Effective Advocacy in My Court

By Hon. Avern L. Cohn

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Introduction

Twice during my first three years as a federal judge I spoke to groups of lawyers about my views as to what makes an effective advocate and a persuasive brief. These remarks found their way to the pages of this journal. This special issue devoted to federal trial practices offers the occasion for a restatement of these views after almost 11 years of experience on the bench. My thoughts have not changed much. I am as sure as I was eight years ago that the more effective the lawyers, the better the judicial product.

Before I discuss what makes a lawyer more effective, let me first describe what I consider to be the three tasks of the judge and how the lawyer can help the judge perform them.

The first of the judge's tasks is to manage the case. The time has long since passed when the judge could be a passive on-looker with little involvement in his cases prior to the day of trial. Managing the case often requires managing the lawyers. This means frequent status conferences to monitor progress and instill a sense of discipline in the lawyers. Status conferences also assure that the case moves forward from filing to disposition without undue delay and unnecessary expense.

The second of the judge's tasks is to master the facts of the case-even when the case is to be tried to a jury. I cannot give an intelligent and reasoned decision on a point in dispute without a complete grasp of the facts and each party's particular view of them. Simon Lee, an English law professor, has noted:

...the vast majority of judges do not spend the vast majority of their time in making law because the reality is that judges spend more time in applying settled law to disputed facts, so that their skill, like the skill of most lawyers, lies in sifting through a mass of conflicting factual material.

The third of the judge's tasks is to determine the law. Not surprisingly, the parties will rarely agree on what the law is. The lawyers who do the best job advocating their position are those who can clearly articulate precisely how they disagree with their opponent. Therefore, the better the job the lawyers do framing the facts, explicating the law, and sharpening their dispute, the better my decision is likely to be.

Trial Practice

Effective Advocacy in My Court

By Hon. Avern L. Cohn

Effective trial practice requires a variety of skills and a range of knowledge, as well as good instincts and a sense of civility. The way a lawyer cn be effective in my courtroom is best discussed in the context of the three stages of the case in which the lawyer is likely to see me. Status conferences also assure that the case moves forward from filing to disposition without undue delay and unnecessary expense.

Cases in the Eastern District of Michigan are assigned by blind draw in the Detroit non statutory division in which I sit. Cases in the Northern Division at Bay City are assigned to either Senior Judge Churchill or Judge Cleland, who are regularly assigned to that division. Cases arising in Genesee, Lapeer, Shiawassee, and Living Counties are assigned to Judge Newblatt who sits in Flint. A portion of the cases arising in St. Clair, Sanilac, and Macomb Counties are assigned to Senior Judge Harvey, who sits in Port Huron. All other cases arising in the Eastern District are assigned to one of the 13 regular judges and the two senior judges who sit in Detroit, or to Judge LaPlata who sits in Ann Arbor.

A case assigned to me stays with me until disposition, whether by stipulation, dismissal, or judgment. The Federal Rules of Civil Procedure and our local rules allow for considerable latitude in pre-trial and trial management. Not all judges operate in the same way. A lawyer with a case on my docket should know my idiosyncrasies. For example, I personally handle most discovery disputes, in contrast to some of my colleagues who may refer them to a magistrate. Many years ago a famous German legal philosopher noted:

The administration of justice has always contained a personal element in all ages. Social, political and cultural movements have necessarily exerted an influence upon him. Whether an individual judge yields more or less to such influences, whether he is more inclined to follow tradition, or rather disposed to initiate change and innovate, depends, of course, less on any theory of legal methods, than upon his own personal temperament.

More recently an English judge, Lord McClusky, has noted:

The law does not have the quality of a railway timetable with predetermined answers to all the questions that human life, man's wickedness and the intricacies of commerce can throw up…The law, as laid down in a code, or in a statute, or in a thousand eloquently reasoned opinions, is no more capable of providing all the answers than a

piano is capable of providing music. The piano needs the pianist and any two pianists, even with the same score, may produce different music.

There are a variety of ways a lawyer can be informed as to my habits, expectations, and

thought. Lawyers who have tried cases in front of me should have some insights. LEXIS and WESTLAW are readily accessible sources of my previous opinions in particular subject areas. And, of course, no one knows my expectations better than my deputy clerk.

I now turn to the three stages on which a case is played in court. They are: Status and pre-trial conferences , motion hearings, and trial. Each stage calls for a somewhat different approach. Not all cases play out of 20 cases are resolved before trial. Many time, a case does not even reach the first stage. Unfortunately, there is no good litmus test for determining which case will go to trial. Therefore, during rehearsal, i.e., before the first appearance in court, each case should be treated as likely to go to trial.

As to the first stage, there may be more than one status or pre-trial conference. In a complex or protracted case, there nay be many. Good case management requires monitoring, about the case and monitoring can best be accomplished by periodic conferences. It little serves the interest of the client or judicial economy for a lawyer to come to a pre-trial conference without the purpose of the meeting in mind. Only a lawyer who is familiar with the case should be at such a conference. I look most unkindly on a lawyer who shows up at a status conference knowing nothing about the case because he or she is substituting for another attorney who could not attend. At a final pre-trial conference, it is obvious that the final pre-trial statement must be in hand. If, for some reason, the parties are not prepared to go ahead with a pre-trial conference, I do not object to a joint request for adjournment, with the reasons fully stated. Likewise, a suggestion that the conference be conducted by conference call will generally meet with my approval. What is important at the first stage setting is to avoid looking unprepared and certainly to avoid irritating me by wasting time.

Stage two calls for a different approach. At a motion argument, whether substantive or procedural, the obvious purpose is to persuade me or obtain an indulgence. What is important at this stage is to understand and articulate the objective and then present an argument, written and oral, that furthers that objective, Skimming along the top of the issues at hand rarely works. It has always bewildered me why lawyers will take the time to file motions where my decision should be obvious in advance. What higher strategy may be at work in such a situation? I am known to be generous in allowing for broad discovery and rarely require that rigid deadlines be observed, particularly where no real

prejudice can be shown. Aside from causing irritation, a dog-in-the-manager position on a motion diminishes a lawyer's credibility. Sometimes that credibility vanishes completely. And credibility, once lost, is rarely regained.

The third stage is the trial. While a bench trial and a jury trial call for different skills, techniques,

and instincts, they are not very different as far as I am concerned. Certainly, motions in limine to clear the underbrush are more effective in a jury trial setting, because in a bench trial, I can deal with evidentiary objections during the course of presentation of the evidence without fear of contamination.

In a jury trial, evidentiary disputes that require side bar resolution, or excusing the jury, not only delay progress and increase expense, but also exasperate me and irritate the jury. Lack of familiarity with exhibits, hesitation in questioning, and confusion over the desired evidence from the witness are all circumstances to be avoided.

In a jury trial, a draft set of instructions on the law and a verdict form are of great assistance in marking out the parameters of the case. If there is any great single failure of trial lawyers, it is the inability to agree on a plain-English set of jury instructions with an appropriate verdict form. With the multitude of standard instructions available, there is little, if any, need to reinvent the wheel.

My chambers has available a copy of the jury charge given in almost every case I have tried. Yet, more often than not, what I get are two original literary works. The law is not so mysterious or uncertain that lawyers should not be able to agree on the law of the case in words and phrases readily understandable to ordinary persons. Where there are differences in the instructions, they should be clearly articulated in the full text so that I am no required to become an author as well as a stage manager.

In sum, at the third stage, the conduct of a trial lawyer should reflect complete familiarity with the facts of the case, full knowledge of the relevant law, and civility in presentation.

Brief Writing

There are, in my view, seven points to bear in mind when writing a brief. Overall, it is important to be aware of who you are writing for, as well as what you are writing about.

First, be brief. The Oxford Legal Dictionary defines a brief as "a written argument presented to a court to assist it in reaching a decision." It is not always clear to me that

lawyers focus on the "assist" purpose of their writing. Local Rule 17(f) states that the brief accompanying a motion contain a concise statement of reason in support or in opposition. Too frequently, the "concise" element is ignored. The local rule limits a brief to 20 pages. While the limitation has had a disciplinary effect on lawyers' writing, more effort needs to be expended in assuring that I understand precisely what position is being taken and why the

motion at hand should or should not be granted.

Second, use care in citing cases. Bracton, a medieval legal scholar, reputed to be the originator of the use of precedent, is quoted as saying:

If, however, similar things happen to take place they should be adjudged in a similar way, for it is good to proceed from precedent to precedent.

When citing a case, a lawyer should be sure that it stands for the proposition for which it is being advanced. Too often, briefs overcite, and, too often, I get the impression that cases have been cited that have not been read. String citations should be avoided; I am not going to read the cases. Lord Devlin, an English judge has said:

It is the ratio decidendi that makes the precedent; a case without a ratio is a harmless as a wasp without a sting; it can only buzz. Lists of cases which have been decided one way followed by a list of cases decided the other way are like lists of irregular verbs: they make no grammar.

Cite cases as if you intend the judge to actually read them. A single well analyzed case that supports a proposition is many times all that is necessary to carry an issue. It is also quite helpful to include with your brief copies of your main cases, with the relevant parts tabbed and highlighted.

Third, a lawyer should write with style. A brief is a form of prose. Concern with proper usage and style is important; it improves readability and enhances persuasiveness. There are few authors who are satisfied with the first draft of a writing; a lawyer should be no different. Although time is money, anything worth writing is worth writing well. Every brief writer should make it a habit to annually read The Elements of Style by Strunk and White.

Fourth, a brief should have structure. Roman numerals, capital letters, small letters, and Arabic numerals should be used to divide the brief into parts. If there is time, each section should be titled. A table of contents is always helpful to give me a bird's-eye view of the argument. Fact descriptions and legal arguments should be separated. For

clarity of presentation, facts should be described in concise, separately numbered paragraphs. A neutral, non-argumentative style, which avoids hyperbole and color words will greatly enhance your credibility with any court. The purpose of the brief should be kept in mind.

A response brief should obviously take on a different form than that of an opening brief. Too

often, I see briefs that pass in the night, as if two different cases were being argued. Try to address opposing counsel's arguments directly. It is often helpful to follow the organization of the opening brief in your response.

Fifth, a brief should be placed in its procedural context. Different stages of a case require different formats. If the brief is in support of a discovery motion, the motion can set forth the reasons, and the brief need only cite the applicable rule. If it is a motion for an adjournment, the motions should state the reasons. Lawyers often fail to recognize the substantial difference between a motion to dismiss and a motion for summary judgment. Exceptions to a magistrates' report and recommendation should be specific as to what part of the report the exceptions address. Too often, objections to a magistrate's report will consist of nothing more than a conclusory blanket objection and a general citation to the underlying brief. Needless to say, this practice violates local Rule C.4(b) and inevitably antagonizes the judge.

Sixth, a brief should be self contained. Lawyers should remember how many briefs I am likely to read during a week and that I may read them in a car or at home. While I do not suggest overuse of reproduction machines, there is nothing more frustrating than to read a brief where I am directed to a prior filing which is not at hand. When a statute or federal regulation is cited, a copy should be included. Citations should be made to a readily available set of reporters-nothing is more frustrating than to be cited to a specialized reporter or an electronic service when a case is available in the federal reporter system. Lastly, lawyers should remember that a judge's briefcase carries only so much. Be careful not to overload the brief with a lot of marginally relevant exhibits and cases.

Seventh, there is no sin in facilitating plagiarism. A brief is written to assist me in reaching a decision. The ultimate objective is to persuade me to adopt a particular position, usually in a reasoned decision. There is nothing wrong in making available to me words and phrases that I might use in writing that decision.

Conclusion

I have no better way to conclude this brief exposition on my particular views of what will make a lawyer more effective in my courtroom than to recall what Judge Charles W. Joiner said some years ago to the Antitrust Section of the American Bar Association (with some editing):

As you approach a problem I urge you not to forget that courts are not designed to provide detailed and refined results. The kind of justice that comes out of most courts is moderately rough and gross. This is in part due to the amateur nature of jurors who made the decision, to the way in which we attempt to convey information to them, to the way in which we attempt to influence their decisions through persuasive argument. It is also due in part to the amount

of work a judge is required to dispose of, and therefore the limits on his or her time for any particular matter, and due in part, also, to the particular skills of the judge.

The fact is, however, that this rough type of justice does provide an important tool to dispute resolution and if it's permitted to operate in a reasonably simple and straightforward manner. Anything in the system that tends to introduce complication and excessive detail will tend to thwart the system.

A court consists of a judge, one or no more than two able and highly motivated law clerks, and a secretary. The court has the assistance, of course, of the lawyers and in the case of a jury trial, six persons chosen by random means from among society. If you keep it reasonably simple, the courts can help resolve disputes. If you don't, while you complicate the judge's tasks, you certainly complicate your own work and more importantly disserve your client.