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Remembering John W. Davis: The Oral Argument of an Appeal

By
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SHORT BIOGRAPHY

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Volunteering for an article about oral arguments on appeal, I asked myself, "What could you bring to this topic that would be truly fresh and original?" Promptly answering that question, "Nothing whatsoever," I considered abandoning the enterprise for another subject, except for two things. First, I really like oral arguments—they are my favorite part of the appellate "business," and if I couldn't come up with something useful to say on the subject, well. . .

Second, I was reminded that perhaps the greatest appellate advocate of the twentieth century, John W. Davis—member, Davis, Polk & Wardwell, Solicitor General of the United States, Ambassador to the Court of St. James under President Wilson, Democratic Party nominee for President in 1924—found himself in a similar predicament some 60 years ago, when preparing an address on the very same subject to be given to the Association of the Bar of the City of New York. (Davis' address is printed in volume 26 of the American Bar Association Journal (1940), at pages 895 through 899; it will be cited here simply as "Davis.") Initially describing the topic of oral argument as "well worn," Davis concluded his "decalogue" with this comment:

> I am . . . painfully conscious . . . that I have offered nothing new concerning the subject in hand. I have not even been able to cover old thoughts with new varnish. How could I have hoped to do so? The process of appeal from one tribunal to another is very old in the history of human justice. No matter in what form it is carried on the essentials of an appeal are always the same, and there is nothing very new to be said about it.

Davis, at 895, 899.

Well, if John W. Davis thought he could offer "nothing very new" on the subject of oral argument, I concluded that I should be relieved of any guilt feelings on that score. Moreover, as I contemplated yet again the structure of the Davis decalogue (which I confess to reading at the start of every oral argument prep effort—a sort of appellate advocate's "pre-shot routine"), it occurred to me that if I could not offer something new, I could cover old thoughts in new varnish—to wit, the thoughts of John W. Davis, by employing the structure of his decalogue and updating it, in light of my own experience as an advocate, as well as experiences shared with me by my colleagues and friends in the developing (if still *de facto*) national appellate bar.

But first, let me try to answer an obvious threshold question: Why should any "modern" appellate advocate care about what John W. Davis had to say 60 years ago about the argument of an appeal. To begin, Davis must be acknowledged as one of the greatest American appellate advocates. Consider just two facts about his record: (1) at the age of 79, he argued and won the steel seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); (2) at the age

of 80, he twice argued, and ultimately lost (to Thurgood Marshall) in *Brown v. Board of Education*, 347 U.S. 483 (1954). (Technically, Davis argued on behalf of the State of South Carolina in the companion case of *Briggs v. South Carolina*, which was consolidated to be heard with *Brown*.) There is no dispute that Marshall and his colleagues considered Davis their true, and a formidable, foe. And lest anyone question the propriety of holding up Davis as an exemplar for appellate lawyers, given his willingness to argue for South Carolina's constitutional right to maintain segregated schools, I note that Thurgood Marshall himself idolized Davis as the consummate appellate advocate. See, *e.g.*, Harbaugh, *Lawyer's Lawyer: The Life of John W. Davis* at 503 (1973).

An appellate lawyer who could sustain his powers at such a level so late in his life deserves our attention, when he outlines to fellow members of the bar what he has found to be the keys to effective advocacy. Moreover, the fundamentals of appellate advocacy have not changed so much since Davis gave his 1940 address that we cannot hope to gain from reconsidering Davis's ten rules for effective oral argument. Davis did remark on one major change from the earliest days of American appellate advocacy—the rise of written argument (briefs), which Davis acknowledged "ha[d] certainly become the most extended if not always the weightier of the two." Davis, at 895. Whether oral argument has since been totally eclipsed by the briefs is a point that will be touched on at the conclusion of this article.

In his 1940 address, John W. Davis set forth ten rules of appellate oral argument. Examination of these rules, and their applicability to the modern day, will take the balance of the article. We begin with what Davis declared "the cardinal rule of all":

1. Change Places (in your imagination, of course) with the Court.

A senior lawyer in my firm, who put me onto Davis in one of many acts of mentorship, preferred to call this first point, "understanding the court's 'point of view.'" Davis described what he meant by changing places with the court as follows:

> 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?

Davis, at 896. He did not point to any specific factors peculiar to the nature of an appellate court that might affect what it is that they would want first to know about the case. Here is the first point where I shall presume to annotate Davis, by identifying several factors that I believe are peculiar to appellate judges, and which will affect how they would want the story told. Although appellate courts undoubtedly share with trial courts the same desire to do justice, appellate courts just aren't the same as trial courts, and the differences affect the way in which appellate judges approach a case.

Trial courts operate one judge at a time; appellate courts operate collegially. Trial judges deal with a stream of issues, whose individual resolution often requires making a fast and intuitive call; appellate courts expect they should have to deal, case by case, with only a handful of issues, to which they can address the time for the kind of reflection demanded of a precedent-

setting body. Appellate courts tend to attract judges, who are—how to say this?—"pickier" than trial judges, and appellate courts therefore tend to hold the lawyers who appear before them to a stricter standard of precision when it comes to characterizing both the law and the facts (*i.e.*, the record) of a case. This tendency is reinforced by the collegial nature of the institution, including the fact that the panel of judges will be backed up by a "panel" of clerks, bright young law graduates who play a far more important role in framing the judges' point of view than was the case of most appellate courts in Davis's day. Finally, although trial judges, at least as to the ultimate merits, generally bring no particular bias to bear, appellate courts bring a very definite bias to bear—against reversing the decisions of their trial colleagues.

All these institutional qualities, shared by every appellate court in my knowledge, affect the manner in which these judges approach an oral argument. Every appellate lawyer should approach preparation for argument with an awareness of how these qualities can shape how the judges approach their study of the case.

This brings me to another point not mentioned by Davis, but which fits very much in a discussion of the importance of understanding the court's point of view: the need for an advocate to recognize that, when he or she sits down to begin preparing for oral argument, this will be the first time that the lawyer will ever have studied the case in the same form as the court studies the case. Charles Wiggins, a former Washington State intermediate appellate court judge and a leading appellate advocate in the Pacific Northwest, has described this phenomenon in several talks on oral argument by distinguishing between the process of appellate advocacy and the end result of that process. As Wiggins puts it, advocates during the course of a case are engaged in an interactive process, by which both sides in a series of moves and countermoves create the record (much of which does not exist until the appellate lawyers call it into being, *e.g.*, by ordering the transcript) and then the briefing that embodies both sides' written arguments concerning the issues to be addressed by the reviewing court. But for precisely that reason, the lawyers can't know what they have created for the court's study until they complete the process, which in most cases comes with the filing of the appellant's reply brief.

Accordingly, the first chance for the advocates to see what they have created generally comes when the notice of argument-setting arrives in the mail. One therefore would expect an attorney to approach his or her preparation recognizing that he or she, like the panel before which the case will be argued, will be studying the case as a whole for the first time.

Here should be the best chance to follow Davis' advice—to change places with the court, and try to study the case with attention to what is likely to catch the court's eye. Yet all too few lawyers seem to grasp the need to approach their preparation with this cardinal principle in mind, and instead treat oral argument as little more than the chance to regurgitate orally an outline of the points already made in their briefing.

Many appellate lawyers seem to be misled by the short time allowed for argument. Confronted with a notice announcing one will have "only" ten or twenty or thirty minutes, many draw the (utterly erroneous) inference that they need dedicate far less than they would for a one or two hour summary judgment or closing argument before a trial bench. In fact, given the kind of precision expected by appellate judges, appellate advocates actually need to commit *more* time, precisely because they don't have the luxury of the kind of verbal vagaries that one can

safely risk in some grand trial court showpiece. And once having made the decision to limit preparation to "the afternoon before," the lawyer doesn't have time to do much more than craft an outline of the points already set forth in the briefs. As a result, the advocate has missed his or her best—indeed, *only*—chance to see how the court may see the case, and this loss can only weaken the effectiveness of his or her oral presentation. And the resulting adverse impact on the quality of the argument probably goes a long way towards explaining why oral arguments reportedly change the outcome in so small a percentage of cases.

2. State First the Nature of the Case and Briefly its Prior History.

Davis' decalogue suggests that "cold benches" (those judges who had given a case virtually no study before oral argument) were fairly common in his day, and this rule #2 appears to derive in part from this experience. But while the classic cold bench (*i.e.*, one on which no judge has even skimmed the briefs) may have become a thing of the past, Davis's advice still retains this contemporary resonance: Quickly tell the court from where the case originates, and what it concerns. In other words—get to the point! Tell the court who you are, and who you represent. If you represent the appellant, then state (in Davis's words) "the nature of the case and briefly its prior history," and then move directly to identifying the specific issues you intend to address. If you represent the appellee (respondent), as these matters will almost certainly have been touched upon by the appellant, proceed immediately to the issues after identifying yourself and for whom you speak.

3. State the Facts.

Here is the only point on which I must part company with Davis. He almost certainly expressed the need for a fairly full statement of the facts because of the substantial likelihood of a "cold bench" whose members would require a detailed explanation of the case at hand. But while contemporary appellate courts are presumed to be far more ready for counsel to plunge straight into "the issues," this does not mean that the facts no longer matter. *Ex facto jus oritor* (the law arises out of the fact) remains the controlling dynamic of an appellate case just as it was in Davis's day. Counsel must be prepared to demonstrate to the court how the facts compel a particular outcome, based on the rule of law made applicable by those facts.

But counsel must also remember—point of view, again—that the appellate court is not engaged in a *de novo* review of factual issues, save in the rare circumstance where the trier of fact has utterly missed the boat, and by so wide a mark that no reviewing court should be willing to throw out the lifeline of deference to the fact finder, and haul in the appellee to the safety of an affirmation. In the far more typical appeal, counsel must concern himself or herself with demonstrating that the facts of the case, as established by the trial court (or the jury, ratified by the trial court) are consistent with the application of established rules of law, or demonstrate the need to extend or modify (or even overturn) those rules of law. Many counsel fail to grasp this principle, and their failure is the chief cause of what appellate judges throughout the country refer to disparagingly as the "jury argument" approach to appellate argument.

4. State Next the Applicable Rules of Law on Which You Rely.

To restate Davis' point in more contemporary terms, demonstrate how the governing rules of law (or what you contend should be the governing rules of law) compel an outcome in favor of your client. As previously discussed, this requires tying the facts of your case tightly enough to a governing rule of law, with sufficient strength that the knots can resist the best efforts of opposing counsel to work them loose.

5. Always "Go for the Jugular Vein."

Now here is a rule that can never go out of style. Davis put it this way:

> More often than not there is in every case a cardinal point around which lesser points resolve like planets around the sun, or even a dead moon around a planet; a central fortress which if strongly held will make the loss of all the outworks immaterial.

Davis, at 897. Yet, so many appellate lawyers do exactly the opposite. Yielding to the temptation to "let no guilty point escape," these attorneys try to cover four or five or six issues, instead of picking their best one or two points and leaving the rest for the briefs. Fear of picking the "wrong" issue seems to cause many lawyers to try and cover the map. But as Davis points out, it is "the quintessence of the advocate's art" to be able, by the time of argument, to make the hard choices—to identify those issues that have passed through the briefing fires with the best chance of achieving the outcome sought for the client. Of course, the chances of identifying these issues is enhanced if counsel recognizes the need to commit sufficient time to preparing for the argument. For nothing increases the likelihood of an argument marred by an attempt to "cover all the bases" than waiting until the afternoon of the day before the hearing to begin one's preparations.

6. Rejoice When the Court Asks Questions.

And don't merely rejoice—anticipate those questions, and then when the court asks them, answer them directly and specifically. Study the case with an eye towards the questions it may raise in the mind of the court, and then prepare your answers so that they are the most persuasive. Be ready to answer the question with a response that promptly communicates the essence of the answer: "Yes, and . . ."; "No, but . . ."

Above all, abjure the temptation to "professorize"—to think one has the time to build an answer from the ground up, without telling the court what that structure will look like when it is finished. Appellate courts perceive that their time is limited and precious—and they are right! Launching off into what threatens, from the judge's point of view, to be a long, involved ramble of an answer that may never "get to the point" is only to invite interruption, and disruption, and to no good purpose.

Questions are the only way the appellate court has to direct counsel to the area of the case that gives the bench pause. The lawyer therefore should bend all his or her efforts to identifying likely areas of inquiry before argument. Then, during the argument, the lawyer should always give the court reason to believe that *this* attorney understands that his or her job is not to give a

speech but to engage in a dialogue that will help the court to resolve its concerns. Let me add that courts would be more likely to get the kind of direct answers they seek if the judges would abandon the "law school professor" approach to questioning, and instead just say—bluntly—"here is the problem for your side as I see it; give me your best argument as to why that really isn't a problem for your side."

7. Read Sparingly and Only from Necessity.

I will go further than Davis, at least as to the first crucial minutes of the argument: do not read *at all*. His point was fundamentally psychological: "There is something about a sheet of paper interposed between a speaker and a listener that walls off the mind of the latter as if it were boilerplate." Davis, at 898. For precisely that reason, the opening minutes are critical to establishing in the court's mind that you are different—that you understand that oral argument is not the time to read a prepared sermon, but to be ready to engage in a dialogue with the court. To do so, be ready to launch into the first minute or two of the argument ("May it please the court, my name is X. Along with Y and T, who are with me on the brief, I represent Smith. This case concerns. . . ."), making eye contact with every member of the court, and without *any* resort to prepared notes.

8. Avoid Personalities.

Amen! Don't attack the intelligence or integrity of opposing counsel, or the trial court. To be sure, if opposing counsel has misstated a material fact, don't hesitate to point that out. But do so *without adjectives*. If you can destroy the credibility of an adversary, by all means do so. But don't do so in a way that detracts from your own credibility.

9. Know Your Record from Cover to Cover.

"This commandment might properly have headed the list for it is the *sina qua non* of all effective argument." Davis, at 898. I have touched on this earlier, and will reiterate here—one must, given appellate courts, be prepared to demonstrate a *total* mastery of the *key* record. That means one must be ready to provide citations, down to the page and line of the testimony of a key witness or exhibit, especially when a question from the court demands such information. You cannot develop such an immediate, working mastery of the record unless you have dedicated the preparation time necessary first to identifying those portions of the record and then to mastering their precise content. Moreover, the overwhelming majority of appeals ultimately turn on the interpretation of just a handful of pages of the record—four, five, six, at most ten pages taken from what may total thousands of pages of testimony and documentary exhibits. The court will expect counsel to know these documents intimately, and a lawyer who is not ready to discuss that portion of the record at the level of pages, paragraph, and line simply has not done the work needed to prepare to make an effective argument on the client's behalf.

10. Sit Down.

In this day and age of ever more abbreviated oral arguments, you may rarely—especially as an appellant—ever have the chance to sit down before time has expired. But the point nonetheless remains as valid today as when Davis enunciated it, *i.e.*, that once you have made your essential points there is no good reason to continue. Of course, you should invite the court to ask

whatever questions it may still have. And you should, at the outset, have identified those issues you do not intend to cover, in order to send the court a signal that its members should "speak now or forever hold their peace" on such points. But if you come to a place in the argument where you truly sense closure, then let the court know this is your frame of mind, and without further ado—sit down.

A Concluding Observation

Many of us who regularly appear before appellate courts have heard judges repeatedly suggest that oral argument rarely changes the outcome. I believe that the poor quality of such oral argument contributes substantially to this perception. Until advocates are prepared to do more than spend an afternoon sketching an outline of points made in the briefing, to be repeated at the hearing scheduled for the following morning, oral argument will remain a squandered opportunity. I say "squandered opportunity" because I also believe that appellate courts, burdened by burgeoning caseloads, can no longer give the time required to master thoroughly all (or even most) of the cases presented to them for review, in the fashion their predecessors could 20 or 25 years ago. Under such circumstances, oral argument should play an ever more important role, because judges really do need the benefits of good oral argument to help them achieve the kind of precise focus required to assure that appellate justice is done. If advocates would only take the time to apply the lessons embodied in sources such as the Davis decalogue, they would not only do their clients a tremendous service—they would also fulfill their responsibility as appellate lawyers to (as Davis put it) "realize the maximum of justice in human relations."