

Appellate Issues



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EIGHT LESSONS FROM THE "OBAMACARE" BRIEFS

By Ross Guberman (1)

The Affordable Care Act blockbuster decision had enough to make both the Solicitor General and Paul Clement big winners in the advocacy wars. Hoping to put any hindsight bias aside, I'll share below four techniques from the government's opening and reply briefs on the individual mandate followed by four more techniques from Paul Clement's response.

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AN INTERVIEW WITH HOWARD J. BASHMAN ON HIS *HOW APPEALING* BLOG

By David J. Perlman (1)

On a brilliant morning last spring, I visited the complex on Computer Avenue in Willow Grove, Pennsylvania where the creator of the How Appealing blog, Howard Bashman, keeps his office. It was a surprisingly pastoral setting, one and two story buildings spread throughout green woods. In a conference room in his suite, I asked Howard about his widely read, indispensable blog on appellate law.

DJP: Good Morning, Howard.

HJB: Good Morning.

DJP: How did *How Appealing* get started?

HJB: When I was at the Buchanan Ingersoll firm, serving as chair of the firm's appellate group, one of the younger attorneys, an associate who had come over with me from Montgomery McCracken, had been reading law-related blogs. He kept trying to draw my attention to these sites because he thought I'd find them interesting too. You know, we were good friends and he kept saying, "Look at this site

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...Continued from page 1: *Eight Lessons from the "Obamacare" Briefs*

1. A FLASH OF INSPIRATION (GOVERNMENT)

Third Circuit Judge Ruggero Aldisert urged brief writers to identify the "flashpoint of controversy." The Solicitor General does so brilliantly in his reply brief, whittling away to that flashpoint by claiming that his opponents have conceded everything but:

Respondents concede that Congress has the constitutional authority to regulate the interstate health-care and health-insurance markets. They acknowledge Congress's power to prescribe guaranteed issue and community rating. And they do not question Congress's power to regulate how individuals pay for health care, or dispute that participation in the health-care market is virtually universal and that the risk of participation is unavoidable. They do not even challenge Congress's power to impose monetary penalties or other consequences (such as denial of health care) on those who lack health insurance, or to require that insurance be used to purchase health care. **They dispute only the point in time at which Congress may employ the concededly valid means of a minimum coverage provision.**

2. SHOW, DON'T SMIRK (GOVERNMENT)

Like the advice to "Have a Theme," the "Show, Not Tell" admonition is easier to spout than to execute.

Sometimes, "Show, Not Tell" means weaving together unadorned facts in neutral-sounding fashion that just so happen to favor your client or disfavor your opponent. In his opening brief, for instance, the Solicitor General highlights how prominent conservative think tanks once supported the very mandate that the Right now rejects:

Alternatives to President Clinton's plan emerged, ranging from federal single-payer plans (extending government-provided health insurance to those not eligible for Medicare or Medicaid) to proposals to expand coverage by requiring individuals to obtain insurance, coupled with tax credits to

make insurance affordable. (citation omitted.) Plans in the latter category were based on recommendations by the **Heritage Foundation** and a group of health care economists and lawyers associated with the **American Enterprise Institute**, both of which supported the mandatory purchase of private insurance so that the sale of insurance and delivery of health care would take advantage of private-sector market efficiencies. [Citation omitted.]

Other times, the most effective "facts" are unadorned quotations. Compelling from the government's point of view is this quotation from Republican-appointed Judge Jeffrey Sutton, who voted to uphold the mandate when it was before the Sixth Circuit:

As Judge Sutton recognized, "[n]o one must pile 'inference upon inference,' *Lopez*, 514 U.S. at 567, to recognize that the national regulation of a \$2.5 trillion industry, much of which is financed through 'health insurance . . . sold by national or regional insurance companies,' 42 U.S.C.A. § 18091(a)(2)(B), is economic in nature." *Thomas More*, 651 F.3d at 558 (Sutton, J.).

With more-traditional sources, like case law, merging short snippets of quoted text into sentences about your own case can help you find the sweet spot between unconvincing paraphrase and excessive quoting. Here is a good example from the Solicitor General's ultimately successful taxing-power argument:

"Every tax is in some measure regulatory" in that "it interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky*, 300 U.S. at 513; see *United States v. Kahriger*, 345 U.S. 22, 24 (1953). So long as the statute is "productive of some revenue," Congress may exercise its taxing powers irrespective of any "collateral inquiry as to the measure of the regulatory effect of a tax." *Sonzinsky*, 300 U.S. at 514.

(Of course, not all quotes speak for themselves. In Mr. Clement's brief, for example, he mocks the statutory language "applicable individual" so that he can weave it into his broader themes about the legislation's long reach: "To be clear, 'applicable individual' is just the [Affordable Care Act's] legalistic and vaguely Orwellian way of referring to virtually every human being lawfully residing in this country.")

3. SOUND OFF (GOVERNMENT)

Numbered lists count among the easiest things for a reader to follow—far easier than a string of sentences spliced together with "moreover" or "furthermore."

Here the Solicitor General counts off five purported benefits of the broader legislation:

The Affordable Care Act establishes a framework of economic regulation and incentives that will reform health insurance markets, expand access to health care services, control costs, and reduce the market-distorting effects of cost-shifting. *First*, Congress made health insurance available to millions more low-income individuals by expanding eligibility for Medicaid. . . . *Second*, Congress enacted taxing measures that encourage expansion of employer-sponsored insurance. . . . *Third*, Congress provided for creation of health insurance exchanges to enable individuals and small businesses to leverage their collective buying power to obtain health insurance at rates competitive with those charged for typical large employer plans. . . . *Fourth*, Congress enacted market reforms that will make affordable insurance available to millions who cannot now obtain it. . . . *Fifth*, Congress enacted new tax credits, cost-sharing reduction payments, and tax penalties as incentives for individuals to maintain a minimum level of health insurance. . . .

And here he jabs his opponents with three numbered counterpunches:

These contentions rest on several fundamental errors. *First*, this Court has repeatedly re-

jected efforts, like respondents', to put particular conduct beyond Congress's commerce power by artificially isolating it from the overall commerce of which it is a part. . . . *Second*, Congress was not required to stay its hand until the point uncompensated care is consumed, or somehow attempt to identify and regulate only "those [uninsured persons] who do not pay for a portion of their health care." . . . *Third*, there is no practical way to limit an insurance requirement to those "who do not pay for a portion of their health care."

4. BRIDGE TO SOMEWHERE (GOVERNMENT)

Another priceless writing technique is to begin a new sentence with information that the reader remembers from the one before.

This technique can work within a paragraph:

As a class, the uninsured shift tens of billions of dollars of costs for the uncompensated care they receive to other market participants annually. **That cost-shifting** drives up insurance premiums, which, in turn, makes insurance unaffordable to even more people. The Act breaks **this cycle** through a comprehensive framework of economic regulation and incentives that will improve the functioning of the national market for health care by regulating . . .

And it can work between paragraphs:

As a class, the uninsured actively participate in the health care market, but they pay only a fraction of the cost of the services they consume. Congress found that the cost of tens of billions of dollars in uncompensated care provided to the uninsured is passed on to insured consumers, raising average annual family premiums by more than \$1000.

The minimum coverage provision addresses **those defects** in the health care market.

[***]

Finding these measures inadequate to prevent "hospital emergency rooms [from] re-

fusing to accept or treat patients with emergency conditions if the patient does not have medical insurance,” 1985 House Report Pt. 1, at 27, Congress in 1986 augmented the patchwork of state laws through enactment of the Emergency Medical Treatment and Labor Act, 42 U.S.C. 1395dd. That statute requires all hospitals participating in Medicare and offering emergency services to stabilize any patient who arrives with an emergency condition, without regard to evidence of ability to pay.

It was clearly proper for Congress to take into account **these legal norms**, and the societal judgments they reflect, in determining that denying health care to persons without insurance, or otherwise attempting to penalize them at a time of medical need, was an inappropriate means of addressing uncompensated care.

Adding these semantic links between sentences and paragraphs, as the Solicitor General does throughout, is probably the best way to enhance the flow of an otherwise dense and dry argument.

5. FULL CIRCLE (CLEMENT)

That said, if the government’s briefs have a flaw, it’s the lack of a memorable theme.

Here and there, the government does appear to gravitate toward “the Court has never done what our opponents are asking it to do,” as in these opening-brief excerpts on the Commerce Clause and the taxing power:

In the modern era of Commerce Clause jurisprudence beginning with *Jones & Laughlin Steel*, the Court has not once invalidated a provision enacted by Congress as part of a comprehensive scheme of national economic regulation.

[...]

The Court has never held that a revenue-raising provision bearing so many indicia of

taxation was beyond Congress’s taxing power, and it should not do so here.

In the end, though, these notions are too vague and negative to work as a theme, let alone to stick in the reader’s mind.

Not so with Mr. Clement’s brief. His own theme is big and bold from his opening words. He announces in the very first sentence, in fact, that “[t]he individual mandate rests on a claim of federal power that is both unprecedented and unbounded.” (That phrase might not be happenstance: as *The CackleBur* notes (2), Chief Justice Roberts used “unprecedented and unbounded” in a 2007 opinion.)

“**Unprecedented**” appears 20 more times in the brief, and “**unbounded**” another 8 times. The related idea of “**limit**” or “**limiting**,” also introduced in the brief’s opening paragraph, resurfaces no fewer than 40 more times.

Thus this theme is everywhere. Take the first sentence in the Statement of the Case:

The Patient Protection and Affordable Care Act imposes **new** and substantial obligations on **every corner of society**, from individuals to insurers to employers to States.

And the theme returns full circle in the argument’s parting thought:

The statute the federal government defends under the tax power is not the statute that Congress enacted. In *that* statute, the penalty provision is merely the tail and the mandate is the proverbial dog, not vice-versa. And *that* statute imposes a command that is **unprecedented** and invokes a power that is both **unbounded** and not included among the **limited** and enumerated powers granted to Congress. It is therefore unconstitutional, no matter what power the federal government purports to invoke.

(2) <http://www.thecacklebur.com/supreme-court/unprecedented-and->

6. DON'T BE FOOLED (CLEMENT)

Another favorite Clement technique is to goad the reader into choosing between two views of the case, his opponent's and his own. Because he is the one framing the contrast each time, he can sound the alarm that "this case is not about X; it's about Y." In doing so, he's exploiting a technique that I call Don't Be Fooled in *Point Made* and that rhetoricians call antithesis. Think "Ask not what your country can do for you – ask what you can do for your country."

One Clement contrast juxtaposes two "either-or" views on the mandate:

The power to compel a person to enter into an unwanted commercial relationship **is not** some modest step necessary and proper to perfect Congress' authority to regulate existing commercial intercourse. **It is** a revolution in the relationship between the central government and the governed.

Another compares two ways of "compelling individuals into commerce":

The power to compel individuals into commerce is **exercised not to effectuate** regulation of existing commerce, **but rather to create** commerce so that Congress may regulate it.

Yet another pits "the Act is unprecedented" – Mr. Clement's theme – against "health care is unique" – the government's:

The focus on the purported "uniqueness" of the health care market and the centrality of the individual mandate **might explain why this is the first** time Congress has asserted this unprecedented power, **but it does not explain why it will be the last.**

7. LEAD BY EXAMPLE (CLEMENT)

In Justice Ginsburg's own Affordable Care Act decision, she famously mocked the "broccoli horrible" – the notion that the government will next make us eat vegetables. Yet her frustration only proves how effective examples are if left unchecked.

The government ceded much ground to Mr. Clement in this regard. Left too faint in the government's briefs is the idea that "if the government can't regulate health insurance, then it shouldn't be able to regulate _____."

Seizing the moment, Mr. Clement conjured up his own parade of horrors, one that dominated both the oral argument and the ultimate decisions. In his rendition, it's all about what the government might try to regulate next. His diverse examples range from different kinds of health care to different industries, different societal problems, and different kinds of insurance:

To pick an example from the "health care services" realm, some of the high costs generated by **emergency dental care** could have been prevented by regular trips to the dentist's office. The dynamic involves the same cost-shifting potential arising from the humane impulse not to deny care in emergency situations that the federal government suggests makes the mandate unique. It would hardly be "irrational" for Congress to attempt to reduce that burden on the health care services market by mandating that everyone visit the dentist twice a year.

Problems in the **automobile** industry could be solved by mandatory new car purchases. The congressional interest in ensuring the viability of the **agricultural industry**, which has typically been addressed through subsidies, could be furthered instead by compelling the purchase of agricultural products. Individuals' surprising unreceptiveness to substantial incentives to **invest in 401(k) accounts** could be overcome by mandating such investments. And so on. Most economic problems involve questions of demand and supply, and if Congress has the power not just to regulate commercial suppliers and those who voluntarily enter the market, but to compel demand as well, then we have truly entered a brave, new world.

. . . [L]ife insurance and burial insurance both finance far more universal needs that

are every bit as likely to arise “from a bolt-from-the-blue event,” and will be paid for one way or another even if individuals fail to plan for them.

8. WHAT A BREEZE (CLEMENT)

Finally, I know I’m hardly the only reader to appreciate the breeziness and confidence of Mr. Clement’s prose style.

But is that breeziness a science or an art? Let me try to turn it into a six-part science.

Sometimes a breezy prose style means using figurative or evocative language:

But an otherwise invalid statutory provision derives no immunity **from the company it keeps**.

It would be an odd notion of limited and enumerated powers that allowed the comprehensiveness of surrounding legitimate regulations to empower Congress to go the **final mile** and compel individuals to enter into its regulatory sphere.

The statute the federal government defends under the tax power is not the statute that Congress enacted. In *that* statute, **the penalty provision is merely the tail and the mandate is the proverbial dog**, not vice-versa.

To be clear, “applicable individual” is just the ACA’s legalistic and **vaguely Orwellian way** of referring to virtually every human being lawfully residing in this country.

Other times it means searching for vivid nouns and zinger verbs:

But such amendments were not proposed even by antifederalists deeply suspicious of the power of the new federal government for the rather obvious reason that the Commerce Clause was not some **vortex of authority** that rendered the entire process of enumeration beside the point.

The power to compel individuals to enter commerce, by contrast, **smacks of** the police

power, which the framers reserved to the States.

In all events, the federal government gains nothing by asking the Court to **jettison** both the mandate and the penalty and replace them with a tax, as the hypothetical tax statute the federal government proposes would be no more constitutional than the statute Congress actually enacted.

The federal government attempts to **sidestep** the tax power problem it would create by insisting that the Court has “abandoned the view that bright-line distinctions . . .”

What is more, the Court did so for the very same reason that **dooms** the federal government’s arguments here: because the means Congress adopted were neither valid exercises of the commerce power itself nor means “proper for carrying into Execution” that power.

Sometimes just using punctuation to vary sentence structure does wonders, as with Clement’s use of an em dash here:

Nowhere in the mandate—**or anywhere else in the entire 2,700 pages of the ACA**—did Congress require individuals to actually pay for health care services with the insurance that the mandate requires them to obtain.

Another suggestion is to start more of your sentences with short conjunctions:

For example, most individuals living in a flood zone will suffer flood-related losses at some point, and those losses are likely to be shifted to the rest of society through mechanisms such as publicly funded disaster relief. **And** the same kind of cost-shifting is just as inevitable in markets for basic necessities such as food and clothing, even though they are not financed by insurance.

Rather than attempt to place any meaningful limits on the power that Congress actually asserted in the ACA, the federal government focuses most of its efforts on recharacterizing

the individual mandate as a regulation of “the timing and method of financing the purchase of health care services.” **But** the federal government’s euphemistic description cannot obscure the simple reality that that is not what the individual mandate does.

A power to control every class of decisions that has a substantial effect on interstate commerce would be nothing less than a power to control nearly every decision that an individual makes. **Nor** may the federal government save the mandate by resort to that “last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause.”

Short sentences can spice up the prose, too, as can the occasional sentence fragment:

Yet the Court did not hesitate to hold the take-title provision facially unconstitutional once it concluded that the means Congress employed in that provision were “inconsistent with the federal structure of our Government established by the Constitution.” *Printz is no different.*

The federal government attempts to minimize the lack of constitutional grounding for a mandate to purchase health care insurance by recharacterizing it as something it is not: a “regulat[ion of] . . . the way in which individuals finance their participation in the health care market.” **That is simply not true.**

Individuals’ surprising unreceptiveness to substantial incentives to invest in 401(k) accounts could be overcome by mandating such investments. **And so on.**

Another technique: challenge yourself to craft memorable parallel sequences:

The federal government spends billions of dollars **feeding** the hungry, **clothing** the poor, and **sheltering** the homeless.

The reason why the mandate’s penalty provision **is not labeled** a tax, **is not structured** as a tax, and **is not grounded** in Congress’ tax power, and why the President emphatically assured the public that it is not a tax, is because the political branches lacked the public support to enact a tax.

All this gushing aside, neither brief is perfect. The Solicitor General botches some parallel constructions, misses a few typos and grammatical glitches, and launches into bureaucratese more often than need be. Even Mr. Clement, perhaps the best prose stylist writing briefs today, has a missing “that” here and an extra comma there. In the end, though, when Chief Justice Roberts offered a rare and understated “well argued on both sides” to these same two men following their arguments in the Arizona immigration case, he was praising two of the greatest advocates of our time.

...Continued from page 1: An Interview With Howard J. Bashman on His *How Appealing* Blog

where this UCLA law professor is writing about the First Amendment," and, "Look at this other site that is a really popular blog." I'd never even heard of blogs; they sounded frivolous and self-indulgent.

But eventually he prevailed upon me to look at the *Volokh Conspiracy*, which is a site run by a UCLA law professor who's a First Amendment expert. My friend was absolutely right – there was high-level discussion of legal issues. And that brought home to me that the Internet provided the ability to have a presence on various topics dealing with the law.

So, one weekend, I decided to do a Google search to see if there were any blogs involving appellate litigation. And I discovered there weren't. Next, I did some quick research on how to set one up.

Then one day, I came to the office at the regular time and put up a blog post introducing myself and explaining my hope for the site – that I was planning to focus on appellate issues, especially issues that were of interest to me but that might not justify full-length treatment in my monthly column for Philadelphia's *Legal Intelligencer*.

From the beginning, I did maybe a post or two a day that would link to interesting new appellate decisions or news coverage of appellate courts. Within the first week or so, somehow, a link to my site appeared in another blog more popular than mine. And as a result, readers started to trickle in.

I had a hit counter and realized that, over time, the number of people visiting the page was growing into the hundreds, and eventually, into the thousands, where it stands today. Now, on a typical weekday, I'll receive between five and six thousand page-views.

DJP: Was the site always called "*How Appealing*?"

HJB: It was. That was one of the potential names I offered the *Legal Intelligencer* for my column. But the editors picked "*Upon Further Review*" because that sounds a lot more serious. Perhaps my mom deserves some credit for the name because the "*how*" is a shortened version of my first name that she sometimes uses; so the pun may have existed for some

time but there had never been a place to employ it before.

DJP: When did you start the blog?

HJB: In May, 2002.

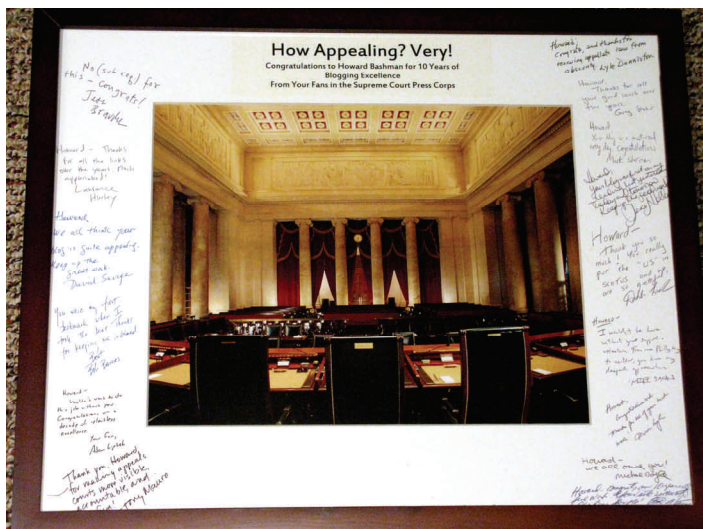
DJP: Did it receive any recognition for its ten-year anniversary?

HJB: Yes, two notable instances, in addition to a lot of nice mentions on other blogs focusing on the law. Tony Mauro, the Supreme Court reporter for *Legal Times* and *The National Law Journal*, wrote an article about the blog and included an interview with me. He cited occasions where U.S. Supreme Court Justices mentioned the blog in talks they've given in various locations. He also included a quote from Second Circuit Judge Bob Katzmann, who now heads the Federal courts' committee on relationships between the media and the courts. Judge Katzmann had some very kind words about the role the blog plays in helping people understand how appellate courts operate in general. That Tony Mauro article was really a wonderful and much appreciated recognition.

And then, the U.S. Supreme Court press corps got together and wrote their congratulations and thanks for the site on a photograph of the U.S. Supreme Court chamber. The photograph shows the view of the Court from behind the bench, where the Justices sit. The reporters included Adam Liptak of *The New York Times* and the reporters for *The Wall Street Journal*, *The Washington Post*, *The Los Angeles Times*, two reporters from *The Associated Press*, the reporters from *Reuters* and *Bloomberg* and also *The Huffington Post*. And I'm probably even leaving out one or two others. So it's nice to be appreciated.

DJP: After ten years, you've earned that recognition.

HJB: I blog not so much for recognition but for my own enjoyment. I try not to keep at the forefront of my mind, when I'm posting, who all of the site's readers are; it can almost become terrorizing to think that, you know, whatever I am typing into a blog-post may be read by the Chief Justice of the



A signed photograph of the Supreme Court presented to Howard Bashman by the press corps.

United States.

DJP: How do you know that Chief Justice Roberts reads the site?

HJB: I've heard from several reporters at the U.S. Supreme Court that they or others they know have been invited into his chambers and have seen it on his computer screen. And less indirectly, I've bumped into him personally at various occasions and he's mentioned the site.

DJP: And what did he say?

HJB: He's joked, "Howard, if you're here at this event that we're both attending right now, then who's updating your blog in your absence?" So, that's among the things that he's said.

DJP: Have any other U.S. Supreme Court Justices mentioned your site?

HJB: Well, I've heard it said by a law professor who was attending a talk by Justice Alito that, when someone asked what blogs, if any, he checks, he mentioned *How Appealing*. And then, more recently, at the Sixth Circuit judicial conference, Justice Kagan was being questioned by a Sixth Circuit Judge and one of the questions was, does Justice Kagan read any blog sites, and she mentioned *How Appealing* and the *SCOTUS* blog that Tom Goldstein operates.

DJP: Do you have a background in journalism?

HJB: Long before I was a lawyer and wrote my column for *The Legal Intelligencer*, I went to Penn Charter for high school, which was founded in 1689, and claims to have started the first-ever student newspaper in the United States. I was fortunate to write for that newspaper from ninth grade on and became its Editor-in-Chief. Then I went to Columbia College at Columbia University and wrote for *The Columbia Spectator* as a reporter covering the university administration and had been intending for many years to become a journalist. But, unfortunately, due to family circumstances that involved the unexpected death of my father when I was 16, I had to focus more carefully on picking a career that would be more likely to offer self-sufficiency from a very early age; I knew that one could be successful in journalism but it also involved many years of toiling in obscurity, and that was not a risk I was able to take, especially since I had younger siblings who also required my mom's assistance in getting through college.

So, I decided to focus on being an attorney and after graduation from law school took an appellate clerkship here in the Third Circuit. Then I decided to focus on appellate work, which allowed me to take advantage of the writing and analytical skills that I had developed. And now through the blog, I have been able to serve something of a quasi-journalistic function even as an appellate attorney.

DJP: How do you decide what to post?

HJB: What I focus on, generally speaking, are things that are of interest to me. I know that might sound like a highly personalized decision but fortunately it turns out that things that are of interest to me are also of interest to this universe of appellate attorneys and others in general. There might be rare occasions when people whose influence I value are, more or less, asking me to mention what's of interest to them. And I often receive pitches, for lack of a better term, from journalists or judges who are trying to bring my attention to things they think ought to be mentioned on the site. I try not to allow who these people are to influence me too much in deciding whether to mention what it is they want me to mention.

DJP: Do you read everything you post?

HJB: I may not have time to read everything from start to finish. And so, I guess the best way to refer to the blog is a list of things that I would like to read.

If I'm posting about a judicial decision that has come out, I will try to understand what the Court has ruled so that I can write a short summary description that is not erroneous.

And sometimes I'll get e-mails from readers who will point out mistakes in articles or even judicial rulings that I've linked to, and I'll go back and take a second look at either the decision or the article. If it's a noteworthy mistake, I may mention it in a follow-up post. I've noticed that a mistake will frequently be corrected very soon after it is mentioned on my site.

DJP: In other words, you might link to a judicial opinion where someone had pointed out a mistake and you will point out the mistake in the blog and then the Court will correct its opinion?

HJB: That's absolutely what I was saying. Since that's been happening, I've been saving a copy of the original decision so that I can upload it to my own server. That way, I can show that the mistake I referred to actually existed because the official version of the opinion is usually corrected almost instantaneously. Otherwise, people will say, "Howard you said the opinion has a mistake but it's not there."

DJP: So your saved opinion is like a rare coin that has a bad impression that's since been corrected.

HJB: Right. There was an interesting incident, for lack of a better word, that arose several years ago where the Second Circuit had issued an opinion one morning in a *Bivens*-type action. It was brought by an individual who was accused of involvement in the 9/11 attacks. And so the Second Circuit issued an opinion adjudicating an appeal in that *Bivens* case where someone was saying he had a Federal civil rights claim against the government for having been wrongfully accused for being among the perpetrators of the 9/11 attacks. This was someone who was staying in a hotel located across the street from the Twin Towers and who was originally accused of

having had a pilot's radio in his hotel room, which would have allowed him to listen to air traffic. But, in fact, a pilot was staying in that hotel room and this accused person was on a different floor but was of Middle Eastern descent. So somehow he was wrongly accused of having had a pilot's radio in his hotel room. Later, the pilot who owned the radio said, "No, the radio wasn't that guy's; it was mine."

The Second Circuit, one morning, issued an opinion that adjudicated this guy's claim, and I received e-mails alerting me to that decision but I was out of the office when those e-mails arrived. So mid-afternoon I went to post about the decision but the decision was no longer available at the Second Circuit's website. It had been removed. I put up a post about the decision and wrote in the post, if anyone has a copy of the opinion that was issued but has since been removed, feel free to e-mail it to me and I'll be glad to post it because it undoubtedly had appeared and was taken back.

One of my readers had saved the opinion and sent me the pdf file and I posted it on my website. And then I heard from the Clerk of the Second Circuit that the reason the opinion was removed was because it contained information that the Second Circuit had intended to redact. So here's the scenario, I had reported on the opinion, the Second Circuit had published the opinion and made it freely available for a period of time, people had downloaded the opinion themselves, and I had published the opinion on my blog, making it available to everybody.

DJP: Was the Second Circuit asking you to take it down?

HJB: Yes, now the Second Circuit was asking me to take it down. At that point, I read through the opinion and saw that the part of the opinion that the Court wanted to redact involved the manner in which the FBI had interrogated this person. I thought that information had independent news value. So I reported back to the Second Circuit that I'm not taking it down. And the next day, the Second Circuit posted a redacted version. Thereafter, several news outlets, including *The Washington Post*, reported on the original opinion that they had obtained through my blog.

There was some discussion whether or not Howard Bashman is a journalist under those circumstances. But, you know, that's one instance where a Court was trying to get me to take down something that it had originally published itself, and I just told the Court, "No, in my judgment this has independent news value."

DJP: What do you mean, people were asking, is Howard Bashman a journalist? Do you mean, is he a journalist or a lawyer? Where do his loyalties lie? The journalistic thing would be to keep it up there.

HJB: Yes, I thought my role as a journalist was to keep it up there. And, you know, people were saying, did I do the right thing or not and certainly all the journalists in the audience thought I definitely did the right thing.

DJP: Do you think you did the right thing?

HJB: I was proud of what I did under those circumstances. I mean, that's one unusual instance where I found myself unwittingly embroiled in controversy because when the Second Circuit took it down there was no public announcement made by that Court explaining why the opinion had been removed; the Court did not alert the public over its website that it took down the opinion because it realized that it contained materials that it had not intended to make public.

DJP: The Court only told that to you?

HJB: Right, but only after I had made the opinion available to download at my blog.

DJP: And did you make **that** information public?

HJB: Yes, I put up a post saying that I received a request from the Clerk of the Second Circuit to take down the opinion and that I have decided not to take it down.

DJP: And the newspapers that reported on it deduced without your telling them why the Second Circuit had withdrawn the original?

HJB: By the time they were reporting on it, the revised version of the opinion had issued and they were able to see what was redacted. And I think that nobody, in the fullness of time, ever came to a con-

clusion that somehow the original opinion had compromised anything that the Federal government needed to have kept secret.

DJP: Did it cross your mind when you were making that decision that you might someday appear before the Second Circuit?

HJB: The request was not made to me in my capacity as an attorney but rather as someone who runs a website that is devoted to reporting on appellate courts. Thankfully, when I later sought admission to the Second Circuit to represent a client on appeal, the Second Circuit promptly granted my application for admission.

DJP: You link to newspapers and blog sites all over the United States as well as Canada and foreign countries and you post to articles instantaneously, as soon as they're published. How do you do that?

HJB: Well, here's the method that I use, more or less on a daily basis. I know when the Federal appellate courts publish their opinions on their own websites. Some courts publish opinions in the morning and others publish them in the afternoon. So, I try to check the courts that publish in the morning promptly. And then, in the evening, I'll look at the sites that publish in the afternoon. And that's something I've been doing even before I had the website, just to stay up to date on anything of interest coming out of the Federal appellate courts.

The U.S. Supreme Court generally issues opinions once or twice a week when it's in session. I'll try to mention those opinions when they issue, if I can.

With regard to state appellate court decisions, I have an *Associated Press* site that delivers *AP* law-related articles, and if I see anything interesting from state appellate courts, I might post about that.

And then, I run a Google search. You can do a search looking for coverage of a specific case if there's a case that's of interest to you. But once a day, I'll do a general Google search of articles that might be reporting on appellate decisions, and if any the results are of interest, I might post those decisions.

And then there's, of course, the pitches that I re-

ferred to, where people bring things to my attention that I might not otherwise know about.

And I'll look at some blog sites that are of interest to me like the *SCOTUS* blog or the *Volokh Conspiracy*, which I mentioned earlier as a site that influenced me in starting my site.

DJP: How do you juggle the constant postings and your law practice?

HJB: Well obviously the law practice has to come first, and then the other stuff, I just fit into the interstices of the day. I would say, typically, I spend a couple hours a day updating the blog but much of that is either before work or after I've left for the day. If it's during the day, it's just when I am taking a break.

Yesterday, I was delivering an appellate court argument — it went very well, thankfully — and I put up a post the night before saying there won't be any updates to the site until tomorrow afternoon at the earliest. And then I got home and, you know, I figured the Phillies were on, and I have tickets to the Phillies and go to a lot of Phillies games, and I wanted to catch some of the game on TV. So it ended up that I didn't have any new posts until 10:00 last night.

And at that point, I might have put up six posts and checked all the different appellate court rulings that had issued during the day and fortunately there wasn't a whole lot that was of interest. So the posts were mostly news articles reporting on various things.

This evening, my son has a baseball game and I'm the assistant coach, so if I leave the office at around 4:45 this evening, there'll probably be a big gap on my blog between 4:00 and 10:00 tonight.

You know, I've been very busy at work and there are times when I'm finishing up a brief and I can't do any blog posts and that's fine. I love doing appellate work.

I was recently attending my 30th high school reunion and I was telling one of my friends from high school about the blog. And he was joking with me, something along the lines of, "Let me understand this, for

work you're an appellate lawyer so your job is appellate law, and then in your spare time for fun you write on the Internet about appellate law." Actually, that pretty much captures it. I really enjoy the subject matter. It's not something that is a burden.

DJP: You used to run a feature called "Twenty Questions" in which you posed questions to appellate judges around the country. Why did you discontinue it?

HJB: It was something I really enjoyed but it also involved a great deal of time and resources finding people who were willing to be interviewed and coming up with questions. There were several months towards the end when people who had originally volunteered to do it had to withdraw their acceptance due to unexpected developments in their professional or personal lives. Not being able to keep the consecutive streak going and realizing that it was one aspect of the blog that consumed a lot of my time, I decided to stop.

But the interviews I did continue to be available to everyone online free of charge. For example, when Jerry Smith, who is a Fifth Circuit Judge, became embroiled in news coverage for requiring the Justice Department to file a letter confirming or disagreeing with the Federal government's view of whether courts have the right to strike down legislation under the Constitution, a profile of him that *The Associated Press* put together quoted one of his responses to my *Twenty Questions* interview. That brought home to me the fact that, five or so years after the feature ran, it still has value.

DJP: Who were some of the judges you interviewed?

HJB: Dick Posner of the Seventh Circuit, Frank Easterbrook of the Seventh Circuit, Judge O'Scannlain of the Ninth Circuit, Stephen Reinhardt of the Ninth Circuit. And Judge Bryson of the Federal Circuit, who had been at the Solicitor General's office and was able to answer both about how the S.G.'s office operated and the Federal Circuits operate. I had Senior Third Circuit Judge Aldisert, who's written books about appellate advocacy. I had Shirley Abrahamson, Chief Justice of the Wisconsin Supreme Court. So I had some state Supreme Court

Justices participate as well and also a Judge from California who is on the California Court of Appeal and writes a column about appellate issues for *The Recorder*, Justice William Bedsworth.

I was incredibly pleased by the judges who agreed to take part. And the interviews were fascinating, not just to me, but to so many of my blog's readers. And, you know, I'm sorry that I had to give up the feature but I think it had run its course by the time it was done.

DJP: Where do you envision *How Appealing* going?

HJB: Well, hopefully, I will continue to enjoy doing it and it will remain largely the same. Now we are in an age when blog sites tend to feature lots of pretty pictures or live chats or video, but my site is largely text driven. I may link to an audio file of an appellate oral argument but, you know, you won't click on my blog to hear audio of me talking about a case or see me discussing a case on a live webcam or

have me chat with my readers in a live chat feature. Indeed, only recently did my blog start having a Twitter feed. As long as people like *How Appealing* the way it is, which is essentially the way it's been for the past ten years, I'm more than happy to keep it going.

The one thing I've enjoyed about it for all the years it's been in existence, in addition to all of the positive reader feedback, is that every single post has been something that I've generated by pushing keys on my own computer and hitting the post button. I've been the one who's decided what it's going to say; every single post has been something I've put up there. And that's the way I intend it to be into the foreseeable future.

DJP: Thank you Howard.

HJB: Thank you.

ACTING ADVICE FOR THE APPELATE ADVOCATE

By Wendy McGuire Coats (1)

Appellate argument is a performance. But unlike a stage or screen actor, the appellate lawyer expects and hopes for an interactive audience. The generally accepted roles of the players in the appellate arena are fairly well defined. The bench must clarify and test the issues, facts, and governing law alongside an advocate's conclusions. The advocate must ensure that the bench has a correct understanding of the facts and law plus is persuaded, emotionally invested, and motivated to act in favor of the advocate's client. Much like an actor, the advocate's role is to bring the case to life.

Familiar suggestions for oral argument preparation include: (1) lead with an evocative opening; (2) focus only on three main points; (3) know the record; (4) spontaneously answer questions; (5) speak confidently and conversationally; and finally (6) do not do anything annoying or distracting. While the list of suggestions identifies "outcomes" for performance, this list noticeably fails to provide the advocate anything tangible to do in preparation.

Moot courts are not enough. A moot court is more like the dress rehearsal before a show's opening night. It may help vet responses to anticipated questions, identify potential pitfalls in logical reasoning, and highlight an advocates ticks or distractors, such as swaying, "umms," and failing to make eye contact, but a moot court is not where an advocate prepares for performance.

Trained actors work on their craft daily. Much of this training has no audience but is a solo endeavor. Admittedly, some of the exercises and suggestions may feel awkward. But if the advocate pushes through the self-conscious uncomfortableness, the exercises will result in a more confident, relaxed, and effectively persuasive argument.

Preparing the Voice & Body for Performance

A well-trained actor would never consider taking to the stage without first warming up both the body and voice and neither should the advocate. Oral argument is not a casual conversation. Both the voice and body-control needed for effective oral argument differ substantially from those used during an attorney's typical business day of phone calls, client meetings, and informal presentations. Speaking requires engaging multiple muscles in the mouth, face, neck, back and abdomen, but when placed in the heightened performance experience of oral argument, an advocate's muscles will naturally tense up with stress. When this happens, the actor's and lawyer's performance tools of the body and voice contract and effectiveness drops precipitously.

Read Aloud

Trained actors read aloud to prepare for the "cold reading" portion of an audition. An actor will be handed a script and on the spot is expected to read (perform) it and bring it to life. A skilled cold reading actor will seem to look at the page, effortlessly sweep the words up, and then deliver them naturally as if the words being spoken had just occurred to him. Reading aloud thirty minutes every day helps develops this skill.

Reading aloud using this "look, sweep, deliver" approach can strengthen your oral argument performance. The exercise literally works to get the "words in your mouth." Reading aloud forces the mind, body, and voice to slow down. It requires pacing, diction, volume, and full breath control. It develops the advocate's sensitivity to volume with the goal being to "fill the room" without shouting. While both the actor and the advocate hope the microphones work experience tells that technical difficulties plague live performances. Having routinely read aloud in various settings (small office, conference room, lecture hall), the advocate will be innately

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prepared to immediately adjust his volume to the extremes of an overly sensitive microphone or to one that simply does not work.

Reading aloud key quotes from cases, statutes, and briefs reinforces substantive preparation while at the same time revealing challenges the advocate faces with cadence and breath control. Wordy or cluttered phrases or points that flowed well in written form may require tightening into memorable sound-bites for oral argument. Some passages read aloud do not flow conversationally and require changing the word order or emphasis to drive home a point.

If oral argument turns into an uninterrupted presentation with no questions from the bench, an advocate who has routinely read aloud will feel comfortable hearing his lone voice fill the silent room and will resist rushing while naturally varying tone and speed for emphasis.

Do Daily Diction Drills

Like reading aloud, diction drills are a daily part of the trained actor's discipline. Incorporating just a few diction exercises into your daily routine will help improve enunciation, volume control, and cadence. Here are a few quick exercises to enter into the advocate's smart phone. The first three drills practice vowel sounds made by arching the front of the tongue towards the hard palate, the middle of tongue between the hard and soft palate, and back of the tongue towards the soft palate. The next two practice diphthongs - gliding vowels - where two adjacent vowel sounds occur in one syllable.

Front Vowels: Lee will let Pat pass.

Mid-Vowels : Stir the surprised signer's cup.

Back Vowels: Who would obey all honest fathers?

Five Long Diphthongs: Pay my boy go now.

Five Short Diphthongs: Here their poor ore car.

Diction drills are not just about speed. Work on having each word stand alone. Focus on producing a full, open, and complete sound for each word. These five exercises challenge the advocate to transi-

tion from one word to the next clearly and specifically.

Helpful Hints for Vocal Care

On the day of performance, avoid dairy products, including cream or milk in coffee. Also avoid chocolate and nuts because, like dairy products, these increase mucus, which interferes with vocal control. If feeling particularly "phlegmy" eating a raw apple can help clear the throat before performance. Caffeine (coffee!!!), cold medicines, antihistamines, and aspirin dry the voice, so if they are necessary, water intake must increase. Warm water with lemon and honey is the safest relaxant for vocal use, along with onion soup or chicken broth. And if during a performance the mouth suddenly goes dry, gently chewing the tongue will activate the salivary gland and immediately moistens both the mouth and throat.

Warming Up The Body

"Stand still, but not stiff." "Stand up straight; don't slouch." "Be in control." "Be confident." Great advice. But under stress, even the most prepared and knowledgeable advocate can start slouching, swaying, wandering, and even shaking. And there's only so much the brain can focus on at one time. The advocate is usually hyper focused on the substantive part of the argument, which leaves little brainpower for body awareness or regulating ticks.

Ultimately, the advocate's challenge is to get and keep control of the physical part of the performance. Neither the actor nor the advocate can realistically demand their body to deliver the desired performance without first ritually rehearsing and building muscle memory of the desired outcome. The body needs to be on autopilot.

First, stretch daily. Trained actors stretch and physically warm-up, just like trained athletes. Stretching does not have to be complicated. But a daily routine of releasing the body's natural tension through brief stretching is the cornerstone on which the rest of your body control is built. And especially stretch the morning of oral argument. It is virtually impossible to be or appear relaxed when the body's muscles are tight and stressed. Having stretched daily,

when the advocate begins stretching on the day of argument, the advocate's body will begin to release excess tension, loosen, and relax even while the brain is readying for the performance. A trained actor learns that stretching primes the body for both practice and performance and also quiets the mind.

And what's with the uncontrollable shaking and trembling? Ever felt confident about the case and excited to finally argue it, and yet surprisingly a hand would not stop shaking or a leg would not stop bobbing? This regularly happens to actors. They are excited. They are ready. They have been preparing for weeks or months and now the moment's here. All of their senses are heightened. Adrenaline has kicked in. One dance instructor described this shaking phenomenon as excess energy needing to leave the body. If prone to this frustratingly uncontrollable shaking, the key is to shed the extra energy before the performance. One quick and effective way: push-ups. Pragmatically, this means taking off the suit jacket and doing 15-25 standing push-ups at an angle against the wall of a bathroom stall. When finished if the body still has that "I could do some more" sensation, keep going and dump the extra energy.

Next, much like the actor, an advocate's oral argument should never be weakened by body position and breath control. To eliminate the inadvertent slouch, the advocate should adopt a routine that trains the body to default into a natural, controlled, and confident posture. Here are two simple daily routines to help find and develop a strong and open body posture.

Brushing Teeth: Stand still at the bathroom counter (basically a lectern with a mirror) with feet hip width apart and a slight bend in the knees. Raise your shoulders up in an exaggerated shrug towards your ears. Press your shoulder blades back towards the wall behind you and then drop them down into your shoulder sockets. (Think: shoulders - up, back, and down.). Release the clench in your seat. Finally, float your head straight up towards the ceiling like it's attached to a balloon. Place one hand on your abdomen and take a few breaths feeling the abdomen release out on the inhale. You should be standing aligned with ears over shoulders, shoulders over

hips, hips over knees, and knees over ankles. At first the position may be hard to hold or uncomfortable because now you are standing up straight. Brush your teeth and resume this position after each "rinse and spit" building muscle memory with each repetition.

Working at Computer: Sit with legs hip width apart and feet flat on the floor. Release the clench in your seat allowing your tailbone and the small of your back to be supported by the back of the chair. Do the same exaggerated shoulder shrug - up, back, and down. Let your head float towards the ceiling aligning your ears, shoulders, and hips along with your knees now directly above your ankles. This also may require adjusting both the height of your chair and the location of your computer. Now type.

Overtime creating this muscle memory will result not just in an advocate who can actually stand up straight and knows what it feels like but will more grounded, confident, and relaxed advocate.

Abandoning the Traditional Script

"Do not read your argument to the bench." While there are notable exceptions to the rule, it is fair to say that a majority of appellate advocates take some version of "notes" with them to the lectern. These notes may range from a sparse outline to a verbatim "ideal" argument speech. And whether the notes are actually used during argument, they are the script. But there's a fundamental disconnect between the prepared script and the actual argument; the script is linear and the argument is not.

In order to move fluidly from issue to issue and not to flip pages, take a single sheet of blank legal-sized paper and divide the sheet into wider columns, creating a grid. Then handwrite all the key points, case citations, and partial quotes on this one page. Use color coded highlighting to make glancing down to identify and sweep up the needed information fluid and seamless. Handwriting the information will force the advocate to streamline the information while also reinforcing the information's location on the page. If using only one page for the entire argument seems too limiting, try using this one page technique for each major issue. At most, the advocate should end up with three pages. Regardless of

which issue the bench focuses on, the correct page is easily slid to the top without having to turn several pages in a binder to get to the relevant section. Finally, loose notes should not be carried to the lectern but should be tucked inside a leather folder or portfolio.

While facilitating effortless access to all of the key information, another bonus to this one-page script is that, unlike an outline or a verbatim speech, a grid of key points does not intuitively feel like it should be read. Instead of feeling wedded to a script, the advocate now has in front of him everything he needs, regardless of where the bench wants to go.

If facing a cold bench, the advocate will still easily move through each main point, but if the bench is hot and jumping back and forth between issues, the advocate will move effortlessly back and forth without ever turning a page or hunting for information. In this respect, the advocate will not be tied to the script but will be living the argument.

Learning to Listen & Respond

Actors act with partners. Even a stand-up comic or a solo performer has a partner – the audience. Much the same, the appellate advocate has a partner in argument performance – the bench. Both the actor and the advocate have the same responsibility to their partners: see, listen, and respond. It's not just that it is annoying and boring to look at the top of an advocate's head while he reads to the court; eye contact is about connecting. It is about being open to having the conversation and welcoming the bench's questions.

An advocate is not truly listening to a question when he immediately begins thinking about the answer before the question is finished. Real listening is not pretend listening. Real listening requires a change of focus. "Total attention away from yourself is the creative source of acting," taught legendary acting instructor Charles E. Conrad. Conrad was a protégé of Sanford Meisner who developed what is known as the Meisner Technique for acting training. Actors trained in the Meisner Technique work through a series of repetitive exercises designed to emphasize the "moment-to-moment" spontaneity produced when actors communicate

truthfully within fictional circumstances. For example, two actors may sit across the table from one another with this repetitive dialogue going back and forth for several minutes: "I have long hair." "You have long hair." "I have long hair." "Yes, you have long hair." During this repetition exercise, the words fall away and the actor begins responding to his partner's behavior. If they are really listening, the actors begin responding impulsively to their partner's brusque, pleading, or sensual tone, the subtle lift of an eye brow, a hardly noticeable dismissive shake of the head, or momentary grimace or playful smirk. To really listen, both the actor and the advocate must stop focusing internally and direct their focus out. Too often advocates respond immediately without having fully considered the full breadth of the question or before the question was actually finished. Not only can this come across as inconsiderate but it can lead to shortsighted, quipped responses. But an advocate's attentive listening followed by a moment of thought before responding demonstrates enormous respect to both the bench and the question. While technique allows the actor to let the creative process take over, technique allows the advocate to get to the heart of the issue.

It's Really All Improv

Trained actors are often familiar with theater games or other improvisation exercises designed to keep the actor from falling into self-consciousness. Improv exercises start from a playful, spontaneous, active place and are designed to help the actor learn how to "be" and "stay in" the moment. In her 2011 book, *Bossypants*, Tina Fey of *Saturday Night Live* and *30 Rock* writes, "The first rule of improvisation is AGREE. Always agree and SAY YES." And then, "The second rule of improvisation is not only to say yes, but YES, AND. You are supposed to agree and then add something of your own." It is on this foundation that a successful improvisation exercise, theatre game, or television show like *Who's Line Is It Anyway* flourishes.

Effective appellate argument always follows these first two rules. The advocate need not answer each question from the bench affirmatively, but the advocate should agree to answer the question. Appellate

judges seem to uniformly direct appellate advocates that during oral argument “answer the question asked and answer it now.” Even if the question is unrelated to the current discussion and the advocate would have preferred to deal with that issue later, agree to answer the question. Even if the advocate does not like the question, or even worse, does not like the necessary answer, agree to answer the question. An overwhelming number of questions from the bench can first be answered with a “yes” or a “no” and then followed by an explanation.

Here, the second rule of improvisation directly applies. Add something. “Yes, but . . .” or “No, and . . .” serve to both answer the question – even the really difficult ones – head-on while allowing the advocate to steer the argument in a desired direction. Now draw attention to the case’s facts that mirror the facts in the controlling case. Now segue to a more persuasive case that is distinguished from and trumps the case the bench may be tempted to apply. Add something. Do not start with the law first. Agree to answer the question. Giving a “yes” or “no” removes any doubt of your answer. Now add something.

Unlike actors, appellate advocates receive little in-

struction in how to prepare and practice the performance aspect of oral argument. But like actors, advocates must work to get themselves out of the way so that the argument’s focus is on the story, the issues, the coming to life of the case that hopefully compels a favorable result for the client. And it is true for both the actor and the advocate’s performance, “the audience did not pay to come and see you practice.”

For More, Consider Exploring:

Freeing the Natural Voice: Imagery and Art in the Practice of Voice and Language, Kristine Linklater (2006) and www.kristinlinklater.com

Sanford Meisner Master Class DVD (2006)

Sanford Meisner on Acting, Sanford Meisner & Dennis Longwell (1987)

Improvisation for the Theater: A Handbook of Teaching and Direction Techniques, Viola Spolin (1999)

CRAFTING AN INFLUENTIAL AND EFFECTIVE REPLY BRIEF

By Richard C. Kraus (1)

Even though reply briefs offer the opportunity for the last written word on appeal, many read like an appellant's afterthought. Anecdotal reports indicate that some judges and clerks read reply briefs first, assuming that appellants will have distilled the most critical and compelling arguments by then. Yet, too many reply briefs are focused entirely on rebutting the appellee's arguments and fail to effectively present the appellant's position. Whether read first or last, an effective reply brief must leave the judges with a coherent understanding of the reasons why the appellant should prevail on appeal.

A reply brief should serve as a reprise – a return to the original theme. In musical theater, a reprise repeats an earlier song or theme, usually with changed lyrics to reflect the story's development. The theme developed in the opening brief needs to be brought back to the forefront, refashioned or refocused as needed to respond to the appellee's arguments. The opening and reply brief must share the persuasive theme.

Crafting an influential reply brief is difficult. Most jurisdictions have short page or word limits(2). Courts rarely grant motions to file reply briefs exceeding page limits. Within these confines, an appellant must respond to the appellee's arguments, refresh the arguments from the opening brief, and make a final push to persuade the court to reverse. Reply briefs test appellate counsel's ability to concisely and effectively distill winning arguments on appeal.

Deciding whether to file a reply brief

In almost all courts, reply briefs are optional. Yet, there are very few – if any – circumstances that justify the decision to forgo the chance to file a reply. Trying to lighten the reading burden for busy appellate judges is not a good reason for waiving a reply.

Although judges can be irritated by a reply that just repeats the same arguments in the opening brief, courts appreciate a succinct and well-written reply brief that demonstrates the merit of the appellant's position despite the appellee's response arguments. Judges want to get it right. A good reply brief can help.

A reply should be filed even when counsel hopes to send a message that an appellee's brief is so lacking that no response is needed. An effective approach is to highlight the arguments that the appellee did not contest or discuss. This provides an opportunity to briefly restate the appellant's arguments and add that the appellee "does not challenge" or "does not dispute" those points.

Selecting the arguments to address

Many lawyers, including experienced appellate practitioners, suffer from the advocate's compulsion to respond to every argument in appellee's brief. However, the appellant's job never changes. The reply brief, just like the opening brief, must explain why the appellate court should correct the trial court's errors. Before drafting a reply brief, try to identify which response arguments will interest the judges and what questions the panel might ask at oral argument. If an appellee's argument does not deal with these critical and dispositive issues, an appellant should not waste valuable space by replying. In some cases, a brief footnote explaining why the argument can be ignored may be appropriate.

Use an introduction

A brief introduction allows the appellant to concentrate on the key legal issues and develop a statement of the critical arguments that counters the appellee's response. The urge to jump directly to a rebuttal of the appellee's arguments should not obscure the benefit of a succinct reprise of the reasons why the trial court reversibly erred.

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(2) The limits in state appellate courts range from 10 to 30 pages. F.R.App.P. Rule 32(a)(7)(B)(ii) allows a fairly expansive limit of 7,000 words.

Point out concessions and omissions

A very effective approach is to identify and highlight the arguments that the appellee concedes, or more commonly, the arguments that the appellee does not address. An introduction with a bulleted list allows the appellant to restate the arguments that are conceded or uncontested.

Structuring the reply brief

When representing an appellee, a skillful appellate advocate will commonly restate and reorder the arguments rather than accept the appellant's organization. Faced with this approach, an appellant's counsel must decide whether to retain the organization from the opening brief or reply to the appellee's arguments as presented in the response. In almost all cases, acceding to an appellee's reorganization is a mistake and forfeits the appellant's advantage of framing the arguments. The reply to appellee's arguments should be woven into the appellant's reprinted themes. Following the opening brief's organization and structure helps to refocus the court on the issues presented by the appellant.

Avoid the defensive trap

Many lawyers fall into the defensive trap and make the mistake of repeating the opponent's argument before rebutting it. A typical paragraph begins with the appellee's argument as the topic sentence. The remainder of the paragraph is the appellant's response. This approach combines two errors - the opposing argument is repeated for the court and given the prime real estate occupied by the topic sentence. A better approach is to begin the paragraph with a sentence stating the appellant's argument and the error in the appellee's argument: "The plain language in the contract supporting appellant's interpretation cannot be overcome by the extrinsic evidence asserted by appellee."

Counsel should also be careful when replying to an appellee's argument requires explaining it. Restating a confusing response carries a risk of clarifying it. Although the approach will vary, it is often effective to state the appellee's argument in general terms without any of the supporting details that are or should have been presented.

Responding to the counterstatement of facts

Because the statement of facts in the opening brief should cover the relevant facts in a non-argumentative but persuasive manner with supporting record citations, there should not be any need to engage in an exhaustive point-by-point rebuttal of the appellee's factual statement. It may be enough to simply state that the appellee's counterstatement fails to comply with the requirements for an accurate, unbiased and supported recitation. The reply should avoid a litany of "she said, he said" statements. A few key examples of the appellee's misstatements of fact will demonstrate that the court should rely on the statement of facts in the appellant's opening brief.

At times, the appellee's response will point out facts that undermine or weaken the appellant's position. A reply is necessary in those cases, especially when the facts should have been acknowledged and dealt with in opening brief. The reply should demonstrate why the facts are immaterial or the appellee's statement is wrong. If the appellee has fairly identified factual errors in the opening brief, the reply should acknowledge the mistake. A forthright admission is less painful than being skewered at oral argument or in the court's opinion.

Respecting the rule against new arguments

The rule against raising new arguments in a reply brief is easy to state. Judges do not appreciate sandbagging and understandably take a jaundiced view of any new arguments presented in a reply brief and of the appellant's counsel who raises them.

The line between a new argument and a restated argument is not always well-defined. If the response to an appellee's argument requires an extensive revision to the original argument, it is important to explain why the reply argument is still a restatement. The link between the original and reply arguments should be evident.

Courts understand the difference between raising a new argument and dealing with an unanticipated one. Most appellees understandably rely on the same arguments that were successful in persuading the trial court. While a good appellant's brief will

anticipate and address those arguments, there are times when an appellee offers new twists, *e.g.*, when an appellee retains new counsel on appeal, especially an appellate specialist, who realizes that the trial court's reasoning is weak and relies on the "erroneous ruling but right result" principle.

When an appellee presents an issue that does require a new argument in reply, the appellant should acknowledge it and explain why the issue was not discussed in the opening brief. In some cases, the best explanation is the appellee's failure to raise the issue in the trial court. With reply space at a premium, appellants can characterize the appellee's approach as conceding that the trial court erred in its rulings. The reply can point out that experienced trial counsel did not feel the arguments had sufficient merit to raise them in the trial court. Treating the appellee's arguments as "fall backs" or "last resorts" that can be easily discarded can be effective.

An appellant's counsel should be very reluctant to move for permission to file a reply brief exceeding the page limits. Explaining the need for additional space gives the clear message that the appellee's argument may have sufficient merit to warrant affirmation.

Replying to the attack brief

When an appeal is handled by experienced appellate counsel, the "attack brief" is blessedly infrequent. At times however, the response attacks the appellant and appellant's counsel. In almost every case, the reply should ignore the attacks. At most, a brief footnote indicating counsel's unwillingness to take the bait may be justified. In *all* cases, the appellee must refrain from adopting the tone of the response. Appellate judges are not impressed, and in most cases, turned off by incivility. Courts welcome a reply brief that maintains the same professional tone as the opening brief.

Footnotes

Due to page limits, there is a natural inclination to use footnotes for replying to important but non-essential responsive arguments. Although the approach does not work when a court has word limits, the space saved by single-spaced footnotes in page-

limit courts is tempting. Generally, counsel should resist the temptation. Judges know why counsel use footnotes. The risk that some judges will not read footnotes is unacceptable, especially in courts where briefs are read on tablets and footnotes are not easily viewed. The space used for footnotes is better devoted to cogent arguments in the text. In some cases, however, it may be worthwhile to employ a sparing number of footnotes to signal that an appellee's argument is immaterial and can be summarily dismissed.

Conclusion and relief requested

As a way to save space, appellants sometimes choose to omit a statement of the relief requested. Unless there is no alternative, a reply brief should close by telling the court what the appellant wants. After all, that is the most important question in any appeal.

Final thoughts

An appellant's opening brief should provide the court with all of the legal and factual grounds for reversing the trial court. The reply brief should emphasize why those reasons are still compelling after a fair consideration of the appellee's response. The reply should confidently and credibly refocus the court's attention on the appellant's arguments.

WALKING THE MILITARY APPELLATE BATTLEFIELD

By Brian K. Keller (1)

The last five years have seen multiple, significant shifts in military appellate law. *Miranda*-like in scope, they have changed the charging and prosecution of crimes in military trial courts as well as the relief available to service-members in military appellate courts. Although the names of the seminal cases are “familiar in the mouth as household words” to military prosecutors and defense counsel, they have received little attention in national media. The public face of military justice is dominated by the sensational: the Fort Hood shootings; reports of unprosecuted sexual assaults; the Bradley Manning Wikileaks court-martial; and, the long-lived saga of military commissions. But this foundational shift in the military justice system, decades in the making yet congealed in only the past few years of appellate decisions, remains unrecognized.

The military appellate court system is three-tiered. After trial by court-martial, appeal begins with an appeal of right to one of the four service courts of criminal appeals (Army, Air Force, Navy-Marine Corps, and Coast Guard). Opinions from these service courts are then subject to discretionary review by the United States Court of Appeals for the Armed Forces, the highest of the military’s appellate courts (<http://www.armfor.uscourts.gov>). Established in 1950 and composed of five Presidentially-appointed civilian judges with fifteen-year terms, the Court of Appeals for the Armed Forces is an Article I sister-court to the Article III Circuit Courts of Appeals, hearing, among other things, criminal and constitutional matters pertaining to the military trials of service-members. Since 1983, decisions of the Court of Appeals for the Armed Forces have been subject to discretionary review by the Supreme Court. As the Supreme Court reviews relatively few military cases, the majority of the opinions discussed below are holdings of the Court of Appeals for the Armed Forces.

Here, then, are four trends that have occupied sig-

nificant amounts of appellate litigation throughout the service appellate courts and Court of Appeals for the Armed Forces during the past five years:

The provision of Indictment Clause-like protections to service-members. Pursuant to their constitutional powers, the President and Congress created a military justice system through the Manual for Courts-Martial and Uniform Code of Military Justice that is unique to the military and sensitive to military life and tradition. Under this system, the Fifth Amendment Indictment Clause has been held not to apply to the military. Thus courts-martial have charged uniquely military crimes such as “service discrediting conduct” and “conduct prejudicial to good order and discipline” without explicitly listing the “terminal element” of the crime on the charging documents. The final element of what is commonly called “General Article” or “Article 134” crimes was held to be implicit on the charge sheet and also implicitly a lesser-included element of regular statutory military crimes such as rape and murder.

But in a series of cases from 2009 to the present, the Court of Appeals for the Armed Forces has wholly reworked charging requirements in military prosecutions, overturning or remanding large numbers of cases and requiring an Indictment Clause-like specificity previously unheard of. The specificity required now in military charging virtually mirrors Federal criminal practice in the District Courts. *See, e.g., United States v. Humphries*, No. 10-5004, slip op. (C.A.A.F. June 15, 2012); *United States v. McMurrin*, 70 M.J. 15 (C.A.A.F. 2011); *United States v. Girouard*, 70 J. 5 (C.A.A.F. 2011); *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011); *United States v. Jones*, 68 M.J. 265 (C.A.A.F. 2010). For traditionalists in the military — and there are many — the change was shocking and unwelcome. But the new pleading requirements now provide service-members with specificity and notice tantamount to that provided civilian defendants in Federal district courts.

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The controversy over the re-assignment or retirement of court-appointed counsel. Until 2010, the ability of the military to replace government-appointed defense counsel when prior counsel rotated, deployed, or retired, appeared relatively secure. But in 2010, the Navy-Marine Corps Court of Criminal Appeals set aside the conviction of a Marine for murder and other charges in one of the high-profile *Hamdaniyah* trials. Despite making no finding of specific prejudice, the Court found that proper procedures were not followed when his defense counsel did what happens routinely in the military: he resigned his officer commission, left active duty for private practice, and was replaced by a new government-appointed defense counsel. *United States v. Hutchins*, 68 M.J. 623 (N-M. Ct. Crim. App. 2010).

This precedent was raised by multiple accuseds across the military services, and threw into serious question the ability of the military to conduct personnel assignments for military lawyers.

The holding, however, was reversed nearly a year later by the Court of Appeals for the Armed Forces in *United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011). Given the needs of the military, officers serving as lawyers are both routinely rotated from base to base around the world approximately every three years and deployed to war zones. The turmoil arising from the initial decision demonstrates the broad impact military appellate courts now have on daily military life—a far cry from military appellate law’s humble beginnings a half-century ago.

The scope of Service Criminal Courts of Appeals’ power to set aside convictions. Congress’ Uniform Code of Military Justice requires in Article 59(a), 10 U.S.C. § 859(a), that convictions may not be set aside for legal error “unless the error materially prejudices the substantial rights of the accused.” This limitation is modeled on Federal Rule of Criminal Procedure 52(a), which provides that “[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.” In contrast to Federal district courts, however, service courts of criminal appeals possess a broad “factual sufficiency” power by which they can disregard the jury’s determination of guilt beyond a reasonable

doubt and set aside convictions based on their own assessment of whether the elements are met. And, Article 66(c), 10 U.S.C. § 866(c), cabined by precedent, permits the setting-aside of convictions and sentences for prosecutorial overreaching and inappropriately severe sentences. Nevertheless, with some exceptions, and barring exercise of the factual sufficiency power, Article 59(a) has historically constrained the scope of service courts’ power to set aside convictions for legal error.

Thus, the Court of Appeals for the Armed Forces reversed the Air Force Court of Criminal Appeals recently in *United States v. Nerad*, 69 M.J. 138 (C.A.A.F. 2010), where the Air Force Court set aside a conviction not for legal error but because it was concerned that the conviction was “not [for] the sort of conduct which warrants criminal prosecution.”

The very next year in *United States v. Lee*, 70 M.J. 535 (N-M. Ct. Crim. App. 2011), the Navy-Marine Corps Court of Criminal Appeals declined to apply *Strickland v. Washington*, 466 U.S. 668 (1984), to a conflict of interest case, noting that the absence of any deficient performance or ineffective assistance of counsel would require affirming the conviction. In the same case, however, the Navy-Marine Court set aside the conviction of burglary and indecent assault, reasoning that despite a finding of no prejudice or deficient performance, a violation of rules of ethics had caused the conflict of interest, and setting aside the conviction was a “needed prophylaxis.”

The scope of lower military appellate courts’ powers to set aside convictions continues to be the subject of disagreement among military practitioners, and has been examined in-depth in an excellent scholarly article by a former Air Force appellate counsel. Lt Col Jeremy S. Weber, *Sentence Appropriateness Relief in the Courts of Criminal Appeals*, 66 A.F. L. Rev. 79 (2010). The jury is out as to the future of this power in appellate litigation in the Navy and Marine Corps, as well as in sister-services’ appellate courts.

Inherent “Article III court” powers in Article I military courts. It was long assumed that military courts would refuse to consider “final” cases after a service-member was discharged from the military. The Supreme Court, however, ruled recently in a 5-4

decision that military appellate courts had such a power. *United States v. Denedo*, 556 U.S. 904 (2009), affirming *Denedo v. United States*, 66 M.J. 114 (2008). The military justice system historically balanced on a knife's edge a military commander's control over courts-martial as the courts' convening authority (and the Executive's control over the military as Commander-in-Chief) with the powers of military trial and appellate courts. After a service-member was finally discharged and no longer a member of that constitutional class of people named in Article I, Section 8, "the land and naval Forces," the military believed that service-members could no longer look to Congress' Article I military courts for relief from a court-martial conviction.

After numerous politically charged battles in Washington spanning decades, between those who would limit the military appellate courts' power, and the courts themselves, and after the significant *Clinton v. Goldsmith*, 526 U.S. 529 (1999) decision that limited military courts' expansive reading of their own powers, few predicted the balance would shift away from Congress' system of strictly limited powers.

Similar to the long debate over the Tax Court's power to review matters defined as "final" under the Internal Revenue Code, the Uniform Code of Military Justice's finality provisions purported to

deem cases both "final" after the ninety-day period for petitioning for *certiorari* to the Supreme Court had run, and "final and conclusive . . . [and] binding upon all departments" after the final Executive action had been taken. Art. 76, UCMJ; 10 U.S.C. § 876. In military cases, the last Executive action taken in a court-martial adjudging a punitive discharge, as in *Denedo*, is the issuance of a DD-214 severing the service-member's membership in the Constitution's "land and naval Forces." The Supreme Court finally resolved that question: despite no explicit grant from Congress to review cases post-finality and despite the dual finality provisions, at least for *coram nobis* purposes, military appellate courts have inherent judicial powers to re-consider courts-martial after discharge.

This opinion may signal the death knell for the "old guard" view of military justice, shifting military justice definitively away from being presumptively "different" to being, as in the line of cases recently issued by the Court of Appeals for the Armed Forces, held to a standard very close to that of trials of criminal cases in Federal district courts.

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The nominations period for Council of Appellate Lawyers Executive Board and Officer positions is open. CAL Members interested in obtaining or retaining leadership positions are encouraged to submit their own nominations.

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The election will take place at the CAL Annual Meeting
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Pursuant to the By Laws, the Nominating Committee will consist of the Immediate Past Chair (Jerrold Ganzfried), the Chair-Elect (Vincent Buzard) and three members of the Council (who may not be current Board Members or Officers). The CAL Chair (Matt Lembke) will appoint these additional Nominating Committee members shortly.

Please submit a bio, profile or resume, and a brief description of your involvement and interest in the Council of Appellate Lawyers to Christie.Breitner@americanbar.org by **October 12, 2012**.