COMMENTARIES ON THE ART OF ADVOCACY

Hon. John Charles Thomas

I. My Perspective

In my 40 years as a lawyer I have litigated complex cases, argued complex appeals, served on the Supreme Court of Virginia, served as an arbitrator for the Court of Arbitration for Sport, served as Chief of Appellate Practice for my law firm, served as a complex commercial arbitrator for the AAA and otherwise spent a great deal of time thinking about the nature of persuasive advocacy. I have considered the pros and cons of advocacy from the standpoint of a tribunal hearing argument and from the standpoint of the advocate doing his or her best to prevail. I have seen and been affected by advocacy from both sides of the bench and I am certain that advocacy makes a difference: it can win a case that was on the verge of being lost or it can just as quickly lose a case that was on the verge of being won. It seems to me that advocates should be taught at an early stage something that young doctors are taught from the beginning of their studies: Do not make matters worse. Let us now consider how to make effective use of advocacy.

Advocates must be effective at every stage of the proceedings from framing the complaint, to joining issue on the claims, to pre-trial motions, to objections, to instructions, to post-trial motions, to the appellate stage of litigation.

II. Rules to Live By

A. Do Not Underestimate the Importance of Written Advocacy

In virtually every case the first communication with the tribunal is in writing. As the case progresses, our written communications convey critical information about the facts we rely on, the law that supports us, and the arguments that advance our cause. Yet, all too often we file with the tribunal dense, obtuse, footnoted, opaque, hard to follow written materials that must be deciphered, grappled with, struggled with in order to make sense of.

What we fail to appreciate is that the written submissions we make to a tribunal comprise our most intimate approaches to the decision makers. Here is what I mean: Judges routinely take our motions and briefs home with them; they read them by their fireplaces, beside their pools, whilst on vacation. In effect, our written submissions are as close as an advocate can come to having a sit down, one on one, chat with the decision maker.

Suppose a judge were to say to you, "come by my house tonight and chat with me about this case so that I can get a real understanding of what is going on." What would you do? Would we sit there and say, for example, "Code Section 501.6 section (b)(1) subpart 9 provides that. . . etc." Or would we say something like, "Judge this is a case of fundamental injustice. This poor lady I represent did everything that the authorities told her to do yet she

has now lost her home, her livelihood, her very sense of independence; and what's so bad about this is that in never needed to happen in the first place. All the government needed to do was abide by its own rules. . . . etc."

If we appreciated how close our writings get to the decision makers, we would be more careful in our preparation and we would provide a more user friendly product than we often do at present. We would avoid using the jargon that experts in a field of law regularly toss back and forth to each other. We would remember that though a Judge is a sophisticated decision maker, the judge does not spend all his or her time living with the intricacies of a particular legal specialty or sub-specialty and therefore we should learn to communicate with judges in "other words." I, of course, do not mean to speak down to the Court, nor do I mean to dumb-down your advocacy.

Think about this way: suppose you were working on a complex case that involved the constitution, federal statutes, state statutes, related regulations and cases from federal and state courts, you might describe the dispute to a knowledgeable colleague as a 4th Amendment taking problem that was complicated by a collision between a federal statute and its regulations and a state statute and its regulations in an area of law where the federal government had by express statutory terms given discretion to the several states to decide the question. You might throw in all the statutory

citations and the regulatory citations along with the case cites and end up with an accurate yet jawbreaking description of the dispute.

But if your mother were a Ph.D. in history and she asked you what kind of case your are working on, you would probably describe the case to her differently. You would not be pedantic or condescending because you would respect her education and sophistication. And so you might say something like this: "Mom, it is a situation where the federal government asserts the power to tell my client what to do, the state government says it has the same power to tell my client what to do, both governments are telling my client different things, and my client is caught in the middle about to lose everything he has."

Courts and other decision makers will often be better able to appreciate your problem if you can find a way to state your case "in other words." One way to achieve that level of "User friendly" writing is to have a legal colleague who is not in your specialty to read the brief and alert you to the places that pose stumbling blocks to a full understanding.

As you write, remember that a judge reads briefs and other court papers day in and day out. Focus on setting your writing apart from the mass of others by clarity, by ease of use, and by completeness. Write with the attitude of helping the court see it your way. Take the judge step by step

through your argument. Don't leave gaps; don't assume the judge will know the intricacies of your case. Make it easy for the court to follow you to where you want the court to go. Here are a few tips:

1. Get your main points before the court early and keep them prominent throughout your argument. Have a theme that you can revisit from time to time. I recall consulting on an appeal where the key argument was not mentioned until 12 pages into a 25 page brief. It would have been very easy to have concluded that that argument was not really important.
2. Avoid long, unwieldy sentences. Use simple declarative sentences.
3. Make liberal use of paragraphing. When I was confronted with large volumes of reading I viewed paragraph breaks as resting places. On the other hand, being called upon to read a solid page of unparagraphed sentences is dreadful.
4. Use divisions, subdivisions, sections, and headlines. In my experience it was very helpful to know, going in, what I was about to read. I would find myself sitting up in anticipation when the headline told me a critical point was about to be discussed. Also,

the table of contents of a brief written with such headings can serve as an argument outline.

5. Be sure to call the court by its own name. For example, there is a Supreme Court of Virginia; there is no such animal as the Virginia Supreme Court. There is a United States Court of Appeals for the Fourth Circuit; there is no such thing as the Fourth Circuit Court of Appeals. Though this is a small point, judges actually pay attention to whether you call their courts by their proper names.

6. Be frank and forthright in your use of authorities. If a statute or a case stands in your way do not ignore it as if it will disappear; it won't. By silence you open yourself to the charge that you made no response because there was no response you could make. Meet the troublesome cases or statutory provisions head on. Find a way to distinguish them. It is often surprising how good an argument can be developed when you confront adverse authority recognizing that you are in a "do or die" situation.

7. Do not leave any of your opponents arguments unanswered. This goes hand-in-hand with the preceding point. As a general proposition, when I decided cases I would actually draw a line down the middle of the page and put each of appellants main

arguments on one side of the page. Then I would search the responding brief for the answering argument. When I found no answer to a particular argument I would treat that argument as essentially conceded.

8. Check to see whether the party responding to your brief has responded to all your arguments and all your citations. This is a mechanical operation that provides you with the ammunition to state in a reply brief that the other side has left several of your cases and arguments unanswered. It was always effective to be told that one side had been silent in the face of an argument or authority proffered by the other side.

9. Be accurate in your citations to transcripts, to the record, or to appendices. It always made me suspicious to see a factual statement on the crucial issue in a brief without a citation to the record. My reaction was that if the point was so clearly established prove it. Failing to cite, mischaracterizing cited material, and making incorrect citations are dangerous things because it can cost credibility with regard to the instant case and with regard to dealing with the court in the future.

10. Use the other side's own words against them. If you can find places where the other side has said things that help you, quote them. Nothing gets a court's attention more than to be told that the other side has admitted this, or agreed to that, and so forth.

11. Use the other sides cases against them. Computer research has a downside for those who are not attentive. The direct search for precise language sometimes leads to the use of cases that have good quotations but which -- once read -- are off point (and sometimes the quoted language comes from the dissent). It pays to analyze the other side's cases very closely. Sometimes you will find cases that help you.

12. Don't demean the trial court in your effort to describe that court's error. There is no wisdom in attacking the court whose ruling you seek to overturn. Stand up to the lower court but don't go so far as to be disrespectful. Judges believe in respect for the courts.

13. Remember that when you write the court, you are in charge of a unilateral communication. When you write you have complete control over what you are saying. Use that control to advance your case.

14. Your conclusion should have heft to it; recap the argument and ask for what you want. Use the conclusion as a summary of what you have said. Do not hesitate to ask for what you want. There have been times when relief was not given because it was not asked for.

B. Recognize That Oral Advocacy Is A Specialize Tool For Persuasion That Most Be Nurtured and Developed

In my very first year as a lawyer, I met Justice Lewis F. Powell, Jr. at a reception in Richmond. I asked him what difference oral argument could possibly make after the Court had read the briefs and read all the cited cases. I have never forgotten what he said: He stated that in 80% or so of the cases, oral argument did not change the view that he had of the dispute when he went on the bench. But he added that in 15 to 20% of the cases oral argument made a crucial difference but that only occurred for him in situations where the lawyer found the linchpin of the case and pulled it. Later, in my time on the bench I came to a similar conclusion about the effect of oral argument. I learned that it can really make a difference.

The key to effective oral advocacy is belief that oral argument really makes a difference. It does. It can alter the outcome of cases. But most practitioners just can't believe that a few minutes of talk -- following a long

course of brief writing -- can make any real difference. The advocates who doubt the efficacy of oral argument usually give themselves away by their demeanor, by their lack of conviction, by a performance that looks for all the world like "going through the motions."

Judges have a sixth sense about whether lawyers believe what they are saying. If you don't believe in your case why should anybody else. If you act as if you are there with no hope of prevailing why should a judge take you seriously.

I have seen cases that should have been won that were lost on oral argument. I have seen cases that should have been lost that were won on oral argument. I have witnessed the way judges who come on the bench thinking that they know the answer get turned around by cogent, thoughtful, bulls-eye arguments. I know to a moral certainly that oral argument can change the outcome. I know too that the court's need oral advocacy.

1. Reading The Brief Is Not Oral Advocacy

Oral advocacy is not just a spoken version of written advocacy. If all you do is read to the Court what you have already written to the Court you cannot get farther than your written submission has taken you. Teach yourself that whereas written advocacy is the quiet one on one chat with the judge beside the fireplace, oral advocacy is more like the clean-up hitter in the

bottom of the ninth inning in the final game of a tied up world series. Oral advocacy is often the last time you will get to answer the court's remaining questions. Once you convince yourself that oral and written advocacy are different, you will act differently when you are before the court.

2. Find the Key to the Case

An effective oral advocate looks for the heart of the case and seizes upon it. An effective oral advocate finds a principle or a theme and drives it home. An effective oral advocate answers any contentions by the other side that were left unanswered, fills any gaps in the facts or the logic of his position, and shores up any weaknesses on his side of the dispute.

3. Remember that Argument Is For the Court's Benefit

An oral advocate must remember that he is there for the benefit of the court. Oral argument is the court's time to satisfy its doubts and questions about the case. Because questions are likely, the oral advocate must keep what I call a "comeback" line of argument: Answer the court's question, come back to the main theme. Answer the court's question in a way that ties into the main theme.

4. Have Command of the Facts and the Law

Command of the facts and the law is crucial to effective oral advocacy. Such command lends itself to flexibility and responsiveness. Such command

allows the oral advocate to be as simple or as complex in a response as the occasion requires.

5. Remember the following:

a. A simple description of the problem using an ear catching analogy sets up the debate and catches the court's attention. Don't be melodramatic. Don't overstate your case. But make the court know that you are convinced that something is wrong and that justice has not been done.

b. Be respectful. "Yes, your Honor." "No, your Honor." "Yes, Judge." "No, Judge." "Yes, Justice Jones." "No, Justice Smith."

c. If you contend that the case is too complicated to explain, you are indicting yourself. I have heard lawyers say amongst themselves that a certain case was too complicated for a jury or too complicated for a particular judge or too complicated even for an appellate panel. Whenever I have heard such remarks my reaction has been that the person speaking did not understand the role of an advocate. Advocates cut through the seeming complexity and get down to simple justice. This is surely true for effective oral advocates.

d. Answer questions from the court immediately. I have seen lawyers hell bent on reading their briefs, the court asks a question, the lawyer says, "in a minute." The court says, "answer now." If the advocate realized that oral argument was for the good of the court he would never put off a question.

e. Where possible, tell the court that you don't seek to change the law, only to follow it. Many courts are concerned about becoming legislatures. They don't want to make wholesale changes in the law. Sometimes the outcome will turn on whether the court can be persuaded that in granting the relief you seek, the court will not be abandoning the law.

f. If the court asks a hypothetical question, answer it as best you can but come back with "that is not this case." Courts like to test lawyers, to find the breaking point of their logic. Hypotheticals serve that purpose. But it is always well to remind that court that the hypothetical is not the present case.

g. Do not ask the court, "Have I answered your question?" Answer the question as best you can then move on. Trust that if you have not answered the question you will be told by the court that you have not.

h. Do not ask the court whether it wants to hear the facts or whether you should simply start your argument. You are in command when you stand up to talk. Act like it. The court is usually annoyed by this question because it contains the implied criticism that the court may not know what is going on. Don't waste your breath. Argue it your way unless or until the court stops you with a question.

i. Never say, “I don't have enough time to argue this case." By making that statement you are already wasting time. And, by making that statement you tell observers that you don't know how to handle limited time constraints.

III. Concluding Thoughts

It takes work to be an effective advocate. It takes work to hone your writing to a point. It takes work to make your oral argument sparkle. But it can be done. I have read engrossing written advocacy and heard eloquent oral advocacy; I remember because it happened so infrequently. Effective advocates have a winning edge. With practice and attention to what we have talked about here, you can own that winning edge.

J.C.T.