

BRIEFING *and* ARGUING FEDERAL APPEALS

A NEW EDITION OF "EFFECTIVE APPELLATE ADVOCACY"

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of the District of Columbia Bar

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WITH A FOREWORD BY THE HON. SHERMAN
MINTON, ASSOCIATE JUSTICE OF THE SUPREME
COURT OF THE UNITED STATES, RETIRED



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been won on the first hearing had a more objective and dispassionate argument than been made, but the items referred to—and there were others of the same nature—did not help my cause, and in the cold, clear, and infinitely painful light of the morning after the original decisions, I became more and more aware of the probable harm that these expressions of personal resentment had done.

Once more to stress the obvious, in an appellate court emotion must have an intellectual foundation on which to rest, and it is far better for the tribunal to be moved to a sense of outrage on its own than for the advocate to expound his personal feelings of chagrin.

If it is permissible to descend to the jargon of Madison Avenue in this connection, the situation is one where the "soft sell" is indicated, where understatement is the most telling weapon. And, lest any reader think this an admonition too quixotic for a realist world, let him ponder the sheer power of restrained statement exemplified by the opinion written by Mr. Justice Brandeis in *Wan v. United States*.⁵⁰ To quote Professor Felix Frankfurter (as he then was), "in the terrible case of Ziang Sung Wan, his restraint attains austerity."⁵¹ Read that opinion, and ask yourself whether any degree of emotionalism could possibly have been as effective.

Section 132. Should the client be present during the argument of the appeal?—Different considerations apply depending on whether the appeal is from the judgment in a civil or a criminal case, but they all lead to the same conclusion: The client should not (repeat, *not*) be present while his appeal is being argued.

(a) *Criminal cases.* Never let your client be present if the appeal involves a criminal case.

Unless such a case involves simply "a matter of principle," such as a \$100 fine for violation of a municipal ordinance the constitutional validity of which is in issue, the appellant of record in a criminal case has a great deal at stake: loss of liberty, loss of reputation, loss frequently of livelihood, loss of property, and, in criminal tax cases, where substantial civil penalties follow upon a successful

case. Of course, when that case was thrown out [*United States v. Icardi*, 140 F. Supp. 383 (D.D.C.)], it was rather too bad, because those were witnesses that could not have been used over again in other cases." *Id.*, p. 58.

⁵⁰ 266 U. S. 1.

⁵¹ Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 Harv. L. Rev. 33, 105, reprinted in Frankfurter, ed., *Mr. Justice Brandeis* (1931) 49, 124.

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a more objective and dispassionate but the items referred to—and are—did not help my cause, and in the painful light of the morning after I was more and more aware of the probable effect of personal resentment had done. I was, in an appellate court emotion, on which to rest, and it moved to a sense of outrage on my part to expound his personal feelings of

to the jargon of Madison Avenue is one where the "soft sell" is the most telling weapon. And, I find it too quixotic for a realist to expect a power of restrained statement exemplified by Mr. Justice Brandeis in *Wan v. United States* or Felix Frankfurter (as he then was) in *Sung Wan*, his restraint attains to the point where I should ask yourself whether any device I could have been as effective.

Be present during the argument. Considerations apply depending on the nature of the judgment in a civil or a criminal case. The conclusion: The client should be present during his appeal is being argued. If your client is being argued, your client be present if the

is simply "a matter of principle," as in the case of a municipal ordinance the consequence, the appellant of record in a case of loss of liberty, loss of reputation, loss of property, and, in criminal cases, the consequences follow upon a successful

point out [*United States v. Icardi*, 140 F.2d 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000].

and the Constitution, 45 Harv. L. Rev. 49, Mr. Justice Brandeis (1931) 49,

prosecution, loss of money in what are frequently very sizeable sums. A man would be somewhat less than human if he were not deeply concerned over these eventualities, and if that concern did not translate itself into an obviously worried look.

Now, courthouses, whether old or new, whether dingy or shiny, are just as much hothouses for rumor and gossip as any dormitory in a girls' finishing school, and therefore the fact that the appellant is making a personal appearance in the courtroom is certain to find its way to the judges. They will, accordingly, be looking for him, first out of sheer curiosity, then as a matter of interest. They will spot him, never fear, and, more likely than not, they will translate his worried look into a consciousness of guilt. "That Schmalzberg fellow looks awfully guilty to me." His presence, accordingly, won't help the appeal, and if you as counsel have rough going with the court, that circumstance won't help the attorney-client relationship—because, inevitably, he will then wish he had retained some other lawyer, on the view that anyone else but the man actually up would have fared differently.

So—insist that your criminal appellant client be not present in person. Have him send an observer, if he is really itchy; after all, the hearing is not *in camera*. But don't let him set foot in the courthouse on the day that you argue his case.

(b) *Civil cases*. Mr. Justice Jackson suggested that the foregoing rule should be generally applied, in all cases. He wrote:

I doubt whether it is wise to have clients or parties in interest attend the argument if it can be avoided. Clients unfortunately desire, and their presence is apt to encourage, qualities in an argument that are least admired by judges. When I hear counsel launch into personal attacks on the opposition or praise of a client, I instinctively look about to see if I can identify the client in the room—and often succeed. Some counsel have become conspicuous for the gallery that listens to their argument and, when it is finished, ostentatiously departs. The case that is argued to please a client, impress a following in the audience, or attract notice from the press, will not often make a favorable impression on the Bench. An argument is not a spectacle.⁵²

⁵² Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A.J. 801, 861.

"Every judge knows that a lawyer is very likely to deliver a different oral argument if his client is in the courtroom than if he is not. I am even told that sometimes judges play a little game among themselves called 'Find the Client!'" Rall, *Effective Oral Argument on Appeal*, 48 Ill. Bar J. 572, 574.

The net result is that, regardless of the type of case involved, counsel will be well advised to insist that his client remain home while it is being argued.

Of course, whatever the nature of the controversy, the forwarding lawyer is not for this purpose to be regarded as a client. The amount or even the fact of his fee may depend on the outcome, but as a professional man he is bound to view the matter with more detachment than the actual client.

Moreover, any appellate argument may be counted on to draw a legal audience, and if the mere thought of fellow lawyers sitting in the courtroom and listening is apt to evoke latent traits of exhibitionism in the advocate who is at the lectern talking, changes in his techniques and attitudes are very much in order. Besides, if the presence of the forwarding lawyer is apt to worry you, how can you fairly expect him to refer more cases to you in the future?

Section 133. Rebuttal.—The first and undoubtedly the most troublesome problem in connection with rebuttal is whether, when you represent the party complaining of the decision below, you should get up at all for a second time. This is a problem—indeed it is frequently a dilemma—that cannot be solved by rote; in the end one's answer boils down to a matter of judgment—tempered by counsel's own temperament.

Advocates of great distinction and ability have suggested that the privilege of the appellant or petitioner to argue in rebuttal should be sparingly exercised. Mr. Justice Jackson wrote:

I would not say that rebuttal is never to be indulged. At times it supplies important and definite corrections. But the most experienced advocates make least use of the privilege. Many inexperienced ones get into trouble by attempting to renew the principal argument. One who returns to his feet exposes himself to an accumulation of questions. Cases have been lost that, before counsel undertook a long rebuttal, appeared to be won.⁵³

And the late Mr. William D. Mitchell, who was a distinguished Solicitor General and Attorney General, said in his review of the earlier version of the present work:

⁵³ *Id.*, at 804.