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The Art of Appellate Advocacy - Changing places

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Changing places with the court is a fantasy that lawyers have every now and then, sometimes as a wistful aspiration, and sometimes not, such as when they've had a particularly bad day before the bench and are dreaming of revenge. It is also the first of 10 rules of oral advocacy that John W. Davis set forth in a speech that he gave to the New York City Bar Association in 1940.

The Argument of an Appeal reflects Davis' keen insight and timeless wisdom in an assortment of ways, as many judges, attorneys and law professor types have pointed out since these 10 commandments were published several generations ago, but in my opinion the reader need venture no further than the very first commandment before being hit over the head by the sheer brilliance of John Davis.

If I were the one giving the speech, I would have been quite content to offer the would-be oral advocate the simple advice that when preparing for argument he or she should change places with the court, and then I would move on to the next commandment. But not Davis. Maybe I have spent a little bit more time analyzing this than a healthy person should, but my guess is that, whether the result of instinct and/or the experience that came with arguing a significant number of cases before the U.S. Supreme Court, Davis knew that somewhere out there would be at least one garbanzo bean lawyer who just might take his "cardinal rule of all" literally. So, in recognition of this distinct possibility, and rather than risk the ire of the jurist who would blame Davis upon finding his or her seat occupied by such a lawyer upon entering the courtroom, Davis' first commandment is that you should change places with the court, but "in your imagination of course."

Okay, so maybe this is not why he added the qualification, but that's my take on it and I'm sticking with it until someone comes forward with a better explanation.

With or without these words of caution, Davis offers invaluable advice that every lawyer should consider, and not just when preparing for oral argument.

One of the most acute perils that all litigators face is that dreaded affliction called "advocate's disease." If you haven't been struck by it yet, you likely will be at some point in your career if you take your work seriously, and I can tell you as someone who has both been there and seen it happen to others, it is not a very pretty sight.

Here's the typical scenario. As you are working really hard on a case, sinking a lot of time and energy into writing a motion or a brief or preparing for an argument, just minding your own business, the disease sets in. Like spyware. Stealth-like. Slowly. Insidiously. Suddenly, bam! Before you even know what has happened, you are now one seriously sick advocate. What was once a case that you told the client had a 50-60 percent likelihood of success has morphed into a slam dunk winner, thanks to the most powerful, persuasive and convincing argument ever, in the history of the law, that you, lawyer extraordinaire, have single-handedly created.

This, my friends, is where Davis' first commandment comes in. Changing places with the court may not cure you of advocate's disease — as with certain afflictions, you can never really get rid of it once it's in your system — but it's a big step to take on the road to recovery.

Whether you have prepared a written or oral argument, use your imagination (of course) and ask yourself what kind of response you will receive from a truly neutral arbiter, who does not have any type of investment in the case or interest in its outcome other than to assess the facts objectively and to apply the law fairly. Remove your intensity and passion from the case, or remove yourself if you're one of those professionals with a pulse rate that remains flat or actually decelerates during a nuclear attack, and try looking at your argument as you imagine a judge would react upon reading or hearing it for the first time.

There is more, though, to Davis' cardinal rule than forcing yourself to look at your case as if you were a brother from another planet. You need to gauge how an objective third person will view your argument, but you also should remember that this person does not have nearly the level of familiarity with the case that you do, nor the time to devote to it. Judges may be smart, but they are neither omniscient nor omnipresent.

You may have spent hours writing the brief and hours more reading cases and the joint record extract in preparing for argument, but don't bet the family farm that the judges in your appeal will have read every key decision, transcript and exhibit. The odds are in your favor that the appellate court judge will have read the briefs, and the chances are also pretty good that he or she may also have taken a look at the record extract. The only problem is that the briefs and extract in your case have to compete with lots of others that are trying to hog the judge's attention. Even with a good law clerk or two, judges are greatly outnumbered by lawyers, so don't take for granted that they know the landscape nearly as well we do.

And please don't take for granted Davis' advice to use your imagination. Because whatever he may have had in mind, you might get squished by a judge if you don't.

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