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Twenty Pages and Twenty Minutes - Effective Advocacy on Appeal

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THIS Article is about effective appellate advocacy in the federal courts, particularly the Court of Appeals for the Fifth Circuit. My comments are from the side of the bench that reads what advocates write and listens to what they say, so I include in my discussion of appellate advocacy both brief writing and oral argument. The comments are solely mine. I cannot even say that all my colleagues of the Fifth Circuit agree with them. I have not asked.

I have discussed this subject with the practicing bar in speeches and seminars. An article reducing those informal dialogues to writing may appear simplistic, but I prefer the risk of oversimplification rather than even a whisper of unnecessary complexity. Communication in simple, understandable terms is a central theme for me.

The subject of effective appellate advocacy has been thoroughly worked over but it always deserves renewed discussion. New lawyers enter the practice. Times change. Courts are continually re-examining their procedures and habits with cold and critical eyes. Judges are less and less willing to accept an answer that we do something, and do it in a particular way, because that is what the institution has always done. Courts are more often asking themselves: “Why do we do this at all?” “Why do we do it in this way?” “Can we do it better, and can we do it more easily?”

Appellate practice is also changing. Bench and bar are learning to get to the bare bones of disputes with less concern for the fat. The discursive or repetitious brief and the hyperbolic argument are no longer welcome. There is an overall air of “no nonsense.” At the same time, the conception of the typical appellate advocate as a wily veteran of many cases and master of rules, tactics, and wit, is changing. Our judicial system is becoming more sophisticated. Appointment of counsel as a matter of right in indigent criminal appeals is bringing to the appellate courtroom lawyers who otherwise might not be there. I do not imply that today’s advocates are less effective than their predecessors. Many are superb. But all need all the help they can get.

An even more immediate reason requires the written brief to have maximum effectiveness. A written brief may be the only shot that counsel gets at the appellate court. The Fifth Circuit, for example, has moved reluctantly to deciding without oral argument appeals which are frivolous or simple or in which the court concludes oral argument will not be helpful. Approximately half of the Fifth Circuit’s cases are placed on the summary calendar and
decided on the briefs and record. Other courts are moving in the same
direction with procedures such as affirmation by a simple order and without
argument. Consequently the advocate must use to his full potential the tools
available to him.

I. THE APPEAL PROCESS

Presentation of an appellate case involves an assembly at a formal meeting
place under the rules of a highly structured system. Gathered together are
- the lawyers (and the parties, if they want to come),
- the records and evidentiary materials of the case,
- advance written statements of the positions of the parties (the briefs),
and
- a body of official deciders (the judges),

for the purpose of having a short, reasoned discussion about the case. Following the assembly, a decision is reached by the official deciders with
perhaps a written statement explaining how it was reached.

Counsel’s role in this assembly is communication and persuasion, first by
the briefs and then by the oral argument. When the meeting occurs the judges
ordinarily will have done their homework ahead of time and will be suffi-
ciently acquainted with the matters under discussion that they can understand
what is said and perhaps participate in the dialogue. Counsel’s participation is
specifically defined and rigidly constricted. His skills of communication and
persuasion must be brought to bear in a few pages and a few minutes. After
this encounter, his role is at an end except for the remote possibilities of
rehearing and certiorari.

There are two steps in counsel’s task. He hopes ultimately to convince the
court that what he advances is correct. To do this he must impress his will
upon the judges so that they will find acceptable what he urges. He cannot win
until he moves off dead center the deciders who read what he has written and
who listen to what he says. But there is a preliminary step. Before counsel can
convince he must inform. He must cause the court to understand him. The
process of linguistic communication has been described in this way:

3. According to the Fifth Circuit’s statistical projections made in May 1976, if the court had
not set up the summary calendar it would have had on that date a backlog of approximately 4,770
cases, nearly all civil. Approximately 47% of our cases are designated “preference” cases by
statute or rule, so, even with the summary calendar, the court is falling behind with hearings of
“nonpreference” cases. In June 1976 the court had approximately 520 cases ready for oral
argument. Some will be displaced by preference cases. Of these cases then ready, some are not
expected to be heard until 1978, if then.

The court projected that, even though it continues the summary calendar, the last of appeals
filed in 1977 will not be decided until 1981, and the last of those filed in 1978 will not be decided
until 1983. Chief Judge John R. Brown, The State of the Judiciary in the Fifth Circuit (May 24,
1976).

4. A portion of this Article goes beyond the strict confines of advocacy and touches, but
only touches, on mechanics of the appeal. The definitive guide on this subject is the Fifth
Circuit’s Internal Operating Procedures Manual published in June 1976 [hereinafter referred to as
Manual]. This highly useful handbook describes the structure of the court and admission to
practice. It outlines the filing of an appeal and the mechanics of perfecting and filing the record.
For the period after the appeal is docketed by the court, it deals with motion practice, briefs,
records and appendices, and operation of the summary calendar. It describes the calendaring of
cases for oral argument and the conduct of arguments. For the post-argument period, it covers
issuance of opinions and petitions for rehearing or rehearing en banc. Lawyers admitted to
practice in the Fifth Circuit can secure copies of the Manual from the clerk free of charge.

5. For discussion purposes I assume there will be oral argument.
The gulf that often separates sender and receiver [of communications], spanned at best by a bridge of signs and symbols, is sought to be narrowed yet further so that ultimately the intended communication may have the same meaning, or approximately the same meaning, for those on the left bank as those on the right.\(^6\)

It is not enough that counsel understands perfectly what he is saying in his written and spoken words. All is in vain unless the court understands. In his heart, if not in his consciousness, counsel knows this. But in a significant percentage of cases the advocate is so intent upon the ultimate aim of persuasion that he overlaps the threshold step of making clear to the court what he complains of, how it came about, what he wants the court to do about it, and why.

A. The Decision To Appeal

Whether an appeal should be taken is an unexplored frontier of litigation. Texts abound on how to prepare and try a case and how to handle an appeal. No text that I have seen devotes more than passing interest to whether a party dissatisfied with the result of trial should appeal. There is similarly a stark contrast between counsel’s approach to the question of whether to go to trial and his approach to whether to appeal. The able lawyer will appraise with microscopic care his chances of winning at trial. He will exhaust the full spectrum of available options to avoid a trial which in his judgment he cannot win. But having been through trial of a case—good or bad—and having lost, the same able counsel will appeal without a precise appraisal of his case. Rather than employ the kind of professional scrutiny that he would put into a decision on whether to go to trial, he will react to the nerve-ends of disappointment and defiance. Ironically, trial losses are seldom recorded in the reporter systems, but the annals do report lost appeals, and the losing lawyer’s name is forever inscribed in the annals for all to see.

Considered purely on a statistical basis, the chances of success on appeal are not good. In the 1975-76 court year of the Fifth Circuit the rates of reversal for various types of cases ran as follows:

<table>
<thead>
<tr>
<th>Category</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal</td>
<td>10.8%</td>
</tr>
<tr>
<td>U.S. civil</td>
<td>18.6%</td>
</tr>
<tr>
<td>Private civil</td>
<td>22.5%</td>
</tr>
<tr>
<td>Administrative appeals</td>
<td>9.1%</td>
</tr>
<tr>
<td>All cases</td>
<td>16.8%</td>
</tr>
</tbody>
</table>

I make an educated guess that of the more than 3,000 appeals per year in the Fifth Circuit, less than ten cases per year are reversed on insufficiency of the evidence to support a jury verdict. Yet in many appeals this point is the only significant issue raised. When the court refuses to give a requested jury instruction and has given an instruction to the same effect but in different language, the chances of reversal are virtually nil. Similarly, reversals are rare in the federal system for erroneous rulings on admissibility of evidence.

\(^6\) M. MEHLER, EFFECTIVE LEGAL COMMUNICATION 3 (1975).

\(^7\) ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1976 ANNUAL REPORT OF THE DIRECTOR, table B-1.
Petitions for rehearings en banc are even less successful. In the 1975-76 court year 309 petitions for rehearing en banc were filed in the Fifth Circuit. Many, if not most, of these were wastes of time, money, and the effort of lawyers and judges. Each petition had to be considered by all active judges on the court. Only sixteen petitions were granted, five percent of those requested and one-half of one percent of the appeals. The standards for granting en banc rehearings are:

[A hearing or rehearing en banc] is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.8

Thus, en banc consideration is not justified merely because a judge, a number of judges, or even a majority of the judges, simply disagree with the decision. The judge must conclude that the case either presents questions of “exceptional importance” or requires the full court to consider the case in the interest of uniformity of its decisions. Conflict with another circuit is not a sufficient ground if the case is not of “exceptional importance.” Moreover, judges are experienced at recognizing efforts to inflate pedestrian cases to a larger status deserving of en banc consideration.9

The question of how long an appeal will take is another factor in the decision whether to appeal. Median time for decision of either criminal cases or civil cases on the summary calendar is sixty-two days from the filing of the reply brief. Counsel can request summary calendar disposition, but judges decide ultimately whether the case is disposed of in that manner or set for argument. Each case not decided on the summary calendar is calendared for oral argument. The median time for calendaring criminal cases is approxi-

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8. FED. R. APP. P. 35(a).
9. In 1976 the Fifth Circuit amended its local rules by adding the following provision to its local rule 12:

Where the petitioner for rehearing en banc is represented by counsel, the petition shall contain on the first page of the petition one or both of the following statements of counsel as applicable:

REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the United States Court of Appeals for the Fifth Circuit [or the Supreme Court of the United States], and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: [citing specifically the case or cases].

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: [set forth each question in one sentence].

Attorney of record for

Counsel are reminded that en banc consideration of a case is an extraordinary measure, and that in every case the duty of counsel is fully discharged without filing a suggestion for rehearing en banc unless the case meets the rigid standards of Rule 35(a) of the Federal Rules of Appellate Procedure.

5TH CIR. R. 12.

This rule serves several purposes. It acquaints counsel with the standards for granting en banc rehearing. It brings counsel nose-to-nose with an appraisal of his chances and with awareness of his professional responsibility. It ameliorates to a degree the fear of the attorney in a criminal case that he will be charged with ineffective assistance of counsel if he does not seek rehearing en banc even though the case does not possibly qualify for it.
mately four months after the last brief is filed, and for non-preference civil cases approximately fourteen months after the last brief.

Once a case has been argued and submitted, the median decision time for criminal cases is fifty-two days. Civil cases will usually take a little longer. Decision time in any case, civil or criminal, is almost never more than a year. In fact, less than one-half of one percent of the cases remain undecided for as much as a year after submission, excluding cases that go en banc and cases in which decision is withheld pending action by the Supreme Court or the court en banc in another case.

Some appeals are clearly delay devices intended to keep the civil judgment debtor in possession of his money or to keep the criminal defendant out of jail a little longer. Whether the criminal appellant is permitted to stay out on bail pending appeal depends primarily upon the district court’s application of the Bail Reform Act. If the district court denies bail pending appeal, the defendant can seek review of the denial in the court of appeals, but the battle will be uphill. Once a conviction is affirmed the court of appeals does not stay its mandate pending petition for certiorari except in extraordinary cases. For the civil appellant with a money judgment against him, however, a meritless appeal can be a boondoggle. He is exposed to no loss other than interest and his expenses on appeal, and, if market conditions are right, he may earn as much on his money as the loss to which he is exposed.

B. The Appealable Order

Counsel cannot start on the appellate route until he has two tickets, a notice of appeal and a final judgment or “appealable order” from which the appeal is taken. The substantive law of appealability is beyond the scope of this Article, but generally one can only appeal (1) from a final judgment in the case, (2) from a judgment entered under rule 54(b) that is final as to less than all issues or less than all parties (which requires an express determination by the district court), or (3) under 28 U.S.C. § 1292(b), which requires both express findings by the district court and leave of the court of appeals.

Dismissal for want of an appealable order occurs more frequently than one would expect. One of the parties may raise the point, but, if not, the court of appeals is compelled to take notice of its lack of jurisdiction. In the last ten days I have had before me three cases, one set for oral argument and two potential summary calendar cases, in which appeals were improvidently taken. One of them contains an interesting dialogue between counsel discussing the fact that they desire a trial court ruling on point A from which the loser can appeal, while reserving all rights to later litigate point B after the appeal is decided. Even though the judge reminded them of the final judgment rule, the judgment later prepared by counsel and signed by the judge was not final as to all issues, no 54(b) determination was made, nor was § 1292(b) complied with.

11. Possibly the federal system should consider whether it would benefit from statutory provisions like those in some states, giving the appellate court power to add a monetary penalty where a money judgment is appealed from, superseded and affirmed. See ALA. CODE tit. 7, § 814 (1958) (mandatory 10% penalty).
C. The Record on Appeal

Most counsel routinely, and frequently without thought, designate in advance under Fed. R. App. P. 30(a) the portions of the record to be reproduced as an appendix. This decision is often a convenient nondecision to reproduce the entire record. A splendid appellate tool, the deferred appendix as provided by Fed. R. App. P. 30(c), was long ignored by practitioners, but it is coming into more use as its potentialities are appreciated. On request the clerk's office of the court of appeals will provide counsel with a procedural manual describing the use of the deferred appendix.

It is only after writing his brief that the appellate lawyer knows the precise contours of what he needs to include in the appendix. Under the deferred appendix system he uses the original record in writing his brief, then he designates the appendix. This permits him to designate at a time when he can, with confidence, specify what is really needed and omit everything else. The advocate's communication with the court is consequently less cluttered, less expensive, and performed with less effort. Moreover, counsel is more likely to concentrate on selecting the critical issues. If he has designated the appendix in advance under rule 30(a) and has reproduced more material than he needs, he tends to labor under the self-induced pressure to address every point that the appendix reveals regardless of its importance to the real issues in the case.

The bar has scarcely scratched the surface of the usefulness of another procedure, the appeal on an agreed statement, which is authorized by Fed. R. App. P. 10(d):

Agreed Statement as the Record on Appeal. In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the court of appeals as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 11. Copies of the agreed statement may be filed as the appendix required by Rule 30.

This procedure is most effective where the relevant facts are simple and the issue precise. For example, I recall an appeal in which the sole issue was admissibility of a document under a business records statute. Everything that the appellate court needed to know could have been stated in a one-page agreed statement and in five-page briefs. But the case was freighted with the full panoply of an appeal, printed appendix (including a full trial transcript), and briefs stating all the facts. Counsel did not attempt to misdirect the court. They just wheeled up the heavy artillery, needlessly, simply because that was the familiar way to do it.

12. References in briefs to the record and appendix are a little trouble, but worth it.
Counsel need not avoid the appeal on an agreed statement for fear of omitting some fact the court considers vital for decision. The court has the power to refer to the original record.

II. TRIPS DOWN A SIDE TRACK

At this point I detour from the main route to talk about some preliminary matters.

The manner and necessity of preparing for an appeal while in the trial court can be stated succinctly: get in your objection to the admission of evidence,\textsuperscript{14} make your objections to jury instructions, and do it before the jury retires.\textsuperscript{15} Where there is prejudicial argument, make your objection, ask for a corrective instruction, and move for a mistrial.

When an objection is not made, the appellate standard of review shifts from "error" to "plain error," a more stringent standard. Also, the appellant who does not object must overcome the added reluctance of appellate judges to hold that a trial ruling or incident is reversible error where the trial judge was given no opportunity to correct it when it occurred. Finally, with the increasing demands on judicial resources, trial and appellate, the objection is becoming more important than ever, not merely because it serves as the formal recording of a predicate for a later appeal, which is the way most attorneys tend to view it, but because it is the trigger device for the immediate correction of trial error at the time it occurs.

The pressure for trial of criminal cases is intensive, especially since the adoption of the Speedy Trial Act.\textsuperscript{16} At the same time access to the district courts for civil trials is increasingly difficult. (In early 1976 one young, vigorous and energetic district judge in this circuit had not heard a civil case for a year and a half.) At the appellate level, the Fifth Circuit operates under a self-imposed system for expediting criminal appeals.\textsuperscript{17} The percentage of criminal cases has continued to increase until today almost half of the court's docket consists of criminal and other "preference" cases.\textsuperscript{18} Consequently, as the waiting lines for access to federal trial and appellate courts grow longer, judges will inevitably increase their insistence that trial counsel who gets his turn at bat carry his share of responsibility for an error-free trial. Other litigants are entitled to their turns, too. Burying a land mine at trial and exploding it on appeal will get less and less sympathy.

III. PRESENTATION OF A CASE IN AN APPELLATE COURT

A. The Court's Interest in Effective Advocacy

The appellate judge shares with counsel a common interest in the advocate's effective performance of his double-barreled task of informing and persuading. The judge wants counsel to get the maximum mileage from the

\textsuperscript{14} FED. R. CIV. P. 46.
\textsuperscript{15} FED. R. CIV. P. 51.
\textsuperscript{17} Fifth Circuit Plan for Expediting Criminal Appeals, app. to local rules; Manual 5.
\textsuperscript{18} See note 3 supra and accompanying text. Some of the court's oral argument calendars (\textit{i.e.}, 20 cases set for hearing in one week before one panel) during 1976 will be composed entirely of criminal cases.
few pages and few minutes allotted to him. True, cases are won on the facts and the law, not on the eminence, polished writing, oratory, or personality of counsel. Counsel can, and often does, lose with a good performance and win with a poor one. The court gives no medals for good briefs and arguments, and it seldom exacts a penalty for a poor performance. But identifying and treating the facts and the appropriate law are often matters of reasonable differences of opinion, particularly at the appellate level. Also, the court's interest is not limited to identified facts but extends to inferences drawn from those facts.

Judges need all the help they can get in identifying and understanding the issues, legal and factual, and reaching the right answer. They are neither all-wise nor all-seeing. Whether in his library or on the bench, the judge is trying with every ounce of his capacity to traverse the path from issue to answer. Every intellectual pore is open to receive help and guidance from what the lawyers say and write. That guidance is most telling when there is a minimum of artificial obstacles and irrelevant diversions that impede communication. Unfortunately, lawyers erect in their own paths obstacles that impede the processes of informing and persuading the court and obstruct the judge's progress from issue to answer.

Courtroom lawyers as a breed are endowed with at least a bit more ego than the average person. Few are shrinking violets. Under an adversary system in which someone must win and someone lose the loser is tempted to use the appellate court as a forum to soothe his bruised self-esteem, and the winner is equally tempted to seek additional elevation of his already triumphant ego. Each attorney wants the approval of the appellate body for his position. The loser at trial hopes for the additional balm of being told that the trial court was wrong, wrong, wrong, and the winner wishes for confirmation of a "just" decision. Ego building and esteem-repairing are unobjectionable unless they interfere with the essential functions of communication and persuasion. Sometimes they do interfere. Issues are advanced and statements made that predictably will not affect the disposition of the case.

The lawyer is filled with his case, proud if he won, unhappy if he lost. It makes him feel better to share his experiences with the court. Like a participant in a divorce case, he wants to tell everything that has ever happened to him, particularly if it is unpleasant. I have a file of examples of poor appellate advocacy to which I will refer throughout this Article. One of the exhibits in it is a fifty-eight-page brief, of which nineteen pages, one-third of the brief, are devoted to complaints about rulings and events before trial and at trial, followed by a statement that none of these matters is claimed to be reversible error. The crucial question in the case, the clearly predictable basis for appellate decision, is given three pages of superficial and incomplete discussion. Counsel squandered his time and his client's money to compose and print a litany of bruises to his emotions. The court lost the benefit of the guidance and assistance it wanted, needed, and should have been given on those wasted pages.

19. Additionally, of course, every judge has a collateral interest, a sense of pleasure and pride, in seeing the advocate's job well done.
B. Selecting and Stating the Issues

Each year I tell my law clerks that the most valuable by-product of clerking is grasping the fact that the dispositive issues in appeals are highly predictable. As Justice Robert H. Jackson wrote:

One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. Of course, I have not forgotten the reluctance with which a lawyer abandons even the weakest point lest it prove alluring to the same kind of judge. But experience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.

Thus, counsel must select with dispassionate and detached mind the issues that common sense and experience tell him are likely to be dispositive. He must reject other issues or give them short treatment. For oral argument counsel may have to be even more selective than in writing his brief. There is simply no way to present eight or ten issues in twenty or thirty minutes.

The great advocate John W. Davis made this same point although in different terms. He spoke of the "cardinal rule" that one must, in imagination, change places with the court.

Yet those judges who sit in solemn array before you, whatever their merit, know nothing whatever of the controversy that brings you to them, and are not stimulated to interest in it by any feeling of friendship or dislike to anyone concerned. They are not moved as perhaps an advocate may be by any hope of reward or fear of punishment. They are simply being called upon for action in this appointed sphere. They are anxiously waiting to be supplied with what Mr. Justice Holmes called the 'implements of decision.' These by your presence you profess yourself ready to furnish. If the places were reversed and you sat where they do, think what it is you would want first to know about the case. How and in what order would you want the story told? How would you want the skein unraveled? What would make easier your approach to the true solution? These are questions the advocate must unsparingly put to himself. This is what I mean by changing places with the court.

I recall an especially effective presentation by a young lawyer, formerly a law clerk for another circuit judge, who walked to the podium of our court and said: "My name is So & So, from Houston, Texas. The issue in this case is whether Chambers v. Maroney is retroactive." He had laid all else aside and gone for the jugular. In two sentences he had identified himself, precisely targeted the dispositive issue on which discussion would be centered and the case decided, and had attracted the interest and attention of the court. The room came alive. Everyone was mentally on the edge of his chair. In seconds counsel had riveted the attention of all participants onto the question that all concerned knew was critical.

In contrast, I have in my files the briefs in a civil case in which there are either five or six issues depending upon how one wishes to slice them. The appellant’s brief states them as twenty-two issues. The appellee restates and regroups them into sixteen issues. The reply brief disagrees with appellee’s restatement and contains a partial third regrouping. In appellee’s brief each restated point begins with a statement about this: “This point covers appellant’s points 2, 5, and first half of 7, and the second half of 14.” To make our way through this maze my clerk and I prepared a mammoth chart with lines, arrows, and boxes, making the necessary consolidations and separations and rationally redefining the issues. It looks like the organizational chart for the Department of Health, Education and Welfare. In the box where each issue is described is a notation like this: ‘Read pp. 4-6, 14-17 and 42-44, Brief I; pp. 19-22 and 31-35 of Brief II; pp. 2-3 and 10 of Brief III.” Counsel in this case were not engaged in communication but in saying things that were not communicated. The communicatee had to devise his own communications system in order to understand what the two communicators were trying to tell him.

Argumentative statement, and restatement, of issues is a specialty of attorneys from one state (which will remain not nameless but unnamed). In a case where the issue could be described as “contributory negligence” or “was the plaintiff guilty of contributory negligence?,” the statement and restatement may come out as follows. Defendant: “The plaintiff was guilty of the grossest kind of contributory negligence in veering over the center line of Highway 82 and into the path of defendant’s truck.” Plaintiff: “The plaintiff was not guilty of contributory negligence and did not drive over the center line of Highway 82 but in fact drove his car with the utmost due care.” Or, the statement-restatement could run this way. Defendant: “The plaintiff was guilty of contributory negligence.” Plaintiff: “The plaintiff was not guilty of contributory negligence.” No one gains any advantage, tactical, persuasive, or otherwise, from these semantical ploys. I assume that the statement-restatement procedure, properly utilized, affords counsel the opportunity to correct incorrectly stated issues. But, at least as applied in the federal system (where the rules do not even provide for it), it is a compulsive play upon words, a charade without utility.

C. The Standard of Review

The standard of review is the appellate judge’s “measuring stick.” Early in the appeal counsel must familiarize himself with the appropriate standard of appellate review for each issue. He cannot adequately prepare his case without that knowledge. For example, for a ruling of law he must inquire: “Was the court wrong or right?” For a finding of fact: “Was the court plainly erroneous under rule 52(a)?” For review of an order denying a motion for a new trial: “Did the court exceed its broad range of discretion?”

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22. There is no case in which 22 issues should be raised on appeal.
23. F. Wiener, supra note 1, at 67, recommends argumentative headings in briefs. They do nothing for me. Rather I resist the notion that I can be affected to any meaningful degree by the semantics of a heading. Argumentative headings generate counter-arguments, and then the judge must settle this side controversy in his own mind in order to identify the real controversy.
an administrative order: "Is there substantial evidence on the record as a whole?" Whether there was sufficient evidence to submit the case to the jury: "Boeing v. Shipman."24 Unless counsel is familiar with the standard of review for each issue, he may find himself trying to run for a touchdown when basketball rules are in effect.

Early in his presentation counsel should state to the court the standard of review which he considers applicable. It is seldom necessary to do any more than identify the standard without further quotation or argument. The court is familiar with rule 52(a), plain error, abuse of discretion, Boeing v. Shipman, and Universal Camera.25

D. Tell It Short and Plain

Communicate with the court, by pen and by voice, in terms as simple and as easily understood as the subject matter permits. Each year I tell my clerks a story told of General Stonewall Jackson. Pressed for an explanation why he kept on his staff a not too bright officer, he replied: "When I have written a field order, I have him read it. If he can understand it, anybody can understand it." Write and talk that way to judges. Some are brilliant, some are bright, some pedestrian. All want to understand, and understanding is the condition precedent to persuasion.

Every lawyer can profit from Professor William Strunk, Jr.'s timeless little book The Elements of Style.26 Priceless fundamentals of writing are crammed into its few pages. If I were still in the practice I would get a copy for the desk of each lawyer in the firm. E.B. White, himself a craftsman with words, studied college English under Professor Strunk. In the introduction to the 1972 edition White referred to Strunk's "attempt to cut the vast tangle of English rhetoric down to size." Then he said:

In its original form, it [the book] was a forty-three page summation of the case for cleanliness, accuracy, and brevity in the use of English. Today, fifty-two years later, its vigor is unimpaired, and for sheer pith I think it probably sets a record that is not likely to be broken.27

Several of Strunk's principles of composition are especially pertinent to brief writing:

11. *Put statements in positive form.*

Make definite assertions. Avoid tame, colorless, hesitating, noncommittal language. . . .

12. *Use definite, specific, concrete language.*

If those who have studied the art of writing are in accord on any one point, it is on this: the surest way to arouse and hold the attention of the reader is by being specific, definite, and concrete. The greatest writers—Homer, Dante, Shakespeare—are effective largely because they deal in

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27. *Id.* at vii.
particulars and report the details that matter. Their words call up pictures.

13. **Omit needless words.**

Vigorous writing is concise. A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all his sentences short, or that he avoid all detail and treat his subjects only in outline, but that every word tell.\(^\text{28}\)

E.B. White comments on Professor Strunk’s paragraph 13 about omitting needless words:

> There you have a short, valuable essay on the nature and beauty of brevity—sixty-three words that could change the world. Having recovered from his adventure in prolixity (sixty-three words were a lot of words in the tight world of William Strunk, Jr.), the professor proceeds to give a few quick lessons in pruning. The student learns to cut the deadwood from ‘this is a subject that,’ reducing it to ‘this subject,’ a saving of three words. He learns to trim ‘used for fuel purposes’ down to ‘used for fuel.’ He learns that he is being a chatterbox when he says ‘the question as to whether’ and that he should just say ‘whether’—a saving of four words out of a possible five.\(^\text{29}\)

White’s own chapter, added to Professor Strunk’s little book, contains other gems of its own:

6. **Do not overwrite.**

Rich, ornate prose is hard to digest, generally unwholesome, and sometimes nauseating. If the sickly-sweet word, the overblown phrase are a writer’s natural form of expression, as is sometimes the case, he will have to compensate for it by a show of vigor, and by writing something as meritorious as the Song of Songs, which is Solomon’s.

7. **Do not overstate.**

When you overstate, the reader will be instantly on guard, and everything that has preceded your overstatement as well as everything that follows it will be suspect in his mind, because he has lost confidence in your judgment or your poise. Overstatement is one of the common faults. A single overstatement, wherever or however it occurs, diminishes the whole, and a single carefree superlative has the power to destroy, for the reader, the object of the writer’s enthusiasm.

14. **Avoid fancy words.**

Avoid the elaborate, the pretentious, the coy, and the cute. Do not be tempted by a twenty-dollar word when there is a ten-center handy, ready and able. Anglo-Saxon is a livelier tongue than Latin, so use Anglo-Saxon words.\(^\text{30}\)

To the suggestions of Strunk and White, I add my own:

(a) A simple declarative sentence can’t be beat.
(b) The active voice is more forcible, direct, and vigorous than the passive.

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\(^{28}\) *Id.* at 14, 15, 17.
\(^{29}\) *Id.* at x.
\(^{30}\) *Id.* at 65, 69.
And, for terse clarity, who could improve on the schoolboy’s essay on Elijah?

There was a man named Elijah. He had some bears and lived in a cave. Some boys tormented him. He said, ‘If you keep on throwing stones at me, I’ll turn the bears on you, and they will eat you up.’ And they did, and he did, and the bears did.³¹

Rudolf Flesch’s book *The Art of Plain Talk*³² is also a strong plea for understandable writing and word usage. Flesch points out the following language that “is hard even on lawyers”:

Sick leave shall be granted to employees when they are incapacitated for the performance of their duties by sickness, injury, or pregnancy and confinement, or for medical, dental, or optical examination or treatment, or when a member of the immediate family of the employee is affected with a contagious disease and requires the care and attendance of the employee, or when, through exposure to contagious disease, the presence of the employee at his post of duty would jeopardize the health of others.³³

He suggests this formulation instead:

Employees shall be granted sick leave for these four reasons:
(1) They cannot work because of sickness, injury, or pregnancy and confinement;
(2) They need medical, dental or optical treatment;
(3) A member of their immediate family is affected with a contagious disease and needs their care and attendance;
(4) Their presence at their post of duty would jeopardize the health of others through exposure to contagious disease.³⁴

His restatement is not substantively perfect, but unquestionably it is more quickly and more easily understood.

Compare these two statements of an issue:

(1) The plaintiff was not contributorily negligent when, as plaintiff was on his way to church, defendant’s 6-ton Mack truck thundered through the red light and upon plaintiff’s Pinto automobile at the intersection of 8th and North streets in Savannah, Georgia, on February 2, 1974.

(2) The trial judge was plainly erroneous in entering a finding of fact that the plaintiff was guilty of contributory negligence.

There is everything wrong with (1). Whether the truck ran the light and struck plaintiff’s automobile, or plaintiff ran the light and drove in front of the truck, was a disputed question of fact on which the entire contributory negligence question turned. The references to defendant’s six-ton truck, to plaintiff’s Pinto automobile, and to plaintiff’s being on the way to church, were sophomoric appeals to prejudice and sympathy. These matters had already been set out in the statement of the facts and none had any relevance to the contributory negligence issue. There was only one accident, so the names of

33. Id. at 36.
34. Id. at 36-37.
the city and of the streets and the date were of no significance except to designate the state in a diversity case.

The greatest fault, however, in the first statement is that the reader cannot discern the message that the writer is attempting to communicate. Does he mean that the trial judge found contributory negligence and that this finding was plainly erroneous? Or, does he mean that there was a jury finding of contributory negligence not supported by sufficient evidence? Or, does he mean that there was no evidence of contributory negligence, so that as a matter of law plaintiff was not guilty of it? Or, is he attempting to say that there was some evidence of contributory negligence but not enough to submit to a jury? Compare example (2) where in a short and simple statement the court is told everything it needs to know without more.

Like other professionals, lawyers either love, or fall into, professional jargon. Some words of the profession carry their own credentials and are invaluable: "proximate cause," "self-incrimination," and "impeachment." Other jargon adds nothing, and at times even obscures meaning. In the "no value" category is the following example from my file:

Without waiving any point heretofore made but expressly relying upon each and all of them, separately, severally and collectively, and without reflecting upon the able judge below, The Honorable __________, United States District Judge for the District of __________, who ordinarily is fair, able and well informed but nevertheless is subject to normal human error, I am constrained to say, respectfully but firmly, that the District Judge committed error to the substantial prejudice of the plaintiff when he declined to accept the argument made in Part IV of plaintiff's trial brief relating to par. 7 of the complaint and instead accepted the contrary argument of the defendant and ruled accordingly.

This is irrelevant nonsense, except for the concluding effort to describe the error, and that effort conceals rather than describes the point. Only when the reader reaches into the body of the succeeding argument is he able to piece together the writer's contention. The author of this fog of words is an intelligent man. If asked on the street how to get to the nearest gasoline station he would say: "Turn right at the second stop light, go four blocks and you'll see it on your left." But put a pencil in his hand and place him in his law library, and he lapses into the noncommunicative patois of his profession.35

Some writers describe issues in a form similar to the jurisdictional statement required by the Supreme Court. The jurisdictional statement serves an important function, but it is a poor device for transferring information from writer to reader. The writer who uses this format tries to crowd everything into one sentence. He strings out clauses independent and dependent, modifiers, qualifications, parenthetical phrases, and exceptions to the exception, all punctuated with citations. Here is a result:

35. In Strictly Speaking Edwin Newman describes a statement by White House press secretary Ron Zeigler explaining a request for a four-day extension to produce records that had been subpoenaed. The extension was needed, the press secretary said, so that attorney James St. Clair could "evaluate and make a judgment in terms of a response." Newman comments: "We are all of us ready to man the barricades for the right to evaluate and make a judgment in terms of a response, but Zeigler could have said that St. Clair wanted more time to think about it." E. Newman, Strictly Speaking 13 (1975).
In an action brought by the last assignee and holder of a negotiable promissory note transferred to him by an assignor in good faith and upon valuable consideration but after maturity, can the maker of the note who is sued establish a setoff or counterclaim, whether matured or not, if mature when pleaded, which setoff or counterclaim existed in favor of the maker against the assignor of the party suing, before notice to the maker of the assignment?

This is a fit example for The New Yorker's "The Legal Mind at Work."

My file contains another striking example of how not to say it short and plain. In a complex case the writer used the maximum allowable number of pages in his brief after being denied permission to file an over-length brief. One of the major parties was United States Fidelity & Guaranty Company, known to everyone who has done much trial practice, and surely to the briefwriter, as "USF&G." In every instance from the beginning of the brief to the end, more than 200 times, USF&G is referred to as "defendant-appellant United States Fidelity & Guaranty Company, a Maryland Corporation." Similarly, in every instance the trial judge who conducted the bench trial is described not as "the judge," "the court," "the trial judge," "Judge Roe," or even "he," but as "Honorable Richard R. Roe, United States District Judge for the _____ District of _____." This is an example:

The Honorable Richard R. Roe, United States District Judge for the _____ District of _____, erred when he overruled, denied and failed to grant the objection of defendant-appellant United States Fidelity & Guaranty Company, a Maryland Corporation, to the admission into evidence of this exhibit, which exhibit was irrelevant, incompetent, immaterial, prejudicial and shed no light on any of the issues in the case.

Motivated by frustration and curiosity, I made a word count on the excess baggage consisting of only the descriptions of USF&G and of the trial judge. This verbiage used up sixteen pages of the brief, pages precious to both the writer and to the court.

The indiscriminate use of dates is a Linus blanket for the writer, but cruel and unusual punishment for the reader. I quote from a brief:

The grand jury returned the indictment March 2, 1974. Defendant was arraigned March 17, 1974. He was tried beginning August 7, 1974. The jurors began deliberating August 9, 1974, in the late afternoon, and returned a verdict at midday August 10, 1974, after deliberating for six hours. The motion for new trial was filed August 18, 1974, argued September 10, 1974, after one continuance and denied by an order entered September 15, 1974. Defendant timely appealed September 20, 1974.

36. Quoted in F. Cooper, supra note 31, at 23.
37. The Fifth Circuit rarely grants leave to file an over-length brief. Numerous requests for leave are made because the writer has erred in his estimate, and when his brief has been printed he first discovers that it is over-long. The court may give him relief for a mistake of a page or two. If the excess is more than minimal, it is likely that the brief will have to be pruned down and reprinted.
38. Following is the work of another writer who was, I assume, trained in the same school of composition. "Defendant-appellant William R. Smith, Jr., says in his brief that as the officers approached the car defendant-appellant William R. Smith, Jr., was not under the wheel, but defendant-appellant William R. Smith, Jr., overlooks the testimony of the officers that defendant-appellant William R. Smith, Jr., was under the wheel."
I read those dates and events assuming that the information was given for
some purpose, and attempted to file in my mind each date and event for future
recall. Like a person watching a striptease, I assumed that when all the layers
had been successively removed I would see something, but there was nothing
to see. There was no issue of timeliness or delay in the case. No date, in fact
no word or figure of this entire recital, served any useful function. It filled
priceless space and it diverted the reader from genuine objectives.

There is a corollary to the principle of “tell it short and plain.” It is “tell it
once—or twice at most.” Erosion by repetition is a poor way to convince.
Most judges will catch the point the first time it is developed. Almost all will
understand when it is run by the second time. Also, please, “tell it early.” The
court blesses the lawyer who steps to the podium and, ZAP, like an arrow to
the center of the target, strikes to the heart of the controversy.

The Fifth Circuit, of necessity, now schedules the majority of its oral
argument cases for twenty minutes to the side. I have a word of encourage-
ment to the lawyers who think twenty minutes is too short. The advocate with
the maximum time of thirty minutes tends to use it uneconomically. He is
likely to be less direct in getting to the point and to dwell too long on
nonessentials. Counsel with twenty minutes knows that he is stripped to the
bare bones and has no throwaway time. Properly used, a twenty-minute
presentation will be as helpful to the court as a less taut thirty-minute
argument.

Every appellate court understands the use of an alternative argument and
knows that by suggesting an alternative the advocate does not waive his initial
contention. “Even if” or “alternatively” will sufficiently introduce an
alternative argument. The phraseology “Without waiving anything hereto-
fore said to the contrary but specifically insisting thereon” is a trite formalism
which almost implies that the court has neither good sense nor good faith.

When you have finished writing a brief look it over with an editor’s eye and
as dispassionately as you can. It should be clean and clear, as taut as a violin
string and as terse as a rifle shot. It should contain not an ounce of fat or an
excess word. There should be a minimum of repetition and no incorrect,
unclear, or misleading statements.

A good place to end a discussion of short and plain writing is to refer to
Lincoln’s Gettysburg Address. It is immortal, and it is ten sentences long.

E. Tell It Accurately

Every appellate advocate must state facts and law candidly and accurately.
This is an uncompromising absolute. “The mark of really able advocacy is the
ability to set forth the facts most favorably within the limits of utter and
unswerving accuracy.” Every sentence must shine with the whole truth. Even
when it has been misled the court may find the correct path, but the
attorney who is inaccurate or less than candid interferes with the objective of
persuasion. He comes to the court saying “please believe me and be per-
suaded.” If it is revealed that what he says or writes cannot be believed, he

39. F. WIENER, supra note 1, at 49.
forfeits the confidence which he seeks to create. The court’s distrust of him may taint his next appeal as well.

Telling the facts accurately does not mean just those facts favorable to your side. It does not mean inferences stated as though they were facts. In an appeal in which everything turned on whether the accused was inside a car or standing outside the car when he was arrested, the defendant’s statement of the facts in his brief said, without qualification or reference to pages of the record, that he was inside the car. The government’s brief, with equal assurance and without reference to what defendant had asserted, baldly stated that defendant was outside the car. This sent me to the record to read the testimony of all the persons at the scene. I discovered, as you might expect, that some witnesses said defendant was inside the car, others said he was outside. Both counsel had misled the court. Neither told us that the evidence was in conflict and that the issue was whether permissible inferences had been drawn from the conflicting testimony. This is poor advocacy.

The statement of facts is not the place for argument or editorializing. This belongs in the body of the brief. Also, the statement of facts frequently reflects the ability of counsel. Under Fed. R. App. P. 28(b) the appellee need not state any facts in his brief except to the extent that he is dissatisfied with appellant’s statement. It represents high standards of professionalism on the part of both lawyers when the appellee can say, “appellee is satisfied with appellant’s statement,” or, “appellee is satisfied with appellant’s statement except for the following additional fact (setting it out).”

F. Tell It Courteously and in Moderation

Both brief and argument should reflect dignity and professional competence of the spokesman and respect for the courts, trial and appellate. Improper tone is a self-created impediment. The court is made uncomfortable by the lawyer who recklessly tosses out accusations that his adversary is misleading the court or misstating the facts or is guilty of improper conduct. Reflections on the adversary throw a shadow on the spokesman’s own standards and on the strength of his presentation. No one expects a good lawyer to roll over and play dead. But firmness, and preservation of one’s own points and rights, seldom necessitate strident accusations or even discourtesy.

Appropriate moderation in approach keeps the court comfortable and is also persuasive. I say “appropriate” because a case may call for forceful hard-hitting statements. But not every mosquito has to be killed with a sledgehammer. Appellate judges, except brand new ones, have already heard, and rejected, more ad hominem arguments than counsel can think up. A judge who has normal sensibilities and loves the law will react on his own to events that call for outrage. He may not respond favorably to urging that he should be disturbed or outraged.

40. In almost all instances Fifth Circuit judges have read the briefs before oral argument, are familiar with the issues, and are at least generally familiar with the facts. The presiding judge may note this familiarity when the docket for the day begins, but, noted or not, counsel can rely upon it.
G. What Cases To Cite

On federal question matters the Fifth Circuit is interested first in the Supreme Court decisions on the point and second in its own decisions. If the Fifth Circuit decisions are adverse, and not distinguishable, counsel is faced with the practice of the circuit that one panel will not overrule the decision of another. He can, however, try to persuade the panel to which his case falls (summary calendar or oral argument) to request that the question be heard by the court en banc. Or, he can await an adverse decision from the panel and then petition for rehearing en banc.41

Decisions of other circuits have third priority. But if the matter is settled in the Fifth Circuit, the panel is not free to adopt a different rule followed by another circuit. To do so would violate the policy that one panel not overrule another. The fourth and final preference is for the decisions of district courts, particularly those in the Fifth Circuit.

In diversity cases the court is interested first in the decisions of the state whose law governs and any decisions of the Fifth Circuit and of the federal district courts in that state concerning the state's law on the point. If no such cases exist, then the general law should be supplied. The court is always interested in law review discussions of whether the issue is based upon a federal question or diversity. A law review piece may have persuasive effect, and, in any event, the analysis and collection of authorities will assist the court.

H. Questions from the Bench

The panels of the Fifth Circuit ask questions, lots of questions, for several reasons. The most likely reason is that the judge wants to know the answer to his particular question. The argument is the place where the court can learn what it does not know. Other possible reasons are: (1) The question is designed to clarify or advance the argument, to get the speaker down to the brass tacks he is not getting to on his own. (2) The questioner is seeking to enliven a dull monologue and stay awake. (3) The question is intended to advance the questioner's own point of view. (At times this is done by the judge's challenging counsel who has a view different from his own, at other times by the judge's serving up "home-run balls" to the counsel with whom the judge agrees. I suppose this is a valid practice but it is overdone.) (4) The judge is engaged in ego play of his own, demonstrating how much he knows about the case and how well he understands it. But at least this may advance the argument and even assist his colleagues.

In an assemblage where the purpose is to inform and persuade, it is like manna from heaven for the potential persuadee to say to the persuader: "Here is what troubles me about the subject on which you are trying to convince me." This opening into the mind of the listener is the most valuable piece of information the persuader can get. Most advocates understand this

41. Counsel can ask in the beginning that the case be heard by the court en banc rather than assigned to a panel for hearing. It is very, very extraordinary for such a petition to be granted. At times, however, the court on its own motion directs that a case be heard en banc along with another case that is being reheard en banc, because the cases have common issues.
principle and welcome questions from the bench and know how to capitalize on them. Other counsel feel that the advocate is responsible for his own case and should be permitted to present it in his own way. These attorneys resent questions as intrusions into a carefully prepared and organized presentation. But the court has its own responsibility to reach the correct decision, and only the judge knows what problems still trouble him.

This subject of questioning from the bench came up for discussion in a seminar at the 1975 Fifth Circuit Judicial Conference at Orlando. It surfaced again in some of the state round-tables at the 1976 Judicial Conference in Houston. I was surprised at the number of experienced advocates who believe that they are over-questioned. Perhaps questioning is overdone in the Fifth Circuit. I am certain that often the judge asks for help too soon. Judges enjoy lively dialogue, but they too can, and do, impede the communicative process. The solution lies, I believe, in moderation on both sides of the bench. Counsel can recognize and accept the value of questions to the court and to them. The court can exercise restraint through fewer and better thought-out questions, and it can be a little slower on the trigger.\footnote{When the Fifth Circuit sits en banc there are so many judges that unlimited questioning from the bench will cause the argument to break down. Thus the court en banc now has a self-imposed practice that counsel is not subject to questioning during the first half of his opening argument.}

IV. THE END RESULT

In concluding the written words in his brief, and finally his spoken words at the podium, the advocate will endeavor to leave some parting impression fixed in the minds of the judges who have read and listened. There is no better impression to leave than this composite: "I understood what he said. He did not say too much. I have confidence in what he said. I am persuaded by it and am compelled to rule with him."