

## **The Art of Appellate Advocacy - A little confidence**

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This article is not what I initially had in mind when, after completing my last column, I started to give some thought to the next aspect of appellate advocacy I would address. For reasons that did not become clear to me until just before I sat down to write what is now being read, my initial thoughts never got past the early embryonic stage. This was not because of a lack of trying — I spent literally hours at home night after night imitating Sisyphus at the keyboard, expending great effort starting something that was destined not to be finished, no matter how hard I worked at it.

I've had my share of performance-related issues before, but this was the worst case of writer's block I had ever experienced. My interest in writing dates back to long before I became a lawyer, starting with some very dark poetry I wrote as a moderately disturbed teenager, and so not being able to write was a very unusual and unsettling place in which to find myself.

Then suddenly, in one of those rare Eureka! moments of profound clarity and Zen-like realization that occurred in the ultimate therapeutic environment — the shower — I identified the underlying source of my extreme discontent, with the result that I could, finally, look death in the face and stare down my enemy.

The problem? A bad evaluation. From one of my students.

Confidence is a funny thing. I lose a case in the Supreme Court and, other than experiencing the obvious disappointment that inevitably comes with not winning, I am no worse for the wear. I get dissed by an anonymous student who is probably half my age and who has never practiced law for even a day, and all of a sudden I'm overwhelmed with grave doubts about my overall value as a contributing member of society. Go figure.

Before I proceed any further, I'd like to point out that most of my other students were exceptionally insightful, as evidenced by the many good things they had to say. Anyone who has taught for any period of time will also tell you that, sooner or later, you will cross paths with an angry student whose serious impulse-control issues run amok once class ends and the anonymous evaluation process begins.

Whatever the reason may be why this evaluation affected me the way it did — my psychotherapist is out of town so I won't know the Freudian explanation until next week — it taught me a lesson that actually has something to do with appellate advocacy.

It is extremely difficult, if not impossible, to be an effective advocate if you lack confidence in your abilities. There is little likelihood that you will be able to persuade anyone — or anything, for that matter, including your dog — if you do not believe in yourself and what you are saying. Contrary to the popular expression, a fact, as a general rule, will not speak for itself. Nor will a legal point. They both need a lawyer to be their advocate. The lawyer who is uncertain or unsure about the subject — whether it is a fact that is in dispute or the ultimate legal issue that is being contested in the case — will convey a negative impression. Saying it may not make it

so, but saying it without conviction definitely will not help, especially if the advocate on the other side is a believer and is able to communicate that belief forcefully.

Sometimes, a little confidence is all that is needed to get past those moments of doubt. In my experience, the inspiration for the confidence I need to get back on track often comes from unlikely sources. I would be a rich man — at least, rich enough to buy a lifetime supply of Tastykake chocolate creamies — if for each time I had an I-am-going-to-be-sick reaction to a brief that my opponent had just filed, I had \$100 after saying to a colleague, upon completing my responsive brief, that the other side is duck meat. Confidence lies within all of us, though it may be slumbering at times. We just need to remember that it's there and may need to be awakened on those occasions when we're not feeling very sure of things.

My own confidence crisis, fortunately, did not last long. Shortly after determining the source of my unrest, I was forced to face my demons, in a different class and new semester. Within a matter of minutes of entering the classroom, the demons quickly scattered, and I was back to acting like I know what I'm talking about. Life is good again. Especially since there are no evaluations for several more months.

Some of you may be wondering just what my now-former student said that so unnerved me. In response to an open-ended question soliciting any and all thoughts the students may wish to offer, the response was, "If you want to coast through this course, instead of working hard, he's the guy."

As the Church Lady used to say on Saturday Night Live, isn't that special? The evaluation process may be anonymous, but I am hopeful that I will have a chance in the future to redeem myself. I pledge that if the opportunity presents itself, ideally with me as opposing counsel, I won't let this person down again. Because I now know how much he does not want to coast.

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