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6 Stetson J. Advoc. & L. 1 (2019)

Thoughts of a New Federal Judge About Appellate Advocacy

The Honorable Michael P. Allen

Judge
United States Court of Appeals for Veterans Claims

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I. Introduction

1. In March 2017, I was a professor at Stetson University College of Law in Florida. I had taught at Stetson for nearly sixteen years at that point. My cellphone rang that March day, showing the call as originating from a "blocked" number. Against my better judgment, I answered the phone. My life changed at that moment.

2. The voice on the phone told me that he was calling from the White House about whether I would be interested in being considered for a federal appellate judgeship. Sure, I thought! In fact, I told the caller I'd proceed with the call but was doing so on the assumption that this was a joke. But it wasn't.

3. Much to my surprise, the President of the United States nominated me to serve as a judge on the United States Court of Appeals for Veterans Claims (CAVC). The CAVC is the country's newest federal court, having been established by Congress in 1988 to provide judicial review to veterans and their dependents in connection with decisions of the Department of Veterans Affairs (VA).[2]

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1 Michael P. Allen is a Judge of the United States Court of Appeals for Veterans Claims. Prior to his appointment by the President of the United States and confirmation by the United States Senate in 2017, Judge Allen was a Professor of Law at Stetson University College of Law in Florida for sixteen years. Before entering teaching, Judge Allen spent nine years in private practice at Ropes & Gray in Boston. He received his juris doctor degree from Columbia University Law School.

2 See Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (codified as amended in scattered sections of 38 U.S.C.).

4. The CAVC is an appellate court with nine active judges and a number of senior judges. It has jurisdiction to review VA decisions denying benefits to veterans and their dependents for a wide range of issues including disability compensation, pensions, survivor benefits, educational benefits such as under the GI various bills, home loans, life insurance, medical issues, and burial matters. The CAVC is a busy place, with nearly 5,000 appeals being filed in the court annually for the past several years. In 2018, the court is on track to have over 6,000 filings. It is an Article I court, meaning that judges of the court are appointed for a term — 15 years — instead of for life as Article III appellate judges are. But other than the term limit, the court operates much as regional circuit court of appeals does.

5. In any event, in a whirlwind five months after that March 2017 phone call, I underwent an extensive background check conducted by the Federal Bureau of Investigation, testified at a Senate hearing, was confirmed by the full Senate, and then the President formally appointed me in August 2017. United States District Judge Elizabeth Kovachevich of the Middle District of Florida administered the judicial oath of office to me on August 14, 2017. I was then off and running.

6. I was honored to have been asked to write an essay for the *Stetson Journal of Advocacy and the L*aw. I decided it might be interesting to write about a few things that I have learned about appellate advocacy[3] in my relatively short time on the bench. Before doing so, however, there are some important caveats I must make.

7. First, I don't claim that anything I say is necessarily particularly groundbreaking or revolutionary. This essay is no more than its title conveys: some thoughts from a new federal judge.

8. Second, I have not attempted to make this essay into an objective, deeply scholarly work. While there are some footnotes (after all, I was a law professor), there are not a lot of them. Rather, I have intentionally approached this topic personally. I hope that my experiences transitioning to being a judge can provide a unique perspective for advocates. In the end, what I write may be objectively "wrong," but it is most certainly subjectively "right."

9. Third, as you will see, I have used a decidedly conversational tone in this essay. If you are expecting something a law professor would write, I am afraid you will be disappointed. I elected to approach the topic in this way for two main reasons. Initially, I truly want people to take something away from this essay that will be useful to their practice. Accessibility maximizes that possibility. The other reason is quite selfish. I believe in the "tips" I discuss. I think they will make you a more effective advocate for your client. But in case you ever appear before me, they will help me do my job.

3 My focus is on advocacy at the appellate level. However, I suspect that many of the matters I discuss are generally applicable to advocacy in a trial court setting as well.

10. Finally, my thoughts are not universal among judges. If you get three judges in a room, you are likely to have five opinions in short order. Seriously, however, judges are diverse with a range of views on the issues I discuss. I suspect there would be more agreement than dissent among my robed colleagues, but it is important to remember that at least some aspects of advocacy need to be tailored to fit your audience.

11. With the preliminaries out of the way, I'll turn to my observations. I've divided them into four general categories. I begin with some comments about judges. We are not the center of the world, but we are the audience in appellate advocacy. In my experience, very few advocates consciously think about judges in that way. That is a missed opportunity. I hope to provide some insights about your audience from the other side of the bench.

12. The middle two parts of the essay deal with the heart of appellate advocacy. I first consider the briefs. If the keys to real estate are location, location, and location, the keys to success on appeal are the briefs, the briefs, and the briefs. No matter how much attention one gives to written advocacy, it is not enough. In this part of the essay, I provide a series of observations on the brief that I believe will increase its value as a tool in your appeal. I then address oral advocacy. No, it's not as important as the brief; that's just the truth. But oral argument makes a difference to judges. Understanding how it fits into the advocacy picture is important, and that's my goal here.

13. Finally, I turn to you — the advocate. The judge, with whom I began, and the advocate, with which I conclude, are the bookends for my discussion of advocacy. As an advocate, you clearly play a pivotal role in the process. However, that's not my point in discussing you as an advocate. Whenever you appear before a judge (whether on paper or in person), you build your reputation. I fear many advocates pay scant attention to this fact. That is unfortunate because it has some serious potential consequences for both your client and you.

II. Remember that Judges are People Just Like You

14. I suspect this piece of advice may strike many readers as somewhat odd: judges are regular people. After all, what else would judges be but human? But the reality is that all too often judges are treated as akin to some type of deity. Perhaps a minor deity, but a deity nonetheless. I confess that since I've become a judge I feel as if I'm funnier and all my old ties suddenly are stylish again — or at least that's what people tell me. But in all seriousness, keeping judges' humanity in mind can provide some surprising advantages in litigation. Let me explain what I mean with some examples.

15. If you could do your job in an easy way or a hard way, which approach would you take? Of course, assuming quality was not affected, you'd most certainly take the easy way to accomplish your tasks. Most people would and judges are people remember. Appellate judges have a job to do: produce a written decision to resolve an appeal. Everything you can do to make it easier for the judge to accomplish that task is important. And, conversely, anything you do to make it more difficult is not helpful to your cause.

16. Second, judges are busy people just like you. Now, the reality is that many appellate judges have a far slower pace than a practitioner, government lawyer, or trial judge. But the basic idea still holds. You should always act as if you are trying to respect the judge's time. For example, if you can say something in ten pages, why take twenty? If you can use fewer words why use more? For your one appeal, there may be incrementally little effect on the judge, but keep in mind that the judge sees thousands of them. We notice (and appreciate) when a brief is done well and efficiently.

17. Third, people tend to have an affinity for those in their same general group. Perhaps this is some type of herd mentality, but whatever its source, I think the concept is true. You need to remember that the person an appellate judge is reviewing is another judge (or some form of administrative adjudicator). That person is a part of the same general group to which the appellate judge belongs. You will rarely advance your case by attacking the adjudicator whose decision is under review. You may have to argue that the lower court judge made a mistake, but that is quite different than suggesting he or she had it out against your client for example. So, tread lightly.

18. Fourth, judges are not experts on everything. Of course, most advocates get that about the facts of the case, but don't assume without some basis that a judge is a legal expert writ large. Depending on the nature of the court at issue, judges will be more or less familiar with certain legal concepts. So, for example, on my court, our judges are experts in certain aspects of administrative law. You don't need to tell us the basics. The same is true for patent law at the United States Court of Appeals for the Federal Circuit for example. But even in these specialized settings, you play a valuable role as someone who has focused on your case — including the law — likely more than the judge has. For some aspects of the law, and certainly as that law is related to your facts, you get to be a teacher. A respectful one for sure, but a teacher nonetheless. Don't waste that opportunity.

19. Fifth, just like most people, judges do not work alone. Of particular relevance here, appellate judges have law clerks. This can be a challenging reality for advocates because they need to keep both these audiences in mind. Things that you may do for a law clerk may be less valuable for a judge and vice versa. There is no magic cure for this problem. The best one can do is keep it in mind.

20. And finally, be willing to set aside everything that I've just written (and likely what is to follow)! As I noted in the introduction to this essay, judges are a diverse group of people. My advice is to learn as much as you can about your judge so that you can tailor your arguments and general approach as appropriate. Judicial views matter, and researching what your judge has written can certainly help. But I'd extend this advice to more "mundane" matters about how the judge does his or her work. Are they active at oral argument? Do they read the briefs first or does a law clerk provide the judge's first window on the appeal? Does the judge have any pet peeves that might distract them when reading your brief or listening to your argument? You can never know too much about your audience.

III. The Briefs Matter — A Lot

21. As an appellate judge, I am essentially a professional reader. This is not just a description of what an appellate judge does; it should be a guiding principle for an appellate advocate. Your brief is the single most important thing that a judge will use to decide your appeal. In many respects, it is the alpha and omega of your (and my) appellate world. Remind yourself in any way that you can of the centrality of the brief and do it often. I might even consider having a post-it note on my computer when I am drafting: "It's Important." The brief is so essential because it will be with the judge at every step in the process. If it is a strong brief, it will serve you well time and time again. But if it's not well-done, either the judge will ignore it or, perhaps worse, he or she will be reminded of defects in your theory time and again. Really, consider that post-it note.

22. An appellate advocate needs to start with the right frame of mind. When you are writing a brief, think of it as if you are making a tool that someone else is going to use to do their job. You are not making a tool for yourself. You may make the best screwdriver in the world, one you are quite proud of and that you could use to great effect. But if the person to whom you will give your tool needs a wrench, the work on your screwdriver will be for naught. For example, you may have wonderful boilerplate language that you have honed over years and that you can put into any number of briefs. What a timesaver. But that is almost never what the judge needs. He or she needs you to apply the relevant legal principles to your unique set of facts. That's the tool that will help the judge. Try to put yourself in the judge's shoes at every step in the process.

23. Make the brief as user-friendly as you can. Have a plan, let the reader know the plan, and follow through with the plan. A brief should never be like a mystery story. If I turn to the last page of a brief and let out an audible gasp (the judicial equivalent of the mystery reader shouting out "the butler did it!?"), things have gone horribly wrong. To stick with our mystery analogy, you should start by saying the butler did it, tell the judge that you will explain how, explain how, and remind the judge at the end about

the butler being the perpetrator. This is not fancy, but its functional. That's what you need most. After all, no one would choose to read a brief over a mystery story. They are quite different forms of writing. Remember which one you are producing.

24. Be brave when you are writing. An advocate should be selective when making arguments. Rarely, if ever, does the kitchen sink approach work well. You do not need to include every conceivable argument in your brief. It takes courage to not say something, but you will often advance your position best by making fewer arguments. You want the brief to "speak" to the judge. Recall, it stays with the judge. If you make every argument under the sun, what the judge "hears" sounds more like a cacophony than a clear guiding voice. Have faith that you can separate the wheat from the chaff; don't rely on the judge or his or her law clerks to do it.

25. Have pride in what you do. The brief is the appellate advocate's work product. It says something about him or her. As a professional reader, I notice when a brief is sloppy. It sends a message that the author has not taken the time to focus on the matter at hand. We are all human and mistakes happen. But when a brief is riddled with typographical errors, it sincerely affects me as a judge. And it's not enough to simply commit to proofreading. That helps to be sure. But an effective advocate will have a true quality assurance plan in place with multiple readers. This is a cost, but it an investment well worth making.

26. Don't neglect what you might see as "unimportant" or "technical" parts of the brief. Of course, your main argument section is critically important. All but the most ineffective advocates will recognize this point. But there are other sections in your brief that carry far more weight than many practitioners seem to realize. Your goal with every word in your brief is to persuade the judge that your position is correct. Not thinking about that with respect to anything other than the main argument section reduces the power of your brief.

27. Consider these more neglected parts of the brief:

Table of Contents

28. The first thing that I read in any brief is the table of contents. Really. People have seemed surprised by that approach and have admitted that they don't consciously think about this almost utilitarian section of the brief. For me, however, the table of contents gives me a peak into the future. Done well, it summarizes your plan of action. It also gives me a roadmap for what I will be reading. Recall, it's not supposed to be a mystery. So, when you are drafting your point headings as you go through the brief, don't think of them just as independent entries. Instead, view them as part of a unified whole that someone will read together as its own piece of advocacy in the table of contents.

Summary of the Argument

29. I cannot stress enough how critical the summary of the argument. First, when I read the brief for the first time, this section gives me a "CliffsNotes" version of your entire brief. It helps me orient myself in the facts and law that I will soon be reading. Just like CliffsNotes can't compare to the actual novel, the summary is decidedly not the brief in all its richness. But it is an important start to understanding your argument at a more nuanced level. Second, I can return to the summary at various points in the lifecycle of your appeal. I may not be able to read the entire brief again, but I can read the summary. My advice is to put significant effort into the summary. Don't delegate it to someone else. It's that important.

The Statement of Facts

30. I suspect that most advocates recognize that the facts matter. But I have been quite surprised by how relatively few lawyers display an understanding that the facts are a part of your narrative in an integrated way. Recall that I described myself as a professional reader. I truly do read a great deal. To be entirely frank, I get annoyed when I'm not sure why I am reading something. Many fact sections of the briefs I read are nothing more than a chronological description of events. In fact, I wouldn't be surprised if a brief one day began with: "There was the big bang and then . . . ."

31. A skilled advocate needs to think of the fact section as a part of the brief that advances the argument as much as any other. Don't expect that the judge will know why something matters in the facts. Tell him or her or at least signal if it is important. And to tie this all together, notice how the table of contents and the summary of the argument fit in here. If these parts of the brief are done well, the judge will already have some context when he or she turns to reading your facts.

IV. Don't Forget that you are in an Appellate Court

32. Consider the position in which your client finds itself. Are they a winner or a loser? This matters. I'm reminded of something I heard at a conference when I was young lawyer in Boston. A judge on the state's intermediate appellate court was asked what his best advice was about how to win on appeal. Without missing a beat, he responded: "win below." That is very good advice. The trial court winner is, all things being equal, in a much better position on appeal. Use that to your advantage. And if you find yourself on the other side of the ledger, orient yourself to convincing the court that yours is the appeal that defies the general rule that winning below is key.

33. A prime example of where the winner/loser dichotomy is so critical is the standard of review. On appeal, the court will almost always be reviewing a decision of a lower court or an administrative agency. How an appellate judge goes about conducting that review matters a great deal. The more deferential the review, the more likely a winner stays a winner. Conversely, the more searching the review, the more likely it is that a loser can snatch victory from the jaws of defeat. If you are the loser below, try to find ways to frame your arguments to take advantage of less deferential standards of review such as de novo review of legal questions. On the other hand, if you prevailed in the trial court, reframe the question as much as possible to less deferential standards such as clear error concerning factual findings. You need to be honest about what the standard is, but you also need to keep the possible standards in your mind's eye as you frame your argument.

34. In terms of your main argument, be right. What I mean is that a skilled advocate needs to have explored the issues from every angle. They need to know the law and the facts inside and out. Being right doesn't mean you will win. However, if you don't put in the effort necessary to fully understand the appeal, you're almost certain not to prevail.

35. Your argument needs to be clear. As I mentioned earlier, have a plan and follow it. Don't assume that a judge will be able to fill in the gaps. Be precise about how your various arguments fit together. Are they sequential? Are they made in the alternative? Again, don't assume the judge will understand what your theory is. Don't hide the ball.

36. Also, as you craft your argument remember that why you win is not necessarily the same thing as why you don't lose. It is too often the case that a lawyer will immediately see the weaknesses in the case. Naturally, the advocate will want to try to convince the judge that these weaknesses aren't fatal. They want to explain why they don't lose. This surely is important, but don't lose sight of the fact that you likely have an independent narrative explaining why you win. Tell that story too.

37. In terms of explaining why your client should prevail, consider that there is more than just precedent. If you have a case that says your client wins, that is fantastic. You obviously want to share that tidbit with the court. And all the better if the favorable precedent is from a source that is binding on the court. But don't neglect the more normative argument you can make even when clear precedent is on your side. Judges like to feel that what they are doing is right, not just compelled by some other decision. Explain why not only do you win under the rule established in Party X v. Party Y, but also why the principle that decision established is the correct one. Some may call this a policy-based argument, but whatever you name it, I believe it is important part of advocacy.

38. Ask for what you want clearly and directly. Don't assume that the court will divine on its own the remedy you're looking for. I'm not just talking here about the ultimate disposition of the appeal. Obviously, that is critically important. I'm also referring to being specific about your preferred approach for how the court reaches its resolution. For example, your desired outcome may be that the decision on appeal is vacated and the matter remanded for further proceedings. But you also would like the appellate court to do so on ground #1 even though you'd get the same relief under ground #2. Tell the court that you'd prefer that result. To be sure, you'll take a win no matter what, but a skilled advocate can affect the way to a victory as well as the bottom line result.

39. If you are an appellant (or petitioner), don't waste your reply brief. You get the last word; you should use it well. First, consider whether you need the reply brief. There are times when silence is the most powerful sound. But make this decision carefully. What you see as silence showing that the appellee (or respondent) has not made a good argument, could be taken by the judge to be a concession of exactly the opposite. In sum, foregoing a reply is an option, but one that needs to be considered carefully.

40. If you elect to submit a reply, there is one very important "don't." Don't merely rehash your opening brief. This adds nothing of value and does little else than take the judge's time needlessly. If you really have nothing new to add, don't reply. On the other side of the coin, the reply can be particularly useful in a number of ways. First, it can underscore areas of agreement between the parties. The reply can take things off the table so to speak. Second, the reply can highlight arguments to which the appellee (or respondent) did not respond. Highlighting such silence can be important and can be used effectively to drive home your main argument.

V. As Important as the Briefs are, Don't Underestimate the Power of Oral Argument

41. One of the things that has surprised me most since becoming a judge is how important oral argument is, at least to me. I can truthfully say that oral argument has made a difference in every appeal I have considered. Don't get me wrong. It's a rarity that oral argument changes the ultimate result in terms of a "winner" or "loser." That should not be surprising. After all, I have lived with the briefs and prepared for oral argument with an eye towards deciding the case. But oral argument does change the way in which a case is decided. As an appellate court, the way in which we decide a case has broad implications because that reasoning establishes precedent.

42. The briefs are static. Oral arguments are anything but. The advocate must be able to assess the flow of the questions from the court and alter the plan to take the "drift" of the argument into account. As is often said, oral argument is not a speech. The speech

is your brief. As egotistical as it sounds, oral argument is for the judge. If an advocate makes it about her, she has already lost the argument.

43. It is critical for an appellate advocate to be an active listener. Of course, no advocate steps up to the lectern and plugs her ears. But it has been surprising to me how many advocates really don't listen. They are so intent on making the point they want to make that they neglect to engage the judges on the panel on their terms.

44. A number of things flow from the importance of listening. To begin with, an active listener is in a better position to figure out what a judge is trying to do with his or her question. Not all questions are the same and a skilled advocate will be able to pick up on the differences. Most obviously, of course, is that when a judge asks a question they want an answer. Always be sure to give it them. Even if the answer "hurts" you, you must answer. Remember, oral argument is for the judges. Almost as bad as not answering a question at all is implicitly not answering by starting off with why the question really doesn't matter. That might be good for your case, but it will annoy the judge to no end. The judge asked the question and it matters to them. To repeat, you must answer. After you do, then you can explain why it doesn't matter in the case.

45. But not every question is asked to elicit an answer. There are times — not infrequently — when I will ask questions in an oral argument not because I want an answer but because I want my question heard. My audience when I do this is the other judges on the panel. Sometimes the panel members will have discussed the case ahead of the argument, but that is not the norm (at least on my court). That means that the first time I can convey my views on the issues to my colleagues is at oral argument. Indeed, depending on how the court operates, it may effectively be the only time a judge can do so before a vote is taken. While at my court there is a discussion in the post-argument conference, other courts do not have much discussion at the conference before voting.

46. A skilled advocate can recognize such a "question" for what it is and use it to underscore the judge's point. Almost always such questions, often referred to as the "friendly question," go to the advocate for which the point is helpful. It has greatly surprised me how often advocates miss the opportunity to take the question I have asked and use it as a tool in their argument. Indeed, they often instinctively resist the question even though it would help them. That would happen far less frequently if active listening were more valued as an oral argument skill.

47. And then there are questions that can be viewed as a sign that the judge is seriously wrestling with an issue. Yes, they want an answer, but these types of questions are the best for a skilled advocate — provided they recognize them. This is so for several reasons. To start, this type of question provides an advocate with precious information: where is the judge struggling? When you write a brief, you don't know that. And if you don't pay attention at argument, you won't know it either. But if you recognize the

struggle, you will be able to focus your argument on what matters to at least that judge, whether you think it matters or not.

48. In addition, the "struggling" type of question provides perhaps the best opportunity for an advocate to truly engage in a conversation with the judge. It is almost trite to say that an oral argument is a conversation not a speech. It may be trite, but it's also true. The conversational nature of argument is most important for matters on which the judge is struggling. This is where an advocate can make the most difference in terms of moving the judge to your way of thinking or at least limiting the damage if the judge doesn't go your way. The advocate can become a teacher of sorts. It's important that the advocate recognize that the judge is struggling and treat that struggle appropriately. It may be clear as day to the advocate, but the advocate is not deciding the case. Working through difficult issues is just that — difficult. But if an advocate is able to help a judge do that, it can pay great dividends.

49. You should always be honest with the court. I hope that goes without saying. But keeping honesty in mind is especially important in the context of the struggling question. First, if you don't know the answer to a question, say so. Don't guess. If the judge is struggling about something, it likely is because the law or facts are not clear. Second, don't be afraid to agree that the issue with which the judge is struggling is difficult. That type of honesty stays with a judge. At one of my first oral arguments after taking the bench, the court was dealing with a difficult question under the Equal Access to Justice Act.[4] I was wrestling with a particularly challenging issue about how the statute applied with respect to remands to an administrative agency. It made a tremendous impression on me when, after posing my question, the lawyer for the Government said that he had been wrestling with the same question but hadn't been able to figure out what the answer could be. That answer did not help me resolve the open question, but I can assure you it had an effect on me. I trusted that advocate a great deal after that response.

50. All of these types of questions can be framed as a hypothetical. An advocate should pay close attention for the hypothetical question. It can be quite helpful for an argument, but only if the advocate addresses it appropriately. The thing an advocate should never do is start their answer by saying that "those aren't the facts of this case." The judge knows that is the case. He or she is trying to figure out how ruling one way or the other in this case would implicate other situations. Feel free to point out that the hypothetical facts are not what is before the court, but only at the end of your answer.

51. Handled correctly, a skilled advocate can use the hypothetical question to great effect. Recall that one of the points I mentioned concerning the briefs was that it is important to judges that their ruling makes sense. An advocate understanding that this is in the judge's mind can use the hypothetical question to illustrate why a given rule leads

4 28 U.S.C. § 2412(d).

to the best result in the wide range of cases. Moreover, when answering a hypothetical question an advocate has greater latitude to explain their position without being burdened by any bad facts that may be a part of your client's baggage. In other words, you can benefit from the fact that the hypothetical is not your case even if you can't say that to the court.

52. An appellate advocate needs to remember that there is more than one judge on the panel. I recognize this seems incredibly obvious. But it is quite easy to forget the judges who are not speaking or not speaking as much as others. Even quiet judges have a vote. A judge who is silent at argument can often feel excluded if an advocate does not actively work to keep them engaged. It doesn't take much, a glance or facial expression can be enough. As I've said earlier, judges are just people. If you engage them non-verbally, they will stay with you.

53. Including the entire panel doesn't mean that you should forget about math. You only need to convince a majority of the judges before whom you are arguing. In most appellate courts, that means you have to get two of the three judges to go along with you. Doubtless it is better to have a unanimous decision in your favor, but it's not necessary. This recognition can have important practical consequences for your oral argument.

54. There may be situations in which one member of the panel is openly hostile to your position. If you can do something to convince that judge that your positon is correct, more power to you. But there may come a time when trying to persuade that judge is no longer the best way for you to proceed overall. You may be losing the opportunity to address the other members of the panel. Of course, you always need to be respectful and answer the judge's questions. However, it may be that you no longer are using answers to persuade him or her but rather to address the other members of the panel.

55. Interestingly enough, the same thing can happen with a judge who is on your side. Perhaps that judge is asking you to take positions that you need not take in order to prevail. For example, perhaps he or she is pushing you to argue that a given regulation should be invalidated when your argument is more subtle. You would win with the invalidated regulation, but you don't need that to happen to prevail. In such a situation, a skilled advocate needs to remember the math yet again. You have one vote, but you need to get one of the other two judges to go along. It may be that you will benefit more in the long run by resisting the more extreme position even if it is favorable to you so that you can turn your attention to the members of the panel who may be inclined to rule more narrowly. Again, it's all about active listening.

56. Active listening may have no greater value than for an appellee (or a respondent). An advocate in this positions will have been able to listen to the judges question the other advocate. Don't waste that intelligence. You may have had a plan before the judges

took the bench that morning, but you have to be willing to rip it up based on what happened in your opponent's argument. By this I don't mean that you should restructure what you were going to say to match the structure of your opponent's argument. Instead, I'm suggesting that you recognize that you will likely have vital information about what the judges are interested in discussing. Use that knowledge.

57. Be careful with rebuttal. Much as with the reply brief, the rebuttal is powerful because it gives an appellant (or petitioner) the last word. It can be squandered by an ineffective advocate. Don't repeat your main argument. The judges have already heard it. Instead, use the rebuttal for one of two purposes. First, make sure to follow up on anything you promised the court you would provide during the main argument. Perhaps you could not remember a case name or a record citation. I guarantee you that, at a minimum, the law clerks are waiting for that information. Second, make sure to address anything that came out — especially from the bench — in your opponent's argument that is important. Again, listening is the key. This is your last chance to affect the appeal and what you say may be the last thing a judge considers before voting after the argument is done.

58. Let me end my discussion of oral advocacy where I began and add a final suggestion. Oral argument is a fluid and dynamic event. It will almost never go as you expect. You need to prepare for the occasion with that in the forefront of your mind. Nothing serves to prepare an advocate for oral argument better than moot courts. No amount of practicing in front of a mirror or when you are driving to work can compare. These things are important too, but they can't do justice to the fluidity of the real argument. It's worth it to your client and you.

VI. Don't Forget About You: Protect Your Reputation

59. I began by discussing the judge. I now return to the other people who populate the appellate system, the advocates. My comments in this regard focus on the importance of an advocate's professional reputation. I hope that matters to everyone, but all too often I wonder based on what I have observed.

60. I begin by making clear that my thoughts on these matters are not divorced from advocacy more generally. There is no doubt in my mind that an advocate who is attuned to his or her reputation and who strives to be civil is more effective than one who does not. Perhaps there are judges for whom incivility and unprofessional conduct don't matter, but I doubt it. Even if there are, I can't imagine that being unprofessional makes you a better advocate in anyone's mind. The bottom line is that not only is your reputation important to you as a person, it is one of the tools you can use to advance your client's goals as an advocate.

61. Honesty is the coin of the realm for an advocate. Being anything less than truthful to the tribunal is not only bad form, it is specifically called out as an ethical violation.[5] But my reference to honesty goes beyond the boundaries of the rules of professional conduct. It extends to ensuring that the information you provide the court is fully accurate. Have you left something out that would change the import of the facts you've mentioned? Are you citing a case for a proposition it may support on an exceedingly general basis but not more specifically? These latter things implicate your reputation too. No, they are not as bad as outright dishonesty, but that should not blind one to the effect they can have on a judge.

62. Let me stop here for a moment to underscore the serious implications of "shading the truth" when you interact with the court in the manner I've described. First, doing so has real world implications for your effectiveness as an advocate. It seems to be that some lawyers feel that papering over weaknesses in the facts or the law advances your case. But it doesn't. The judge, and certainly his or her law clerk, will find out that this is what you are doing. And the result of that is that the court will likely not rely on your work in that case and will certainly question your position at every turn. What may look like a strategy to advance your case could doom it.

63. A second implication is that if you are a repeat player in the court, your actions in one appeal will follow you in others. Judges and their staff do not start each appeal with a fresh set of eyes concerning the counsel who appear before them. When I look at a brief, there are some counsel who start out in a hole in terms of credibility because of what they have done in other appeals. By the same token, counsel who have been above board in the past start out with a presumption of credibility. My point here is that even if one doesn't feel compelled to avoid this conduct because it's the right thing to do, it's also most consistent with advancing your client's interests.

64. The way in which an advocate interacts with their opposing counsel is also incredibly important in terms of establishing and maintaining a positive reputation. In a nutshell, civility is important in its own right. You will never advance your case by engaging in ad hominem attacks on your opposing counsel. I cannot stress this point enough. When a brief includes such material, its persuasive force is significantly lessened. And as I have said, the brief stays with the judge. This means that every time the judge looks at the brief he or she is going to be confronted with your attacks again. It should go without saying that such attacks are no more effective at oral argument.

65. Let me drill down a bit further here. Many of you reading this essay may be saying "I never engage in this behavior." But are you sure? Much as I discussed with dishonesty, there is a range of lack of civility. Have you ever stated in a brief or at argument that opposing counsel has "misrepresented" something about the facts or the law? If you

5 See MODEL R. PROF'L CONDUCT 3.3.

have, you have accused another lawyer of intentionally attempting to deceive the court.[6] That is a serious charge. As I said once to a law clerk when a brief included allegations of "misrepresentation," someone was going to be trouble. Either someone was lying to me or someone was falsely accusing someone of doing so. My point is that an advocate should not challenge the integrity of another lawyer so easily. Perhaps what you mean is that counsel "misreads" the law or is "mistaken" about the facts. These are very different ways to address the issue. I'd caution advocates to be careful on these hidden types of civility matters.

66. I fully recognize that maintaining civility in the face of those who do not value that trait is not easy. I am not a Pollyanna. But doing the right thing is not always the easy thing. I believe lawyers have an obligation to "be better" even when doing so is difficult. Yes, I also believe it will advance your position as an advocate, but in some sense, that is simply an ancillary benefit.

67. Much of what I have discussed thus far in this part comes from acting as a true advocate and officer of the court. You should also look the part. When someone steps up to argue and is disheveled or disorganized, it sends a message that they don't care about the proceedings. It is the courtroom manifestation of a sloppy brief. Your client deserves better. In addition, judges notice what advocates do in the courtroom even when the advocate is not at the lectern. Rolling of the eyes, shaking of the head, and exaggerated facial expressions do not advance your case in any respect.

68. In sum, your professional reputation and conduct in litigation affects your ability to be an effective appellate advocate. And without being overdramatic, it also affects the reputation of the judicial system itself. While these issues are not often tied to a discussion of proficiency in advocacy, I believe they are integral to the concept. I hope you take it to heart.

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69. Being a judge has given me a fresh perspective on what it takes to be an effective advocate. In some respects, my preconceived notions have been reinforced. But in other respects, I've understood advocacy in an entirely new way. I guess it really is true that where you stand depends a great deal on where you sit. I hope that my reflections on advocacy as a new federal judge have provided some useful insights for you.

6 For example, a prominent dictionary notes that "Misrepresent usually involves a deliberate intention to deceive, either for profit or advantage." *The Random House Dictionary of the English Language* at 1230 (2d ed.; unabridged).