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Advocacy from the Human Perspective: Advice for Young Appellate Lawyers

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ADVOCACY FROM THE HUMAN PERSPECTIVE: ADVICE FOR YOUNG APPELLATE LAWYERS

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I. INTRODUCTION

I have long thought that in their understandable and necessary desire to transform law students into young lawyers who are rational, linear thinkers, law schools risk draining some of the lifeblood, originality, and spontaneity out of their students. They graduate with finely honed intellects and a solid understanding of essential legal principles, but too often they enter our profession without understanding that advocacy at the highest levels involves a good deal more than our logical, reasoning minds.

Of course there is absolutely no substitute for exhaustive preparation when it comes to appellate argument, and anyone who tells you otherwise is simply misinformed. But recent neuroscience research confirms that the process of decisionmaking is more elaborate than—and less rooted in—the rational, analytical processes that we lawyers tend to focus on.[1]

Effective appellate advocates must take into account a whole host of instincts, intuitions, traits, and abilities that are not easy to define and categorize, and that do not always dovetail with the linear, logical thinking that we lawyers typically rely upon. Many of us overlook or minimize the need to nourish the human instincts and intangibles that can separate the merely well-prepared advocate from the advocate whose arguments will

* Judge, Connecticut Appellate Court. This essay is based in part on the Wherry Lecture that Judge Lavine delivered on May 25, 2012, at the Widener University School of Law.

1. *E.g.*, DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (addressing the influence of both reason and intuition on human thought and human decisionmaking). This scientific insight is nothing new. As Pascal reminded us long ago, "The heart has its reasons, which reason does not know." BLAISE PASCAL, PASCAL'S PENSÉES 78 (1958).

resonate with the court. Indeed, my thirty-five years of studying, preparing for, participating in, teaching, observing, and writing about effective arguments have persuaded me that to be a successful advocate, it is essential to develop skills and traits that are less tangible than, but just as important as, the logic-centered analytical skills taught in law school. These traits and skills include things we don't generally study or talk about in the legal profession: humility; common sense; empathy; curiosity; humor; active listening; the capacity to respond to an unexpected turn of events; the ability to pick up cues being communicated by other participants in the process; and perhaps most important, self-awareness. I often urge beginning appellate advocates to pay careful attention to these less obvious components of effective advocacy and nourish their growth so that this important skill set becomes part of their repertoire.

A. An Instructive Example

The example of effective advocacy that best illustrates my thesis did not take place in a courtroom. And yet it demonstrates the fundamental principle of empathic and persuasive advocacy: It is respectful, not coercive*,* at its core.

This sublime example appears in the New Testament,[2] so take a trip with me in your imagination: It is about 2000 years ago and we are in a hot, dusty, oppressed little corner of the Roman Empire called Judea. A dramatic scene is unfolding in front of our eyes. A woman has been found guilty of adultery, for which the required punishment is death by stoning. The crowd surrounding the woman is ready to carry out the sentence. The tension is palpable.

Into this scene strides Jesus of Nazareth. He does not have much time to advocate for the adulteress, and he has zero margin for error. He understands the religious beliefs of his audience, and he knows that they think carrying out this grisly sentence is not only appropriate, but required by religious law. And he knows that the stoning is imminent.

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2. Some of you may recognize the scene that I am about to set, for I am of course not the first person to use it as an illustration of compelling appellate advocacy. *E.g.*, Karl N. Llewellyn, *A Lecture on Appellate Advocacy*, 29 CHI. L. REV. 627, 630–32 (1962).

He has one chance to save this woman's life. What is the right argument here?

1. The Conventional Approach

With our present-day values and sensibilities, and our law-school training, we would probably recommend conventional legal arguments. We might suggest, for example,

> My friends, listen to me. Killing this woman serves no valid societal purpose. Blessed are the merciful. Let her go.

This is what we today would call a policy argument. And it might work. But imagine that someone in the crowd then yells out,

> Oh, it serves a very real purpose: Aside from punishment, stoning her will prevent this conduct in the future.

That is a pretty good counter-argument based on deterrence. Seeing the stalemate, we might then urge an approach like this:

> Townspeople, hear me: Killing this woman is harsh and cruel and brutal. Blessed are the peacemakers. Let her go.

That's another policy argument. And it too might be successful. But then suppose somebody else cries out,

> Well, it may be harsh and cruel and brutal, but it's what the law has always required.

That's a counter-argument of a type very familiar to modern-day lawyers: It's based on precedent. And like the counter-argument based on deterrence, it too is fairly persuasive.

So we are stalemated again. What to do?

2. The Empathic Approach

It turns out that Jesus of Nazareth—who never went to law school—didn't base his argument on policy or precedent or deterrence. Instead, he fashioned one of the most effective arguments recorded in history by calling on his knowledge of the human heart.[3] Watch in your mind's eye how the scene of the adulteress and the angry crowd plays out:

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3. Today, we use the word "empathy" for this capacity to appreciate the humanity of others and to understand how it feels to experience the world as they do.

> They say unto him, Master, this woman was taken in adultery, in the very act.
>
> Now Moses in the law commanded us, that such should be stoned: But what sayest thou?
>
> This they said, tempting him, that they might have to accuse him. But Jesus stooped down, and with his finger wrote on the ground, as though he heard them not.
>
> So when they continued asking him, he lifted up himself, and said unto them, He that is without sin among you, let him first cast a stone at her.
>
> And again he stooped down, and wrote on the ground.
>
> And they which heard it, being convicted by their own conscience, went out one by one, beginning at the eldest, even unto the last; and Jesus was left alone, and the woman standing in the midst.
>
> When Jesus had lifted up himself, and saw none but the woman, he said unto her, Woman, where are those thine accusers? Hath no man condemned thee?
>
> She said, No man, Lord. And Jesus said unto her, Neither do I condemn thee: go and sin no more.[4]

With one sentence—"He that is without sin . . . let him . . . cast a stone at her"—Jesus quelled the crowd and saved the woman. As advocacy goes, it doesn't get any better than this.

B. Analyzing the Power of the Empathic Approach

What was so powerful about this 2000-year-old appeal to an angry crowd? What can we as modern advocates learn from it? We can learn that great advocates do not prevail only by making logical, linear, analytical appeals. Great advocates prevail because they have cultivated the intuitive, empathic, and feeling sides of their characters and personalities as well. They are perceptive students of human nature and of the human heart.

Jesus' challenge to the crowd was the equivalent of daring everyone in it to proclaim themselves without imperfection in front of their friends. He understood that only a liar or a charlatan would have had the nerve to stand up in front of his

4. John 8:4–11 (King James version).

peer group and say that. And Jesus also knew that sitting silent ("again he stooped down, and wrote on the ground") while leaving the members of the crowd to ponder their own sins would make their own failings loom so large in their minds that even the loudest of the mob's leaders would be reluctant to pick up a stone. So a knowledge of group dynamics also plays a big part in this story: It allowed Jesus to use one pointed, poignant question to save a life.

II. STRIKING A BALANCE

Lest I be misunderstood, let me say again that I do not intend by celebrating the empathic approach to minimize the advocate's need for rigorous preparation, for mastery of the facts, and for complete knowledge of the guiding legal principles. These tools, rooted in the kind of analytical and logical thinking that you learned in law school, are absolutely essential. They are the bedrock of effective advocacy, and without them you cannot succeed as an appellate lawyer. But developing just your intellectual and analytical side does not give you a complete set of advocacy tools.

My concern is that law professors and senior lawyers, in their zeal to teach you how to think like a lawyer and act like a lawyer, can sometimes send the message that you should stifle your true personality, act like someone you are not, and ignore the care and feeding of the non-analytical side of your personality if you are to be successful. This can lead young lawyers to think that if they show too much compassion or common sense or simple decency, they will be ridiculed for not being serious or will fail to be perceived as hard-nosed, aggressive advocates.

I remember a law school class—decades before the attacks of September 11, 2001—in which a professor asked why torture should not be permitted. Some students pointed out that torture violates international law, while others maintained that information obtained by torture can't be trusted. Finally, one student put his hand up and blurted out, "Torture should not be permitted because it's wrong." That was of course the right answer. Any young lawyer who has come to the conclusion that a humane and compassionate approach to the practice of law is

inconsistent with zealous advocacy should rethink that conclusion. Compassion is not the enemy of rigor, and humanity is not incompatible with zeal. All are integral parts of the well-equipped advocate's arsenal.

III. ASKING THE FUNDAMENTAL QUESTIONS

A. A Question about Making the Human Connection

What is at the heart of effective appellate advocacy? What is it that we are doing when we try to persuade the court—a group of human beings—to see things in a particular light that is consistent with our clients' interests? We are trying to forge a human connection with the decisionmakers. And making that connection requires us to keep the judges and their needs and perspectives in mind.

We lawyers have an ethical duty to zealously represent our clients, but we must remember that zealous advocacy is not coercing or bludgeoning the panel into seeing things the way we want them to. That is not advocacy; that is bullying. It has no place in the practice of law. And neither does effective advocacy consist of distorting the facts or the law, or telling half-truths. We lawyers have a word for that sort of thing too, and it's not "advocacy." The word for that behavior is lying. And lying to the court or opposing counsel is not only wrong in and of itself, it is also foolish. The lawyer caught lying risks being disciplined or disbarred.

Effective advocacy begins instead with an attitude of respect for your audience. This advice from a scholar of human interaction describes how a respectful advocate approaches an appellate argument:

> Because he believes the proper way to influence others is to bring those persons to see for themselves the rightness or justness of the claims he presents, the advocate who chooses argument as his instrument treats his readers or listeners not as things to be manipulated, but as persons to be reasoned with, as responsible, rational beings whose judgment deserves respect and whose integrity must be honored. Modes of persuasive appeal which seek to circumvent or benumb the understanding are disrespectful

> of the individuals addressed; they degrade the listeners or readers by endeavoring to produce the automatic, instinctive sort of responses characteristic of animals, rather than the considered, judgmental sort of response humans alone are capable of making. Argument, in contrast, is respectful of people and of those distinctive qualities of reason, understanding and reflection which mark them off as "human."[5]

A critical step in effective advocacy, then, is understanding your audience and learning to empathize with your audience's values and opinions and experiences. In order to understand your audience, you must respect the people you are trying to persuade—the judges on the court before whom your client's appeal is pending—as distinct human beings entitled to be treated with dignity. Advocacy is not about you: It's about appreciating where everyone else in the process (particularly the people you are trying to persuade) is coming from. It is about picking up cues, sensing what is going on in the present moment, and feeling the atmospherics in the courtroom.

Start always from this place of respect. When trying to understand the mindset of the judges, leave the judgmental part of your own personality at home. If you dismiss the judges by viewing them as one-dimensional caricatures, thinking that one member of the court is "soft on crime" and that another is "pro-business," for example, you may be tempted to try to reform them or manipulate them or coerce them. As an appellate judge myself, I can tell you that taking this approach will not be successful.

B. A Question about Leading without Manipulating

The other critical question an appellate advocate must ask is "How can this audience of judges appropriately be led to want to act as desired?" The operative word here is led, not manipulated. Understanding the court's motivation is complicated by the reality that no one is actuated by a single factor; everyone is moved by clusters of factors. Even simple beliefs have sub-parts and shades of gray mixed in with the

5. DOUGLAS EHNINGER, INFLUENCE, BELIEF, AND ARGUMENT—AN INTRODUCTION TO RESPONSIBLE PERSUASION 6 (1974).

blacks and whites of certainty. The effective advocate must try to understand the decisionmakers' beliefs and motives in all their complexity. And must do it while keeping in mind the group dynamics of decisionmaking on the appellate bench.

The advocate must not forget that the judges hearing the case may sometimes hold beliefs—or may sometimes assess the circumstances presented in ways—that cut against the client's position. The delicate task of the advocate is to persuade the judges that additional beliefs or different perspectives, also already held by the judges but consistent with the client's position, should prevail over any belief or assessment that cuts against it. Consider, for example, a judge who is known for advocating the plain-language approach to statutory interpretation. If she is also known to be respectful of long-established precedents, research that reveals a series of older cases suggesting that a particular statute doesn't cover every situation to which its plain language might seem to extend could give the advocate an opportunity to change the judge's perspective.

IV. THE IMPORTANCE OF CHARACTER

Notwithstanding the popular culture's sometimes negative portrayal of lawyers and the legal profession, the best appellate advocates tend to be plain speaking, direct, honorable, and humanistic. Daniel Webster famously said that "[t]he power of clear statement is the great power at the bar,"[6] and no one has better described the importance of being clear, honest, and straightforward in the many years since.

Envision your role in the highest, best, and most noble way: As an appellate lawyer, you are the heir to an ancient and honorable profession. You speak for the powerless and the helpless and the disenfranchised. You are a guardian of the rule of law that keeps us free. And you are the direct descendant of Cicero and John Adams, of Lincoln and Gandhi, and of so many other lawyers who have made the world a better place. As a

6. *See* John W. Davis, *The Argument of an Appeal*, 3 J. APP. PRAC. & PROCESS 745, 751 (2001) (quoting Webster and noting as well that "clarity . . . is the supreme virtue in any effort to communicate thought from man to man") (reprinting 1940 original).

lawyer, you have a sacred responsibility to use your skills not only to represent your clients zealously, but to try to improve the legal system and build a more just society. This is a high calling, but also an honor and a privilege.

Make no mistake: You—as advocate and as human being—play a central role in effective persuasion, not only because of what you know and what you have been trained to do, but because of who you are. Aristotle recognized centuries ago that persuasion is achieved by the speaker's character because "we believe good men more fully and more readily than others."[7] He also pointed out that

> [i]t is not true, as some writers assume in their treatises on rhetoric, that the personal goodness revealed by the speaker, contributes nothing to his power of persuasion; on the contrary, his character may almost be called the most effective means of persuasion he possesses.[8]

Nothing has changed in the ages since: Your character may be the most effective means of persuasion you possess. A couple of contrasting examples—drawn from my experience as a trial judge back before I joined the appellate bench—may help clarify this point.

A. The Unconsidered Approach in Action

I once presided over the trial of an immigrant woman who had filed a claim of national-origin discrimination against the Fortune 500 corporation that had fired her for taking long breaks and failing to put in a full day's work. A very slight woman who had fled Vietnam during the war, the plaintiff spoke very little English. As the plaintiff, she nonetheless had the burden of establishing a prima facie case of illegal discrimination.

In his opening statement, the corporation's lawyer walked right over to the tiny defendant, pointed his finger at her and stated: "Not only are we going to prove that we had just cause to fire her; we are going to prove to you that the plaintiff is an out-and-out liar!"

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7. ARISTOTLE, THE RHETORIC 10 (1981).

8. *Id.*

This was unusually ineffective advocacy, for two reasons. It was a strategic mistake for the defense lawyer to state that he would prove the plaintiff a liar. In one fell swoop, he made the jury think that his client bore the burden of proof. That was bad enough.

But worse still, his conduct reinforced the plaintiff's theory of the case: that she was a fundamentally helpless woman, who had fled from a war zone, was doing menial labor, and had been taken advantage of by a big, bad corporation. The defense lawyer's opening statement fed right into that narrative. By behaving like a bully, he underscored and legitimated the plaintiff's argument. I was not at all surprised when the plaintiff prevailed even though the evidence in the case was iffy. It was as if the defense lawyer walked around the courtroom wearing an invisible sign that read "I am a bully, and my client is a bully."

B. The Empathic Approach in Action

I also saw a different lawyer's intrinsic good character help him win a car-accident case in which the injured plaintiff was representing himself. Throughout the trial, the plaintiff—who knew nothing about the rules of evidence or courtroom procedure—had a great deal of difficulty presenting his case. Although I could try to accommodate the self-represented party to a point, I was of course not permitted to offer him legal advice or strategic help. But the lawyer for the defendant went out of his way to be fair, reasonable, and polite to the self-represented plaintiff.

The jury in that case returned a quick verdict for the defendant. I believed then, and I am still persuaded, that the jury was very impressed by the simple common decency that defense counsel showed. Some lawyers, considering the demand of the adversary system that they vigorously represent their clients, might have been tempted to try to take advantage of the self-represented plaintiff. But this lawyer effectively represented his client while enhancing his own credibility with me and the jury through his professional, and unusually civil, behavior. Like Aristotle, then, I urge you to remember that whatever you do to

heighten your credibility will enhance your case in the short run, and will also enhance your reputation in the long run.[9]

V. PRACTICAL TIPS FOR RETAINING THE HUMAN PERSPECTIVE

A. Step Outside Yourself

Effective advocacy requires another trait that, unfortunately, many lawyers—indeed, many human beings—lack. It requires a lawyer to be able to step outside of himself or herself and stand in the shoes of others. The capacity for self-reflection is a large part of what makes us human: It enables us to have a full appreciation of the people around us. Let me briefly discuss three aspects of this ability as it relates to effective advocacy.

1. Stand in Your Adversary's Shoes

First, the lawyer must be able to stand in the shoes of an adversary, and view the case from the adversary's perspective. This is the only way to truly understand your own case's weaknesses and flaws. It is said that Abraham Lincoln—an outstanding trial and appellate lawyer before he became President—was so effective in debating the slavery issue because he understood the pro-slavery arguments inside and out. And he stated them fairly before eviscerating them.[10]

2. Understand the Decisionmaker's Point of View

Next the lawyer must be able to understand the point of view of the decisionmaker or decisionmakers. As a good friend

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9. After that auto-accident trial, I did something I have done only once in my twenty-two years as a judge. I called the lawyer and told him that I deeply respected the way he had handled himself and the way he had treated his self-represented adversary. I asked him what had caused him to be so professional and courteous. "That's the way I was brought up," he said. "I learned to treat people that way in my home." This was to me an inspiring example of how strong character translates into effective advocacy. And I hope that you will see it in the same way.

10. FREDERICK TREVOR HILL, LINCOLN THE LAWYER 122 (1906) (noting that "Lincoln learned the pro-slavery arguments, stated them fairly, analyzed them pitilessly, turned them against their sponsors, and convicted them out of their own mouths").

and judicial colleague puts it, you must as an advocate convince people to change their opinions for *their* reasons, not for *your* reasons. This pithy saying embodies a good deal of practical wisdom, not the least of which is that understanding your audience—a panel of appellate judges—requires you to listen carefully to everything that is said at oral argument, to watch the judges closely, and to be in the moment during the entire argument.

3. See Yourself as Others See You

Finally, effective advocates must be able to do something else that most of us have a hard time doing—stepping outside of ourselves and looking at ourselves the way other people see us. Here is an example: Back when I was practicing law, I helped some New York prosecutors try a federal criminal case—a political-corruption trial that had been moved to Connecticut because of pretrial publicity in New York. One of the defense lawyers was a famous former prosecutor who had become a top-name defense lawyer and had a very high opinion of himself. When he rose to start the jury-selection process in this trial, he walked over to the lectern in front of the prospective jurors, cleared his throat, straightened his shoulders, introduced himself, and then paused, waiting for a reaction as the jury realized they were in the presence of greatness.

The only problem? There was no reaction. The jury panel was composed of people from New Haven and its suburbs. This lawyer was a big name in Manhattan, but in Connecticut no one had ever heard of him. The potential jurors just sat there, and the lawyer stood there while an awkward silence lengthened. He may have been a brilliant, effective litigator in his own world, but his outsized ego caused him to misunderstand how he would be perceived and received in Connecticut, where he was just another guy no one had ever heard of. He failed to consider how people from New Haven might see him.

B. Be Patient with Yourself

Be patient with yourself as you move along in your legal career. Only with experience will you become comfortable in your role as an appellate advocate. It is common when starting

out to struggle to feel at home in a courtroom—to know where to sit; to know when you should take the podium and when to wind up your argument; to sense how to respond when the judge asks a question for which you have no answer. A time will come when you will find your voice, when you will have integrated who you are as a human being into who you are as an appellate advocate. My advice is to watch other lawyers in action, to learn from everybody, but to copy nobody. Develop your own style. Play to your strengths and improve your weaknesses.

C. Study Human Nature

When I was younger, I remember hearing various professors and pillars of the legal community tell me that to become a good lawyer, it was necessary to study human nature. I thought that was a lot of bloviating. But I don't think so anymore. My life experience has taught me to appreciate the wisdom of the Russian author who wrote that

> [t]he longer I live the more do human beings appear to be fascinating and full of interest.
>
> . . . . .
>
> Foolish and clever, mean and almost saintly, diversely unhappy—they are all dear to my heart; it seems to me that I do not properly understand them and my soul is filled with an inextinguishable interest in them.[11]

I can see now exactly what he meant: The close study of human nature greatly enhances our ability to succeed in our professional—and, I might add, our personal—lives.

D. Don't Limit Yourself to the Law

Being a good lawyer requires doing all the things you were taught in law school and are beginning to make second-nature in your first few years of practice: know the facts, master the law, analyze the arguments. But being a *great* lawyer requires more. It requires endless curiosity, self-reflection, and a capacity to understand human nature and the human heart. Justice Felix Frankfurter once wrote in a letter to a young correspondent that

11. Maxim Gorki, *Postscript* to *The Guide*, 83 DIAL 188, 197 (Sept. 1927).

the best way to be a competent lawyer was to become a cultivated, well-read person:

> No less important for a lawyer is the cultivation of the imaginative faculties by reading poetry, seeing great paintings . . . and listening to great music. . . . Experience vicariously as much as possible the wonderful mysteries of the universe, and forget all about your future career.[12]

Of course he was right: The training to become a great advocate is never-ending. Feed and nourish your creative, intuitive, and imaginative powers as you proceed along in your legal career. There are as many ways to do this as there are people. You can follow Justice Frankfurter's advice or forge your own path. However you manage it, developing your full repertoire of human and intuitive instincts will assuredly make you a better, more effective appellate advocate—and will probably make you a happier human being as well.

VI. A LAST WORD OF ADVICE

Always remember, no matter if the case is large or small, that when you represent someone on appeal, you are involving yourself in one of the most important experiences in your client's life. Try to approach each case as an opportunity for you to expand both your human skills and your abilities as an advocate. Although Aaron Burr once claimed that "[l]aw is whatever is boldly asserted and plausibly maintained,"[13] that statement leaves me cold. I view the world of law as a majestic realm, one that we lawyers are all privileged to inhabit.

In this spirit, I will close with the story of the three stone masons:

> Once upon a time three stone masons were asked, one after the other, what they were doing. The first, without looking up, answered, "Earning my living." The second replied, "I

12. Felix Frankfurter, Assoc. J., S. Ct. of the U.S., Letter to Paul M. Claussen, Jr. (May 1954), in THE LANGUAGE OF THE LAW 357 (Louis Bom-Cooper & Edward Jackson eds., 1965).

13. KENDALL COFFEY, SPINNING THE LAW: TRYING CASES IN THE COURT OF PUBLIC OPINION 46 (2010).

> am shaping this stone to pattern." The third lifted his eyes and said, "I am building a Cathedral."[14]

That, I submit, is the attitude you should bring to each and every case you handle on appeal, and each and every oral argument you make. In the humdrum of many days, try always to bring something special, and majestic, to your work—your noble work—as an appellate lawyer. And always do it by drawing upon the full repertoire of gifts that dwell within you.

14. Robert H. Jackson, *Advocacy before the United States Supreme Court*, 5 J. APP. PRAC. & PROCESS 219, 237 (2003) (reprinting 1951 original).