

The Art of Appellate Advocacy - What do you have to say for yourself?

May 7, 2004

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Special to the Daily Record

Despite the nearly overwhelming temptation to make this article a follow-up **to my last one**, I have decided to postpone for another day, "How Really Not To Write A Judicial Opinion." Just so I'm clear, however, my decision is not because of what some of you may think.

I will admit that, for perhaps a moment or two, I wondered whether I might have pushed the envelope too far in expressing certain views in last month's column about the length of some judicial opinions. One such moment occurred when a friend called to ask me whether I had lost my mind. Another opportunity for self-critical analysis presented itself when, while returning from lunch last week, several people in my group seemingly vanished into thin air when it appeared that an appellate jurist was headed our way.

So, sure, the thought had crossed my mind that having fun with the judges once more might be too much of a good thing and not necessarily in the best interest of my career, but fear is not the reason for delaying Part II to last month's installment. I've never been one to shy away from controversy, and to prove my mettle I've decided to take on a subject even more taboo than judges: my kindergarten teacher.

Early training

Actually, I have nothing but the fondest memories of Miss Kennedy, who made very clear to me during our somewhat tumultuous school year together that she had extremely high expectations that I would have a lifelong involvement with the law. True, she expected that involvement to be as a career criminal and not as a lawyer. But thanks to the invaluable legal training my kindergarten teacher provided by repeatedly asking me the question that is the title of this article, I received a very early head start in developing the skills that all appellate litigators need when defending their legal position before a sometimes hostile and often skeptical audience.

Miss Kennedy was probably not the first human being to ask me if I could explain my position to her, but she was absolutely the most tenacious interrogator I had encountered as of that time in my life. Notwithstanding the passage of several decades, I can distinctly remember as if it were yesterday when she posed the ultimate question to me after I laid to waste an architectural masterpiece that Eric Bloom assembled with wooden blocks. Although on this occasion the question was more like a Miranda warning than an opportunity to be heard, my kindergarten teacher went out of her way during the 1963-64 school year to provide me with many more chances to develop and hone my future litigation skills.

I may not have responded effectively to Miss Kennedy's questions about what I had to say for myself — she tried to have me evaluated by a school psychologist for the

purpose of finding an alternative placement best suited to the type of answers I gave — but her repeated inquiries taught me the importance of being able to answer a question that I initially fumbled as a kindergartner.

She prepared me well: In spite of being asked the same question many times by other teachers, school principals, and an assortment of authority figures since graduating from her classroom, I was never suspended, expelled, or even arrested. Miss Kennedy was an excellent kindergarten teacher.

Make your point quickly

In my experience, explaining in your brief the central reason why you should win your appeal is pretty much the same as justifying your core position to an inquiring teacher. If you cut to the chase and give a straightforward statement of your reasons, the odds are in your favor that you won't get sent to the office. There's no guarantee that you won't wind up there anyway — after all, what possible reason could there be for knocking down a 5-year-old's house of blocks — but beating around the bush with extraneous information will substantially increase the chances that your ultimate destination will not be one that you like.

I recently conducted moot courts for my law students, who all commented that getting to the point quickly was imperative because they had so little time in which to make their oral arguments. A written legal argument should begin in much the same way. You are much more likely to say something that matters if you think of your reader as someone who is not going to give you much time and has heard it all before.

Judges know about standards of review, for example, so writing about the clearly erroneous standard for the first two paragraphs of your argument is not likely to persuade anyone that he or she should decide the case in your favor. Instead, state at the very beginning the central reason why the trial judge in your case committed clear error in reaching the decision that is being appealed. That should be the starting point for your argument, not a bland recitation of general legal principles that have no apparent connection to the best reason you have for winning your case.

Of course, you may have to rethink your strategy if the best reason you've written isn't a particularly compelling one. You may even have to dig a little deeper and embellish, if necessary. Just be sure that, whatever your *raison d'être* is, you get it out quickly.

Because if your judge is a former kindergarten teacher, I guarantee that you will not have much time.

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