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Law

# The Art of Appellate Advocacy: The Judge-In-Law

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Although my father-in-law is neither a judge nor a lawyer, he has been quite influential with respect to the approach I take in written and oral argument. There are many lessons he has taught me over the years since we first met when I was fresh out of law school, but there is one in particular I think of often when preparing a legal argument.

Many a man who occupies the role of son-in-law discovers early on in that special relationship that the best way of ensuring survival is to avoid discussing certain topics with his wife's father. Politics, religion, and favorite past sexual experiences are three that quickly come to mind. The last of these examples should be obvious, but, given some of the wild and crazy things I've seen lawyers say and do over the years, I thought it best to be explicit about strongly recommending that a man should absolutely not talk about this one with his father-in-law.

Politics and religion should also be steered clear of, even when Dad IL attempts to initiate the conversation on the subject. I learned this lesson shortly after I arrived in Florida with my wife and children for a visit with her parents during the Thanksgiving holiday when the results of the 2000 presidential election were still undecided and hinged on the outcome in the Sunshine State.

On any other day, I would have nimbly sidestepped the invitation my father-in-law extended me as soon as I walked in the door to talk about how the Democrats were trying to steal the election. But my internal warning system was sluggish and somewhat compromised after driving for 14 hours and nearly a thousand miles in a cramped mini-van with my wife and our two young kids. Which is why it took all of five minutes before my father-in-law's invitation to talk about politics morphed into a command that I get the hell out of his house and go back to Maryland.

**Proceed with special care**

This close encounter of the familial kind taught me two important lessons that every lawyer would be wise to remember. First, no matter the circumstances, we should never, ever let down our guard when dealing with the in-laws.

And, second, it is just as critical that we use that same degree of caution in our relationship with the judiciary when we compose, structure, and otherwise prepare our arguments.

Before proceeding any further, I would be remiss, not to mention possibly homeless and looking for a new line of work, if I did not say that I have a great deal of affection for my father-in-law and

many of the judges I have come to know over the years. But affection and fondness can be fatal in these relationships. We need to proceed with special care and to always remember whom and what we are dealing with.

Don't allow yourself, for example, to be disarmed or put at ease by the judge's smile or the seemingly warm manner in which you are asked a question at oral argument. Not all questions are hostile, of course, but don't forget that friendly fire can turn deadly and often has.

Cordiality is always to be appreciated, but never to be confused with any assumed notions that the judge is on your side. Maybe he or she is, but perhaps not. Beware, be aware, and advance with guarded suspicion and great caution.

One way to exercise that caution is to ask yourself how a cranky and generally unreceptive in-law would react to what you are considering saying. If the answer is, "not very well," then consider how to make your point in a manner that will ingratiate yourself to, rather than antagonize, your interrogator.

**Inherently conservative**

The same vigilance should govern the approach taken in written legal arguments. Not all judges occupy the same part of the ideological spectrum as does my father-in-law, whose political views are usually easy to anticipate so that the minefields can be avoided. But, regardless of what a judge's politics may be, there is great risk in asking any judge to accept an argument that would require him or her to venture beyond the constraints that precedent, statutes, rules, and other legal factors impose on the judge's decision-making ability and view of the facts in each case.

It is crucial, therefore, that, before advocating why the judgment being appealed should be reversed or affirmed, you know what these constraints are. Use them to define your argument and the core reasons why they compel the result you are asking the appellate court to reach.

If you represent the appellant, you face the formidable task of convincing two or more appellate judges that one of their kind made a mistake so big that it requires reversal of the trial court's presumptively correct decision. This presumption carries the day in approximately 80 percent of the cases decided by our intermediate appellate court, the Court of Special Appeals, so you need to deal with that reality at the outset of your argument.

One way in which to do this is to identify the settled legal principles that you contend govern the disposition of the appeal, and then argue that the trial court disregarded these principles in ruling against your client.

Maybe you'll be right in how you characterize the principles and the way in which the trial judge ruled, and maybe you won't be. But, if you are right, this approach goes a long way in deconstructing the otherwise fatal presumption of correctness by appealing to the appellate court's inherent conservative inclination and belief that all of us, including trial judges, need to adhere to the law.

That's not to say that this approach is a surefire way to victory. Because as I've learned from my father-in-law, there's still plenty of ways in which you can be told to go home.

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