

# Foreword

I am honored to present the foreword to *A Practitioner's Guide to Appellate Advocacy*, which should become a standard reference manual for those practitioners who are drawn—either by preference or necessity—to represent clients in the appellate courts. Before assuming the bench as a federal circuit judge, I was called upon, as both a private practitioner and a federal prosecutor, to handle my share of appeals. In honing my appellate skills, I was indeed fortunate to learn from multiple mentors in that aspect of the practice of law, and those mentors were always willing to impart their hard-earned knowledge to me. Here, however, in a readily accessible single volume, is sound advice that runs the gamut of appellate practice. The guide provides excellent background and insight to lawyers on a range of relevant topics, from filing the appeal to writing the brief to presenting the oral argument.

My goal with the foreword is simple—keep it succinct and punchy, with some nuggets of appellate wisdom. In seeking to accomplish this goal, I lean heavily on a distinguished fellow West Virginian who likely was the finest appellate advocate ever—the “lawyer’s lawyer” himself, John W. Davis.<sup>1</sup> In a 1940 address to a gathering of the New York City Bar Association, Mr. Davis explained the crucial nature of appeals in our justice system. He correctly observed that the “appellate process arises from the innate realization of mankind that the human intellect and human justice are frail at their best.”<sup>2</sup> The appellate lawyer’s re-

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1. John William Davis was a practicing lawyer in West Virginia for many years before serving as a congressman, Solicitor General of the United States, and Ambassador to the Court of St. James, and engaging in an unsuccessful campaign for President. After leaving government service in 1921, Mr. Davis practiced law in New York until the early 1950s, at the firm yet known as Davis, Polk & Wardwell. During his career, he argued an astonishing 140 cases before the Supreme Court—including some of the most important legal disputes of the twentieth century. For an excellent biography of Mr. Davis, see WILLIAM H. HARBAUGH, *LAWYER’S LAWYER: THE LIFE OF JOHN W. DAVIS* (Oxford Univ. Pr. 1973).

2. John W. Davis, *The Argument of an Appeal*, Address Before the Association of the Bar of the City of New York (Oct. 22, 1940), in 26 A.B.A. J. 895, 899 (1940).

sponsibilities have not diminished since Mr. Davis's insightful address of 69 years ago.

As Mr. Davis aptly pointed out on that occasion, "The argument of an appeal, whether by voice or pen, is hedged about today by strict limitations of time and an increasing effort to provoke an economy of space."<sup>3</sup> Our appellate courts must swim against an ever-rising tide of litigation. The court on which I serve, the Court of Appeals for the Fourth Circuit, handles thousands of cases each year. From July 2008 to June 2009—with just 11 active judges—our court disposed of 5,169 cases. This astounding statistic represents an eight percent increase from the previous year. The bottom line is that the appellate courts face an increasing workload without any corresponding expansion in judicial resources. Appellate lawyers thus confront greater difficulties as well, as we increasingly rely on them to quickly identify the pertinent issues and explain how and why their clients should prevail.

In my view, the appellate bar should never lose sight of its audience. Despite being cloaked in an aura of omniscience, appellate judges are simply human beings who seek to understand the intricacies of each case and make proper and reasoned decisions. Unlike trial judges, appellate judges lack involvement in the development of the relevant record. It is thus the appellate advocate's duty to inform the court—precisely and incisively—on the nature of the underlying dispute. Put simply, appellate lawyers are not entitled to obfuscate the issues in the vain hope that the judges will somehow overlook a relevant fact or miss an applicable legal principle. Any attempt at confusion or misdirection is sure to backfire and cause the appeals court to lose confidence in the lawyers involved.

By its nature, the appeals process involves minimal interaction between the bench and the bar. The appellate advocate has, at best, only two opportunities to present his case: first by brief, and second by oral argument. The brief is the court's first impression of the lawyer's case, and this opening shot should never be squandered. Mr. Davis aptly asserted that the author of a brief should follow "the three C's—chronology, candor, and clarity."<sup>4</sup> To be sure, clarity and absence of error in the brief are paramount. Any excess verbiage, misspellings, or grammatical errors must be eliminated. Rightly or wrongly, appellate judges develop

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3. *Id.* at 895.

4. *Id.* at 897.

a sense of counsel's credibility from their review and analysis of the briefs. In order to be an effective advocate, you must edit your written work again, again, and again—only then might you have created a mere “draft” thereof.

Because oral argument is the only opportunity the lawyers have to respond to the judges' questions, it demands equally diligent preparation. From my seat, an effective advocate always answers the court's questions directly. If you have the answer, give it. If not, say so promptly. Any indication of evasiveness is a serious misstep. And dodging a judge's question will nearly always elicit the same reaction—restatement of the initial question in an exasperated tone.

Finally, every appeal has a primary issue that deserves emphasis. The effective advocate must, as Mr. Davis emphasized, “go for the jugular vein.”<sup>5</sup> “More often than not,” he said, “there is in every case a cardinal point around which lesser points revolve like planets around the sun.”<sup>6</sup> In the Fourth Circuit, each party is normally allowed but twenty minutes to make its case. This narrow window is rarely sufficient for multiple contentions, so it is crucial that the lawyers focus on their most important points.

*A Practitioner's Guide to Appellate Advocacy* explains strategies calculated to assist counsel in fully utilizing all their opportunities, as it draws on the experiences of the very best practitioners and scholars. In my view, the *Guide* will be invaluable to all lawyers who seek to improve their appellate skills. As Mr. Davis astutely recognized, there exists “no field of nobler usefulness for the lawyer” than appellate advocacy.<sup>7</sup> As a result, I am indeed honored and humbled to be able to introduce such a useful and comprehensive tool for the legal profession.

Robert Bruce King  
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August 2009

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5. *Id.*

6. *Id.*

7. *Id.* at 899.