The Seven ABCs of Successful Appellate Advocacy

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People tend to believe the secret to success lies in some long-lost writing. Consider the popularity of Sun Tzu's 2,400-year-old *The Art of War*. Recently falling prey to this fancy while preparing for an oral argument, I plucked from my shelf a book that has gathered dust since I bought it several years ago: *The Common Law Tradition—Deciding Appeals*, by Karl N. Llewellyn (1960). Flipping the pages, I imagined finding a secret formula for an argument that would compel the court to rule for my client from the bench. That particular formula remains a secret, but I did discover a powerful set of maxims for successful appellate advocacy.

Karl Llewellyn and "The Common Law Tradition"

First some background on Karl Llewellyn and his treatise on appellate law. Llewellyn is regarded as one of the leading commercial scholars of the modern era and the leader of the American Legal Realist Movement. He taught at the University of Chicago; and *The Common Law Tradition* was his last major work, representing his final thinking on the judicial process. Howard A. Levine, *Deciding Cases in "The Common Law Tradition"; A Productive and Innovative Year for the Court of Appeals in Business and Commercial Litigation*, 48 Syracuse L. Rev. 355, 360–61 (1998).

Llewellyn's stated purpose in writing the book was to dispel what he perceived to be the Bar's "crisis in confidence" in appellate courts and the cynical view that appellate judges' decisions represent little more than naked will, later merely rationalized in the writing of the opinion. *The Common Law Tradition* was based on Llewellyn's study of hundreds of state court decisions handed down over three decades. *Id.*

Those are impressive credentials, but in the interest of full disclosure to anyone who might be tempted to add *The Common Law Tradition* to his or her reading list, be forewarned that this little 565-page pamphlet is not light reading. Here's an excerpt:

> Let us pause now and consider what we have seen, in regard to overt, explicit, unashamed, and I say proud resort to the reason of the immediate facts or the reason of the life-situation or both as a guide in deciding the appeal, and in shaping the rule of law announced, and therefore and of necessity in selecting from the spread workbench of the precedent and statutory techniques.

Karl Llewellyn, *The Common Law Tradition—Deciding Appeals* 140 (1960).

But who cares how dense the writing if within lies the secret to success, right? Right. So let's take a look at what Llewellyn calls the "Seven ABCs of Appellate Argument."

Llewellyn's "Seven ABCs of Appellate Argument"

In setting forth his Seven ABCs, Llewellyn senses that his reader might be the ordinary practitioner who has skimmed ahead in search of useful nuggets and introduces the topic with some light banter:

> "Why," said one letter not entirely in fun, "why are you breaking into our monopoly by making our secrets public?" This can be no treatise on appellate advocacy, dear though that craft is to my heart, but a few ABCs do deserve to be set out in words, and in sequence.

Id. at 236. Here are the seven secrets Llewellyn's correspondent was so eager to keep under wraps:

The Insufficiency of Technical Law

The first of Llewellyn's seven maxims might come as a shock to the neophyte. Llewellyn explains that having the law on your side is no guarantee that you will win the appeal:

> It is plainly not enough to bring in a technically perfect case on "the law" under the authorities and *some* of the accepted correct techniques for their use and interpretation or "development."

Id. at 237.

It's no secret that advocates are usually convinced that (1) their own arguments absolutely correct, and (2) the adversary's arguments are wholly spurious. And this tendency makes it all too easy to forget Llewellyn's admonition that unless the judgment you are appealing from is flat-out void, "there is an equally perfect technical case to be made on the other side, and if your opponent is any good, he will make it." *Id.*

The key therefore, is to persuade the appellate court to accept your technically perfect view of the law over your adversary's. But you must bear in mind that "[a]cceptance will turn on something beyond 'legal correctness.'" *Id.* And in Llewellyn's opinion, "[i]t ought to." *Id.*

The Trickiness of Classification

Llewellyn's second maxim is that a technically perfect case "is of itself equally unreliable in regard to the interpretation or classification of the facts." *Id.* In other words, if the appellate court does not perceive the facts of your case as fitting cleanly under the rule you contend for, "your case is still in jeopardy." *Id.*

Using the example of a commercial transaction, Llewellyn posits that not even the twin bulwarks of a comprehensive written agreement and the parol-evidence rule will guarantee victory if oral testimony and circumstances persuade the tribunal that the "true transaction" was for something other than that reflected in the contract. Another example can be found in a recent case, where the Fifth Circuit acknowledged that the facts triggered one of the two alternative bases for applying equitable estoppel, but nonetheless affirmed the district court's refusal to compel arbitration under that doctrine. *Hill v. G.E. Power Sys., Inc.*, 282 F.3d 343, 348-49 (5th Cir. 2002).

The Necessity of a Sound Case "In Law"

Having established that a technically perfect argument on the law is not enough, Llewellyn admonishes in his third maxim that *without* a technically perfect case on the law, "you have no business to expect to win your case." Llewellyn at 237. Llewellyn's rationale for this observation will surprise those who assumed the courts had far more time to research and write opinions 40 years ago:

> Occasionally, a court may under the utter need for getting a decent result go into deliberate large-scale creative effort; but few courts like to. Such effort may interfere with the court's sense of duty to the law; such effort requires in any event independent skill and labor from a hard-pressed bench.

Id.

If few courts liked to go into "large-scale creative effort" in 1960, then you can be assured that even fewer courts like to do so in this day and age of extreme docket congestion. "Sound advocacy," Llewellyn declares, "therefore calls for providing in the brief a job all done to hand. . . ." *Id.* And I would add, a job all done to hand that offers the court the simplest possible answers to the questions presented.

The Twofold Sense and Reason

If you must have a technically perfect argument on the law to win, but you can't win solely by having a technically perfect argument, what are you to do? To win, Llewellyn explains in his fourth maxim, you must persuade the court that sense and decency and justice require (a) the rule which you contend for in this *type* of situation; and (b) the result which you contend for, as between these parties.

Id. at 238. In other words, you must make the whole case, on the law *and* the facts, make sense, "obvious sense, inescapable sense, sense in simple terms of life and justice." *Id.*

> If that is done, the technically sound case on the law then gets rid of all further difficulty: it shows the court that its duty to the Law not only does not conflict with its duty to Justice but urges to decision along the exact same line.

Id.

Good advice, but easier said than done. How do you persuade the court that your arguments make sense "in simple terms of life and justice"? Llewellyn tells us:

> It is a question of making the facts talk. For of course it is the facts, not the advocate's expressed opinions, which must do the talking. The court is interested not in listening to any lawyer rant, but in seeing, or better, in discovering, from and in the facts, where sense and justice lie.

Id.

Here is an excellent example, taken

from the "statement of case" section of a brief filed in the Supreme Court of Texas, of a paragraph designed to convince the court that the petitioners' arguments made sense in simple terms of life and justice:

> This appeal asks one overarching question: Is any ancient judgment, or any land title based on an ancient judgment, safe from attack by a bill of review filed decades or centuries later by the descendants of a party to that judgment, if the "extrinsic fraud" necessary to sustain a bill of review can be established by tenuous inferences, rumor, and speculation? Certainly no judgment or land title based on a judgment has any security if the illusory, inconclusive documents and non-facts credited by the court of appeals can prove that deceased parties intended to and did commit fraud over a century earlier.

Mike Hatchell, Molly Hatchell, John B. Thomas, and Laura B. Rowe, Petitioners' Brief on the Merits in *King Ranch, Inc. v. Chapman*, 46 Tex. Sup. Ct. J. 1093 (August 28, 2003).

The Statement of Facts is the Heart

Llewellyn considered his fifth maxim—that the statement of facts should not be treated as an afterthought—so obvious as to be "trite." The statement of facts, Llewellyn declares, is the advocate's "first, best, and most precious" access to the court's attention. It should "frame the legal issue, and can, and should, simultaneously produce the conviction that there is only one sound outcome." Llewellyn at 238.

The problem with advice that has become trite is that it tends to get overlooked. Llewellyn's remarks about the importance of the statement of facts should be considered with a fresh eye. At a CLE program a few years ago, writing expert George Gopen suggested a mantra for the appellate lawyer. It goes something like this: "I don't care what my adversary argues, let me write the statement of facts and I'll win every time." Hyperbole? Maybe, but not by much.

Llewellyn observes that if the appellant creates a masterpiece statement of facts, it puts the appellee in a conundrum when it comes time for oral argument:

> He cannot rest on any properly done statement of facts by the appellant. Neither can he allow the court to settle back with a bored sigh: "Do we have to listen to all this again!"

For the appellee who must respond to a well-crafted statement of facts during oral argument, Llewellyn offers these examples of useful entrances: "by way of a desire to clear up some 'misconceptions possibly left by one's friend,'" or "by asking the court's particular attention to one aspect of the facts 'which the appellant did not perhaps develop as fully as the case deserves.'" *Id.* at 239 n.238. A little more genteel than some of the retorts we hear today!

Simplicity

"Simplicity" is the sixth maxim, and according to Llewellyn, practitioners in 1960 did not yet fully grasp the idea that the statement of facts should not be overly complicated:

> the *pattern of facts* as stated must be a *simple* pattern, with its lines of simplicity never lost under detail; else attention wanders, or (which is as bad) the effect is drowned in the court's effort to follow the presentation or to organize the material for itself.

Id. at 238.

Simplicity in the argument is equally important, Llewellyn reminds us. Modern practitioners have heard this advice over and over again: "throw in point after point upon point" and you manage "only to scatter and waste [your] fire, to destroy all impact and unity of drive." *Id.* But what we don't often hear is Llewellyn's insightful explanation of what causes an advocate to make this mistake:

> [T]his happens because counsel in question have not become clear that it is a vital matter in any normal case to satisfy the court that decision their way is imperative, is at least desirable, as a matter of sense and justice; and they are still thinking and arguing as if "the relevant law"—*before* the decision, were single and clear *and in itself enough*. Whereas in truth three, two, or one good legal points of appeal (*i.e.*, points technically correct and sound) are all that any courts needs—or any lawyer—once the court gets satisfied that *this* is the way the case *ought* to, *must* come out.

Id. at 238–39.

In other words, you can't bludgeon a court into ruling for your client by the sheer weight of your arguments and authorities. As one court of appeals justice said at a recent CLE, "When I see an index of authorities that goes on for pages and pages, my first reaction is to think that there must be some-

thing wrong with the arguments that follow."

The Principle of Concentration of Fire

Llewellyn's final maxim is that the brief as a whole must be a rifle shot, not an amalgamation of unrelated arguments separately vying for the court's attention:

> Even three points, or two, can prove troublesome as dividers of attention unless a way can be found to make them sub-points of a single simple line of attack which gains reinforcement and cumulative power from each sub-point as the latter is developed.

Id. at 239.

The ability to do this, to take all of your points of error or issues and integrate them into a "single, simple line of attack," is the *sine qua non* of expert appellate advocacy. But it is an incredibly difficult undertaking. One technique I use is to write a separate "conclusion" at the end of the brief. There, I try to offer an overarching theme of my case as a way of helping the court to see all of my arguments as components of a single line of attack. The process of drafting the conclusion often reveals ways to revise the body of the brief so that the arguments are presented as constituent elements of a unified theme.

Another technique is what Llewellyn calls the "proffered, phrased, opinion-kernel." *Id.* at 241. You should include in your brief a passage that gathers your expert advocacy all together, "which clears up its relation to the law to date, which puts into clean words the soundly guiding rule to serve the future, and which shows that rule's happy application to the case in hand." *Id.* Your goal is to draft a passage that:

> can be quoted verbatim by the court, a passage which so clearly and rightly states and crystallizes the background and the result that it is *recognized* on sight as doing the needed work and as practically demanding to be lifted into the opinion.

Id. After you file your brief, keep your fingers crossed that the court doesn't take your brilliant passage and add the following prefix and suffix: "Appellant's contention that" * * * "is without merit."

Conclusion

Think back to the last time you wrote an appellate brief. Did you take into account any of the considerations outlined in Llewellyn's Seven ABCs of Appellate Argument? If not, then the long-lost secret to success you've been waiting for may have just arrived.

You have to know how to accept rejection and reject acceptance.
— Ray Bradbury