administer the first blow can at times be decisive. This advantage may place the appellee in the posture of arguing from a position chosen by the appellant. As in war, there is advantage in choosing the battleground.

In discussing the trial judge's opinion, disagreement is no warrant for disrespect, and disparagement of the trial judge may be deemed an affront against the judicial office.¹² The appellant's image of fairness can be immeasurably damaged by inappropriate remarks. Appellate judges generally give great weight to trial judges' findings of fact,¹³ and an appellant should, if possible, avoid taking issue with such factual findings. If the trial judge's findings of fact must be disputed, one should merely demonstrate that one's factual claims are more readily supported by the record. With respect to the trial judge's conclusions of law, there is less need for hesitancy in taking issue. An appellate judge is more likely to be concerned with the weight of precedent and his own concepts of fairness than with the opinion of the trial judge. Hence, a well researched argument based on precedent can be far more convincing to the appellate court than any contrary view of the trial judge.

11. See Hofstadter, *Appellate Theory and Practice*, 15 N.Y. County Lawyers Ass'n B. Bull., May 1957, pp. 34, 36.

12. See Canons of Professional Ethics, Canon 1.

13. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 221 (1957).

A question often confronting an appellant's counsel is whether he should file a brief in reply to the appellee's brief. In case of doubt, no reply brief should be filed.¹⁴ If counsel has done a good job in his main brief, it should be adequate to carry his message, and if he has not, there is little likelihood that the case can be saved by a reply brief. New points raised by the other side need be rebutted only if they appear to be significant. As a result of filing a reply, there is at least by inference an indication that the principal brief was inadequate. Moreover, by answering arguments propounded by the other side, an appellant may lose the choice-of-battleground advantage inherent in filing the first brief, and, to the extent that the arguments in the reply brief must be fitted into those of the main brief, the reply brief may confuse rather than clarify the issues. The more that is said in the reply, the further the framework of the main brief is disrupted.

If a reply brief seems warranted, it should adhere to the precepts applicable to all briefs, with special emphasis on brevity. Every effort should be made to recast the issues presented by the appellee into those of the appellant's main brief. If possible, it is best to refer back to the argument in the applicable portion of the latter's main brief. The main brief should constitute the primary effort; there is no point to rearguing subject matter that is already covered by the first brief.

V. PROBLEMS PECULIAR TO THE APPELLEE

Appellant having chosen the battleground, appellee must decide to what extent his position has been weakened by appellant's strategy. In dealing with the facts, an appellee will generally fare best by restating them in a manner most favorable to his own posture of fairness and merit. Likewise, if the issues or points of argument as presented by the appellant are not favorable to the appellee, the latter can restate them in the way best suited to his own needs. In his answer to the appellant's arguments, the appellee's interests are often best served by discussion within his own framework of arguments and issues. This approach permits an appellee to shift from the defensive position imposed on him by the appellant into an offensive position of his own choice.

In dealing with cases cited by the appellant, it is generally not

14. This view is disputed by many attorneys who believe that each of the opponent's arguments and citations not already covered in the main brief should be discussed in a reply brief.

necessary for the appellee to undertake a discussion of every opinion. The appellee must depend primarily on his own citations of authority to support his position. The appellant's citations of law can often be dealt with in bulk during the course of the appellee's own legal argument. Where the appellant's citations appear to be controlling of the issues, they should, of course, be specifically answered or distinguished.

As noted above, an appellate court will usually give great weight to the trial judge's factual findings.¹⁵ Reference to the trial judge's findings on particular factual issues may well be helpful to the appellee. In discussing law, however, the appellee should avoid overemphasizing the trial judge's views. The appellate court is more likely to be impressed by the weight of precedent and its own conclusions.

VI. ORAL ARGUMENT

The significance of oral argument in an appellate hearing has often been questioned. With oral argument generally limited to only thirty to sixty minutes per side, a full discussion of the case is certainly impossible. Thus, the likelihood of a decision on the merits based principally on the oral argument is most remote. Nevertheless, the oral argument can be and often is significant,¹⁶ since it provides an additional opportunity for selling one's point of view. Even within the generally prevailing time limitations, it is possible to whet the interest of the court into deeper scrutiny of the merits of one's cause. Oral argument can be particularly effective in creating an impression of the justice of the speaker's side of the case. Moreover, some judges are more receptive to the spoken word than a written brief,¹⁷ and their listening may be more skillful than their reading. The opportunity to convey one's message to such a judge should not be discarded.

In light of the strict time limitations, it is essential that the oral argument be directed to the core of the controversy. All trimmings in the form of subsidiary facts and issues should be avoided, and the discussion should center on a lucid presentation of the facts in relation to the controlling issues. If a judge is to follow and accept an attorney's contentions, it is necessary to gain and hold his attention. The precepts of brevity and simplicity of thought and language are indispensable; the words must be simple, the structure

15. See *Traynor*, *supra* note 13, at 221.

16. See *In the Matter of Oral Argument*, 1 *Prac. Law.*, Jan. 1955, p. 12.

17. *Ibid.*

must be logical, and the thoughts must be direct. To assure that the judge's attention will not falter, the story should be told in interesting fashion. The tone of voice should be neither loud nor dull, and the voice pitch should be conversational rather than oratorical. Variations of tone will lend contrast and interest.

One must assume at the oral hearing that the members of the court know little, if anything, about the case. It is the function of oral argument to tell them what the controversy is about and to present the facts and issues in a manner most favorable to the speaker's side of the case, particularly with regard to the concept of fairness. The oral presentation should be candid and fair, for if the impression is created that the recital of facts cannot be relied upon, it is a reflection not only on the merits of the client's position, but also on the advocate's integrity as an officer of the court.¹⁸ Quotations of law and references to particular decisions should be avoided if at all possible. The court will have ample opportunity for studying the briefs and for doing research on the law. The weight of precedential decisions is best determined by personal study, a task which should be left to the judge in the privacy of his chambers.

It is extremely important to avoid reading one's presentation to the judge, since his interest in the argument can be maintained more easily by direct eye-to-eye contact. The appearance of candor, sincerity, and community of understanding is most effectively conveyed by direct, spontaneous conversation. It is also inappropriate to memorize the talk, because it derogates from the desired conversational setting. Moreover, the presentation must be flexible enough to permit interruption by questions from the bench without interference with the delivery. It is more important to answer questions propounded by the court than to make any particular statement that had been planned.¹⁹ The mere asking of the question indicates an area of doubt in the judge's mind. In answering the question, the attorney has an opportunity to resolve those doubts in his favor. The answer should be direct, frank, and fair; an equivocation or parrying of a question will be taken as indicative of a lack of a meritorious answer.

Occasionally one must decide whether a rebuttal in oral argument should be made, assuming sufficient time is available. Generally, rebuttal argument should be avoided for the same reasons

18. See note 10 *supra* and accompanying text.

19. See *McAmis*, *supra* note 2, at 283; *In the Matter of Oral Argument*, *supra* note 16, at 15-16, 18.

that any doubts should be resolved against the filing of a reply brief.²⁰ If the first argument was sound, there should be no need to buttress it further. The presentation of a rebuttal argument is at best a fragmentary presentation of the speaker's side of the case. If at all possible, one should rely on the more complete presentation of the initial argument. If a rebuttal is undertaken, it should cover only a limited point and be as short as possible. It is impossible to re-argue the entire case on rebuttal, and the client's interests are best served by leaving with the court the impressions gained from sound initial argument.

VII. TALENT IN APPELLATE ADVOCACY

Talent is a commodity in short supply in every field of human endeavor, including the practice of law. A truly gifted lawyer is indeed the exception rather than the rule, and talented appellate advocates are even more scarce. However, the skill required for appellate work is no greater than for trial work. The paucity of talent is perhaps to be explained by the fact that most practitioners deem it dull and uninteresting to work in the cloister of the office or library while preparing a record or brief. By comparison, trial work is rarely dull, usually interesting, and often exciting, since the courtroom is generally bustling with action. The blow or parry during the course of a trial can come from any direction and at any moment.

In contrast, the action on appeal is in the mind of the advocate. He can think long and clearly without the distractions which abound in the courtroom. The pace at which the appellate lawyer works is largely within his own control. He can plan carefully and thereby avoid the pitfalls of the hasty decisions often required in the course of a trial. Similarly, the scope for imaginative thought and formulation of an intelligent plan of action is unrestricted by the exigencies of a trial schedule. The magnitude of the claims asserted by an appellate lawyer is generally greater than that of the claims of a trial lawyer, for only the more important cases are likely to be appealed. In addition, victory on appeal obviously has a degree of finality often absent in a trial court judgment. Through the limited medium of written words, the appellate advocate must convey an effective message of superb salesmanship. He can achieve all of the intensity of interest and pride of performance that has long characterized the role of the outstanding trial lawyer.

20. See note 14 *supra* and accompanying text.