Appellate Practice

Candid Comments

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I was behind on my shopping, and by the look of the mall, a lot of other folks were, too. Holiday music from the overhead speakers followed me from store to store as I dodged a horde of shoppers intent on finishing their lists. At the bookstore, I found a bestseller for my cousin in Minneapolis. I joined a long line to pay for my purchase, right behind a bulky man in an overcoat. In each hand he carried two shopping bags that strained to hold the profusion of gift-wrapped objects poking out the tops of the bags. He turned for a moment, and I saw it was Tim Flegleman. He was chronically late for everything, and I felt a twinge of guilt that I had delayed my shopping as long as he had.

Flegleman caught my eye and shrugged wearily. "Every year I tell myself to do my shopping before Thanksgiving," he said, "but I never get it done."

We talked for a few minutes as the line inched toward the teenager operating the register. "I'm beat," I said. "When I finish here, I'm going to find a spot to sit down."

"Good idea. I'll join you," Flegleman said, although I hadn't invited him.

We carried our purchases along the hallway, wading upstream against a steady current of shoppers. We spotted a couch in a corner, but it was in use; so were two overstuffed armchairs outside the perfume store. Finally, I found a group of uncomfortable-looking folding chairs, set out to accommodate the holiday rush. Flegleman and I collapsed onto two of the chairs. We were still taking off our coats when two more shoppers arrived and put down their shopping bags. As they took off their coats, I realized they were Tenth Circuit Judge Alicia Gonzales and Judge Harry Packwood from the Colorado Court of Appeals. Each was divorced, and they were rumored to be an item.

Out of habit, Flegleman and I immediately stood, but Judge Gonzales said, "Sit, sit. We have no jurisdiction here."

"Thanks, Judge," Flegleman said, settling back onto the hard chair. "Say, I'm glad I ran into you and Judge Packwood. I've been meaning to tell you how much I enjoyed your presentations at the appellate practice seminar last month. I'm going to look at your outlines before I write my next appellate brief."

"That's very kind of you, Tim," Judge Packwood said. "There's plenty of good material in those outlines, and you won't go wrong by following our advice. But I can't help thinking that we weren't candid enough. Too many of the briefs I read are, well, terrible," he said, shrugging apologetically, "and
it seems that lawyers keep making the same mistakes over and over."

Flegleman looked intrigued. "So, what did you leave out of your CLE presentations?" he asked.

Packwood and Gonzales exchanged a glance. He shrugged and said, "Why not?"

Judge Gonzales began, "Well, to begin with, I hate appellants' opening briefs that tell only half the story. After reading the brief, you would think the trial judge was nuts. But then, after reading the rest of the tale in the appellee's brief, everything makes sense. Appellants' counsel who leave out important facts lose all credibility with me and rarely persuade me to reverse. Those cases almost always get affirmed."

"And I hate repetitive briefs," Judge Packwood chimed in. "Some lawyers seem to think we're so slow that we won't get the point unless it's repeated six or eight times. I have a heavy case load, and I have to read briefs fast, but I have no trouble perceiving the main points in a well-written brief. Excessive repetition is just irritating."

The two judges looked at each other and grinned. They were clearly enjoying this opportunity to say what they really thought.

"My turn, I guess," Judge Gonzales said. "Something that absolutely never works is a brief that ignores controlling adverse authority. If the opposing party doesn't tell me about it, my clerk will find it. If you can't distinguish an adverse case, you have no business making the argument."

"Here's one you never hear about," Judge Packwood said: "briefs that heavily over-use underlining, italics, or bold face for emphasis. Not satisfied with emphasizing a phrase in every paragraph and about half of every quotation, these lawyers often use two forms of emphasis simultaneously: underlining with italics and bold face with underlining. Every page seemingly presents a new style of emphasis. I get so distracted by all the word processing fireworks that I can hardly concentrate on what the lawyer is trying to say."

"Oooh, this is fun," Judge Gonzales said, grinning. "My nomination for brief most unlikely to succeed is one that makes personal attacks on opposing counsel or, even worse, the trial judge. Dishonorable mentions to all briefs that convey anger or bitterness about the outcome below or describe the proceedings in pejorative or demeaning terms."

"I agree," Judge Packwood said, nodding, "and the same goes for oral argument. Heated, emotional rhetoric is counterproductive. Leave the passionate oratory for the jury."

"Hey, let's not leave the briefs just yet," Judge Gonzales protested. "I've got a few more bones to pick. Here's one: too...many...footnotes," she said emphatically. "I used to force myself to read extensive footnotes in briefs. But I have to tell you, I don't any more. It's very disruptive to stop reading the text, find the footnote at the bottom of the page, read the footnote, and then find the superscript in the text to resume reading. By the time I've done all that, I've forgotten the last sentence I read in the text, and I
have to go back and reread it to pick up the thread of the argument. I don't mind four or five footnotes in a brief, but when I get a fifty-page brief with forty footnotes, I skip the notes entirely. If it's important it should be in the text.

"And by the way, I disagree with those who say that all case citations should be in footnotes. I have no trouble reading right over case citations inserted in the text, and I like to see short blurb quotations from the cases as I'm reading."

I noticed that Flegleman had pulled a small notebook from his pocket and was intently taking notes. Waves of shoppers surged by only a few feet away, taking no notice of our impromptu seminar.

Judge Packwood said, "I'll go at this the other way and tell you something I appreciate and don't see often enough: simple, declarative sentences, put together in a logical order. Logical writing almost always reflects a logical argument. Rambling, incoherent writing, on the other hand, usually expresses a meritless argument."

"Here's one of my top ten complaints," Judge Gonzales chimed in: "excessive use of 'clearly,' 'plainly,' and 'obviously.' If it's clear, it's already clear when I read the sentence. Telling me it's clear doesn't make it any clearer. And if you say something is 'obvious,' I wonder why you're bothering to tell me about it at all."

"That's a good one," Judge Packwood agreed. "In the same vein, I think lawyers over use words of emphasis like 'very' and 'extremely.' If a lawyer is arguing that a jury instruction was misleading, I think it is actually weaker to say that the instruction was 'very misleading.' Judges tend to believe that lawyers over-argue. When I read a brief that makes the arguments in simple declarative statements, I find that I take that lawyer more seriously."

"How about appellants' briefs that make new arguments on appeal, without ever acknowledging that the argument was not preserved below?" Judge Gonzales proposed. "The appellee's counsel almost always picks that up, and the appellant's lawyer usually winds up looking foolish. On rare occasions, we will exercise our discretion to consider a new argument on appeal, but appellants' counsel usually would do better to admit that the argument was not preserved and simply present the reasons why, under the circumstances of the case, we should dispense with the usual requirement of raising the argument below."

Judge Packwood said, "Too many lawyers either don't state or misapply the standard of review. There are four main standards of review: conclusions of law are reviewed de novo, trial court findings of fact are reviewed for clear error, discretionary rulings are reviewed to determine if they are supported by any substantial evidence. In federal courts, the rules require the lawyers to state the standard of review for each argument. Our rules don't contain the same requirement, but appeals can be won or lost by artful or clumsy application of the standard of review."

"Now I'm ready to move to oral argument," Judge Gonzales said. "My pet peeve is lawyers who take so long to answer a question that they're interrupted by another question before ever answering the first one. Then it happens again and again, and by the end of the argument they haven't actually
answered a single question. When I ask a question, I want the lawyer to fire back an answer within the first five to ten words. Then a lawyer can elaborate. When a lawyer begins an answer to a question with, 'Well, your honor, to respond to that question I first have to explain how witness X testified in his deposition...' I know I'm in for a long and unproductive oral argument.

"By the way, some lawyers do just the opposite and begin answering while the judge is still talking. Don't. Most appellate judges don't appreciate being interrupted."

"I would add a couple of additional peeves," Judge Packwood said: "Lawyers who waste time on a long statement of facts or description of the procedural history of the case; lawyers who read their oral arguments; and lawyers who evade our questions. If a question reveals a weakness in the lawyer’s case, the lawyer would do much better to acknowledge the weakness and then present what the lawyer sees as a countervailing strength."

I was just starting to think about five more gifts on my shopping list when Judge Gonzales stood and looked at her watch. "Only two more hours until the mall closes," she said. "I enjoyed our little talk. Feel free to pass on our comments to your partners and colleagues."

"I might even write something about your ideas," I said. "Happy holidays!"

"You too," Judge Packwood said, as the two judges donned their coats.

Flegleman held up the little notebook in which he had been scribbling and tapped it with his finger. "This is gold. Solid gold," he said. "I think I just got an early Christmas present." He stuffed the notebook into his back pocket and picked up his shopping bags, took a deep breath, and charged back into the throng of shoppers.