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LESSONS LEARNED IN EFFECTIVE ADVOCACY: TIPS FROM JUDGE WEIS'S FORMER LAW CLERKS

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LESSONS LEARNED IN EFFECTIVE ADVOCACY: TIPS FROM JUDGE WEIS'S FORMER LAW CLERKS

Arthur H. Stroyd, Jr.[*]

Judge Joseph F. Weis, Jr. embodied traits that most imagine that a judge should have—wise, beyond reproach, calm, principled, hardworking, in command of every detail and nuance of the dispute before him, generous of his time and talent, responsible, sincere, polite, good humored, gentle, respectful of everyone, empathetic, and more. He was a role model who often shared his impressions about effective advocacy and why he respected particular lawyers with his law clerks ("Weis-Guys" and "Weis-Gals"), who have contributed the following lessons that they learned about legal writing and advocacy as a result of their work with Judge Weis—lessons that each young lawyer should master early in a career. The following tips are compiled from the collective memories of those "Weis-Guys" and "Weis-Gals" insights that served them well in their own legal careers as accomplished academicians, prominent practitioners, and successful business professionals.[1]

The stature that Judge Weis achieved as an appellate jurist was built on a distinguished career as a straight-talking, no-nonsense trial lawyer and on his uncanny ability to reduce complex legal concepts into practical, easy-to-understand ideas. One of the hallmarks of his opinions was a straightforward opening that cut to the core of complicated legal issues, which were in turn methodically dissected in objective, logical analyses. Judge Weis's opinions and the following tips from his law clerks embrace concepts that every young lawyer should consider when drafting briefs, presenting oral arguments or making presentations to any audience.

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[1] Special thanks to **Stanley Edelstein** (Of Counsel, Kang Haggerty, LLC); **Phoebe Haddon** (Chancellor *Emerita* and Professor, *Rutgers University*); and **Joseph Polizzotto** (Senior Vice President, *QuisLex, an alternative legal services provider*), who not only contributed to the following observations on advocacy but also participated in the discussion about Advocacy at the Symposium, *The Jurisprudence and Legacy of the Honorable Joseph F. Weis, Jr.*, held on March 17, 2023, at the University of Pittsburgh School of Law, his alma mater.

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To be recognized as a credible advocate whose word can be trusted, a lawyer needs to consistently honor two absolute goals regardless of whether the audience is an appellate court, a trial court, a board of directors, or an academic tribunal: (I) invariably deliver the "right answer" and (II) consistently make it easy to understand.

I. ALWAYS GIVE THE "RIGHT ANSWER"

The "right answer" is what every judge, every corporate director, and every member on an academic tribunal wants. No matter how eloquently ideas may be packaged, the lawyer's audience needs to have confidence in the trustworthiness of the message being delivered. A judge's comfort level with a brief comes from the lawyer consistently providing reliable, truthful answers. The reputation of an attorney as someone whose arguments and logic are invariably sound is the foundation for a judge's belief that the attorney's answer is dependable, thorough, and honest.

II. ALWAYS BE EASY TO UNDERSTAND

Being "right" only works if your answer is understood. An effective lawyer also needs to communicate it so that a judge can readily grasp it. If your message requires a judge to struggle to understand it, there is a chance that it could be lost. Great teachers do not necessarily impress with their grasp of extraordinarily complex theorems; instead, they reduce complicated concepts to be easily understood. The goal of an effective advocate is similar: to express, not to impress—to be clear, direct, and understood.

The following suggestions can help make a lawyer's message more easily understood:

A. Outlining

While a straightforward opening paragraph that cuts to the core of complicated appellate issues was the last thing that Judge Weis added to each of his opinions, the first step that he took in crafting every decision was developing a detailed outline of his analysis. Outlining not only guaranteed that his opinion would be logically sequenced, but it also ensured that related points would be clustered, that rulings and analyses would not be needlessly repeated, and that transitions from one issue to another would be smooth. Every advocate should strive for those same ends in formulating a brief to a court or a submission to a board of directors by outlining the message as the first step.

B. Road Mapping with Headings and Bullet Points

The volume of reading that a judge is required to consume can be overwhelming. Stirring as the prose may be, judges do not always have the time and

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perhaps the inclination to pour over every word that was so carefully crafted, and many will scan a brief, skipping over sections that are already understood while dwelling on others that may be more significant. It is often easier for a reader to grasp the theme of an upcoming section if it is preceded by a heading or subtitle that signals what lies ahead. These are reasons why the technique of road mapping is often used, especially if the heading tracks the logical sequence of your outline. It establishes your point at the outset of the discussion and helps clear a path for your argument to be more easily understood.

Inserting bullet points into an argument accomplishes many of the same results, in that they allow an argument to be concisely and clearly presented so that it can be easily scanned and quickly absorbed. They also make the position more likely to be understood by:

- Drawing attention to important information;
- Making your submission easier to scan;
- Emphasizing key points quickly and effectively; and
- Communicating efficiently with your audience.

C. Easy-to-Follow Writing

Certain techniques help make writing styles more easily understood:

- Being straightforward, clear, and concise. Don't mince words. Make your point right away rather than gradually easing into it.
- Heavily editing a document by eliminating extraneous facts and narrowing the message into a succinct, compelling recitation of relevant evidence or pertinent arguments.
- Using stylistic methods to simplify the message such as placing verbs close to subjects in sentences, so that the reader has an easier time following the train of thought.
- Using strong verbs and forceful nouns instead of sprinkling the message with flowery adjectives and adverbs.
- Taking charge of the message by avoiding the passive voice, which tends to "back into" the point being made.[2]

[2] There are times when the passive voice can be effective and should be used—occasions when you may want to downplay a person's role or when you need to improve clarity by stating who did what to whom. For instance, instead of acknowledging a client's negligently drove her car, it may be preferable to indicate

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D. Minimizing Distractions

Many advocates needlessly disguise the thrust of their message by distracting the reader's attention with mistakes such as the following:[3]

1. Using Inconsistent Terminology

Using a hodgepodge of different terms to refer to the same party or the same case may confuse a reader who is not able to figure out who or what is being referenced. For instance, references to a party should be limited by consistently using a designation such as "Defendant ABC" instead of varying the names such as "Alpha Beta Co," "Defendant," or "ABC." Although a variety of terms may avoid being repetitive, it can challenge a judge's ability to keep the parties and things straight.

2. Ignoring Court Rules

Judges can also be distracted from focusing on the thrust of the "right answer" if court rules are violated or if a format that differs from what is commonly seen is used. Each court frequently has specific requirements about font size, page length, margin size, spacing, and more, and some have distinct formats that are preferred because they are familiar. Disregarding those specific rules or favored formats can distract a judge from focusing on the substance of a message or at the very least can prompt a judge to question the lawyer's ability to follow basic rules. Local practices in many jurisdictions embrace customary ways to organize and to present motions or briefs, and molding a submission to those expected formats means that the message is delivered in a familiar, comfortable way that does not make the lawyer appear to be uninitiated with local customs and local rules.

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that "her car was involved in the accident." Or, a defendant may want to transcend from the details of the accident by stating "The accident resulted from the traffic signals' malfunction shortly before the collision occurred."

[3] Judge Weis summarized many mistakes to avoid in a tongue-in-cheek article entitled *The Art of Writing a Really Bad Brief*. They include vague references to constitutional and legal concepts: mis-citing volume and page numbers; misspelling parties' names in cited cases; relying on head notes without reading opinions; ignoring courts' hierarchies in relying on precedent; ignoring the factual context of cited cases; ignoring the factual context of your case; recounting irrelevant testimony while ignoring pertinent facts; designating parties, participants and witnesses by initials, acronyms, roles on appeal and the like; making derogatory comments about opposing counsel; grammatical and spelling errors; stuffing additional material into the designated number of pages; stuffing additional material into smaller margins or smaller print; and repeating arguments and irrelevancies. *See* Joseph F. Weis, Jr., *The Art of Writing a Really Bad Brief*, 43 FED. LAW. 39, 39–40 (1996).

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3. Ignoring Rules of Citation

Ignoring basic rules of citation may also be viewed as a slight to a court or at a minimum as an unfamiliar format. Citations are standardized so that a judge or an opponent can effortlessly find a case or locate a quote. When in doubt about a citation, rely on *The Bluebook: A Uniform System of Citation*[4] or *The Chicago Manual of Style*.[5] Although adherence to those guides may occasionally be flexible if the readability of a message would be impeded by stilted formatting, think twice before opting for a "cleaned-up," modernized mantra, which many view as eroding traditional rules of propriety.

A brief with correctly formatted citations not only provides important, basic information such as the holding, the precise name of the case, the court, and the year but also conveys a sense of completeness and thoroughness. Conversely, a brief that is marred by incorrectly formatted citations may raise hackles with some judges and may invite suspicion by others.

4. Violating Rules of Grammar

Rules of grammar should not be ignored. Bad grammar can be as distracting as submissions that violate rules of court. Shortcomings in language usage may not prompt a judge to throw your brief out, but they will often shift a court's attention from the thrust of the position. For instance, a list of comparable points should be organized so that their similarities are emphasized in parallel structure. Tenses of verbs should not be scrambled. Misspellings not only suggest that draftsmanship and proofreading were careless but also speak to a lack of respect for the court. Mixing up words like "principle" and "principal," "its" and "it's," "effect" and "affect," and "there" and "their" may suggest that the lawyer's analysis is no better than the improper choice of words. Avoid words created by nominalization— i.e., turning nouns into verbs such as "the law student summered at the DOJ," in that, although it may seem expeditious to describe a concept by inventing a word, a reader may be distracted from the point being made. Splitting infinitives and dangling participles may offend judges who appreciate finer points of grammar. The use of contractions in formal submissions may be viewed as being too conversational.

5. Littering Arguments with Unnecessary Details

Less is often more—especially if additional words detract from the impact of the message. Be merciless in editing so that the reader focuses only on the core of

[4] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 21st ed. 2020).

[5] THE CHICAGO MANUAL OF STYLE (17th ed. 2017).

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the argument. Flowery language that eloquently embellishes each point being made may be entertaining, but judges are not always inclined to take the time to sort through those trappings when they only want to grasp the key point being made.

6. Using Metaphors that Can "Boomerang"

Although metaphors that are based on readily identifiable concepts can make complex ideas easier to grasp, tread lightly if they can be turned against a position. While analogies can quickly touch a common experience, be mindful if an opponent may also turn them to its advantage. For instance, a defendant making the point that a plaintiff's employment was "a rollercoaster ride of emotions" may expose itself to a responsive brief arguing how the rollercoaster went off the tracks through no fault of the employee, or a mistreated employee who likens herself to "a diamond in the rough" could in turn be characterized by her former employer as being more like zirconia.

7. Being Clever

Avoid being cute, clever, and slick even though it may be tempting to show a judge how talented and creative you are. Before inserting imaginative, artistic and inventive references, remember that the primary mission of an advocate is making the client's position understood. "Artsy" references, while entertaining, may only divert the court's attention from the right answer being propounded. It is better to stick to unembellished, core messages even though they may not impress the judge at how razor sharp and bright you are. The client, however, will be impressed at how well its position is being conveyed and understood.

8. Cluttering Key Authorities

If a single opinion from a respected jurist in the jurisdiction where the case is pending that is on "all fours" is available, do not clutter a brief with additional case law and string citations in an attempt to bolster that key authority. Not only would the lawyer have to master the facts and holdings of each of those supplemental cases when preparing for oral argument, but the judge's workload would also be needlessly increased. There is no need to "gild the lily" as long as a solid precedent from a respected source is cited. Because an advocate's brief and a judge's opinion are rarely designed to be exhaustive surveys of broad legal concepts, Judge Weis was unyielding when applying this rule unless no leading case law from the court's jurisdiction was available.

9. Needlessly Repeating Arguments

One reason why outlining is the preferred first step in drafting a brief is avoiding needless repetition. Many advocates seem to think that repeating their "right answer" will improve the odds that the judge will eventually figure it out, but the more common result of such repetition is a judge who is irritated when "too much

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of a good thing" is viewed as demeaning, in that the lawyer apparently assume that the judge is not bright enough to grasp the right answer the first time.

10. Using Run-on Sentences and Paragraphs

Sentences and paragraphs must be kept distinct and separate. Each should capture a discrete idea or a different topic. Run-on sentences are bad grammar that can be irritatingly hard to follow. Run-on paragraphs are stylistically inappropriate because one paragraph's topic could be lost when combined with another. Besides, fewer paragraphs can result in "too much gray" on a page, which can impede a judge's ability to scan a brief for key points.

11. Overusing the Passive Voice

Legal writing will generally be more forceful, more direct and more convincing if the active voice with the subject of a clause performing the action of the verb is used. With the passive voice, the subject is acted upon by some other performer, and the sentence has less impact.

There may, of course, be occasions when the passive voice does a better job in telling a story especially when the performer of the action should receive less attention. For instance, a hospital defending a medical malpractice lawsuit might prefer to use the passive voice to observe that "the appendix was removed" rather than dwell on who performed the operation.

12. Misusing the Term "Findings" Instead of "Holding"

There is a difference between a court's findings and the holding that it ultimately renders. In weighing competing evidence, a court will make findings on which its ultimate holding will be based. The court's holding resolves the disputed issues of the lawsuit; whereas the findings that the court makes in sorting through the evidence form the foundation on which that holding is based. Referring to the holding of a case as a finding distracts the reader from the point that is being made, while making the author appear to be inexperienced.

13. Using *Italics*/**Bold**/Parentheses/Capitalization

Indiscriminately using *italics*, **bold font**, parentheses, and capitalization may be quick and easy, but they are unimaginative ways to prop up or to highlight an argument. They may avoid having to devise the right phrase or finding a strong verb or noun to emphasize a particular point, but they tend to insult a reader's ability to differentiate nuanced ideas and are not preferred in formal writing.

14. Employing Hyperbole, Sarcasm, or Derogatory Terms

If you cannot say anything nice about an opponent or the trial judge, don't say anything at all. "Take the high road," "turn the other cheek," and be professional in managing setbacks. Besides, an obnoxious opposing attorney or the dim-witted judge

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who may be the targets of denigrating attacks may be friends with a judge hearing the appeal. Casting aspersions on an opponent or the court below will often backfire but will invariably make the accusing lawyer look unprofessional.

15. Having Too Much Gray

Judge Weis was heard to describe sections of some briefs as being coated with "Teflon for the eyes," in that there were so few variations in formatting that page after page looked like a sea of boring gray ink.

> Blocked Quotes. He had an aversion to blocked, single-spaced quotes. Acknowledging that he did not always read lengthy blocked quotes word-for-word, he welcomed introductory sentences summarizing the gist of the quote that followed.
>
> Paragraphing. Each paragraph should deal with a single topic. Organizing related sentences around that topic helps the reader grasp its main points, with each sentence flowing smoothly into the next and with each paragraph transitioning to the one that follows. A paragraph should be limited to a single concept, and breaking up separate ideas avoids ones from being overlooked and helps both to be highlighted. Frequent breaks with separate paragraphs can also avoid the monotony of too much gray.

16. Overdoing Footnotes

Footnotes offer supplemental details or commentary that may not be exactly on point. If a goal is ensuring that the "right answer" is easily understood, the brief should be straightforward, clear, and concise in making its argument and should be heavily edited to eliminate extraneous facts. Footnotes tend to divert a reader's attention from the core of the argument and can therefore be distracting. If a footnote does nothing more than provide supplemental details that are not vital to an argument, it should probably be excluded.

Faced with limits on the number of pages, some unprofessional practitioners have been known to resort to repositioning portions of a brief into footnotes as a way to comply with page limitations a maneuver that is universally viewed as offensive, amateurish, and wrong.

17. Submitting Ineffective Responsive Briefs

Although being an appellee or simply writing a responsive brief may be preferable in the sense that the lawyer is not trying to change the status quo, it can also be challenging, in that the responding advocate has to react to a "table that has already been set" by the appellant or by the moving party. The following tips help to meet that challenge.

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(1) Track the opponent's arguments. A common frustration that judges experience is trying to compare one side of an issue to its opposition. Having to "weed" through a responsive brief for its rejoinder to an argument can frustrate judges who as a result would not be particularly conducive to the responsive viewpoint after it is eventually located. Unless a responsive brief follows the same general format that the appellant or moving party used, its counter to a particular argument may not be easily found, and the judge may be less inclined to accept it.

(2) Confront your opponent's contentions. Don't be shy about distinguishing, and dealing frankly with, an adversary's arguments; it is what the judge must eventually do. Expose the other side's hypocrisy by quoting overstatements and hyperbole and by thoroughly dissecting deceptive and mistaken views.

(3) Highlight arguments that an opponent failed to oppose or to mention. Focusing on what an adversary did not argue may bolster a position because an opponent's failure to address or to oppose a point may amount to conceding it, or at least it can allow an argument that the opponent's silence amounts to waiver.

III. STEPPING FORWARD AS AN ADVOCATE

A breakthrough moment for many lawyers entering the practice of law from academia or from judicial clerkships occurs when they shed the impartial, neutral stance of an objective legal scholar and learn to be an assertive advocate advancing a client's partial position. Too many young lawyers make arguments in such guarded terms that their presentations lack the passion and forcefulness of a convincing advocate. On the other hand, some may be tempted to stretch the law or to distort the record in order to advance their client's positions. It is the trusted lawyer with a solid reputation for consistently having the right answer who finds the middle ground of persuasion being an assertive advocate who accurately summarizes the record and truthfully states the law in an easy-to-understand way.

Effective advocacy may also involve knowing when to concede minor positions or insignificant evidentiary points in order to achieve more important objectives. A nuanced strategist can be more effective by sacrificing a pawn to eliminate the opponent's queen and can gain credibility in the process, especially when trying to defend a position that is a likely loser.

Weis-Guys and Weis-Gals have observed that effective appellate advocates who have achieved enviable reputations for consistently providing the "right answer" in easy-to-follow terms adhere to many of the following practices:

- Weeding out extraneous details from factual recitations
- Using forceful headings and subtitles

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- Employing bullet points to summarize easy-to-follow lists
- Drafting "Issues Presented" in terms of the holdings to be adopted
- Providing the factual context of each cited case
- Eliminating string citations and de-cluttering key authorities
- Preferring the active voice while avoiding the passive voice
- Drafting persuasive sentences with strong, precise verbs while eliminating excessive adverbs such as "simply" or "clearly"
- Avoiding too much gray space on a page by paragraphing and minimizing blocked quotes
- Addressing the applicable legal standard as an early opportunity to position an argument
- Emphasizing their strongest arguments first, while eliminating unpersuasive arguments or relegating them to secondary positions
- Presenting their arguments logically so that one point flows from another, so that arguments are built from facts and so that the court is compelled to embrace the result being sought
- Following the rules of court, of citation, and of grammar
- Being fair, even-handed, and professional at all times

Judges may read hundreds of briefs each year. Briefs that are easy to follow, professionally drafted, and logically organized are always enjoyable. Ones with the "right answer" are generally persuasive. Knowing how to wrap the "right answer" in an easy-to-understand brief is a hallmark of a successful lawyer.

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