

Law

The Art of Appellate Advocacy

Avoiding temptation

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Today's article is about some of the most important brief-writing tips I can think of, although its title just as easily could be a tribute to my decision not to finish two other articles which I had actually begun and was quite tempted to complete until, that is, I decided it was time to let someone else have the opportunity to tempt fate.

One of the articles I deep-sixed was going to discuss the idea that judicial elections for appellate judges might not be such a bad thing. The other article was going to be about a far less controversial and inflammatory topic I had been mulling over, as apparently had an unnamed appellate judge who sent me an e-mail suggesting that I write a piece addressing what lawyers like to see, and don't like to see, in judicial appellate opinions.

A colleague wasn't nearly as enamored as I was with the latter would-be article, asking me, after I told him about the judge's suggestion, "Haven't you already beaten this horse to death?" He apparently recalled two articles I previously wrote offering the respective views that more than a few appellate opinions tend to be a bit lengthy, and that a seemingly inordinate amount of time can expire between oral argument and when a case is decided. It also seemed that he had read two other pieces I had written, one of which suggested that some judicial opinions appear to have been written without the parties' briefs being fully considered, and the other expressing the viewpoint that no opinions should be written — not even drafts — until after oral argument.

I suppose that my colleague had a point about beating a dead horse, but, as I told him, there's still so much more to say because it's such a big horse. I nevertheless tabled the idea after deciding that what people would really much prefer to read is a commentary about contested elections for appellate judges.

Well, not really a commentary, but more like an article questioning whether we should revisit the currently existing judicial selection process for appellate judges — you know, the one that excludes the electorate from participating in any meaningful way in choosing the most powerful part of the strongest branch of government — if, as some people believe, this

process is not strictly merit-based.

My intent was to ask people reading the article to stand up if they agreed that politics has sometimes played a role in the selection of appellate judges, at which point I would engage in an imaginary debate, starting by asking him/her/them how this procedure is any different from the process of choosing the governor, senators, delegates and other leaders of the other two branches of government.

Someone would probably respond that lay people, as non-lawyers, lack the legal expertise for deciding a judge's qualifications, to which I would reply that there's no constitutional requirement that the governor, who currently appoints judges, be a lawyer. Nor, I would add, is there any requirement that all 17 members of the Appellate Courts Judicial Nominating Commission be lawyers, prompting my next question in the make-believe debate, namely, whether any non-lawyer commission members have the expertise to decide who should be on the list of nominees submitted to the governor and who should not be.

...Especially these temptations

The problem with writing an article in which I debate myself with these and other questions is that it could be read the wrong way.

I was going to clarify, of course, that the suggestion that appellate vacancies should perhaps be filled by contested elections, rather than gubernatorial appointment, was not meant to cast any aspersions on any of the participants in the process that currently exists — not the judges who now serve or have previously served on either of Maryland's appellate courts; not the applicants who have been nominated for vacancies on the Maryland Court of Appeals and Court of Special Appeals; and especially not the members of the Appellate Courts Judicial Nominating Commission who voted for them, one of whom is the managing partner of my firm.

But why not avoid the temptation altogether and just not go there, right?

Which is why today's article is not about contested elections for appellate judges or what lawyers prefer to see in judicial opinions. It's not about those subjects because, as the following checklist items make quite clear, this article is about, and only about, important temptations to avoid when writing and editing your appellate argument.

Checklist item #23: Avoid the temptation to argue the other side's case rather than your own. One of the easiest brief-writing traps to fall into is the one where you feel an almost overwhelming need to shmush what the other side has said in their brief or in the trial court by pointing out 243 fatal flaws in their argument. As much fun as this exercise may be, discuss it with your psychotherapist the next time the two of you talk about your impulse-control issues, but leave it out of your brief. Even if you convince the appellate judges that your adversary's argument is wrong, that doesn't necessarily mean your argument is right. You can avoid the temptation to make your opponent's position the centerpiece of your brief

by, instead, discussing the merits of your argument. In the course of advancing that discussion, feel free to point out the deficiencies that plague the other side, but do so in the context of your argument, not theirs.

Checklist item #24: Avoid the temptation to plunge into the details of your argument with paragraphs that lack informative topic sentences. Another common mistake made by overeager lawyers is immersing the reader in the argument without adequately explaining how the minutiae relate to the big-picture point of the discussion. I'm as impatient as the next person is when it comes to getting from here to there without delay, but, as my wife has repeatedly told me when I've complained about waiting for the elevator, I wouldn't really be doing myself any favors by jumping out the 21st floor window of my building to get to the lobby more quickly. You can avoid the temptation to get to the particulars of your argument immediately by forcing yourself to use topic sentences that give appropriate context so that the reader understands the details that you're so anxious to share.

Checklist item #25: Avoid the temptation to discuss cases without providing sufficient context. This checklist item, while seemingly related to the preceding one, concerns the entirely separate temptation to use cases without explaining their significance. Cases, like other components of a legal argument, need context so that the judges can fully appreciate their relevance. Engaging in a case-by-case discussion is not likely to persuade the reader to do anything other than to turn the page in the hope that he or she will find the answer to the question, "Why am I reading this?" Be sure to tell the reader the "why" before proceeding with the "what."

I think I had better stop at this point before I'm tempted to say anything else, which is probably the smartest decision I will have made today.

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