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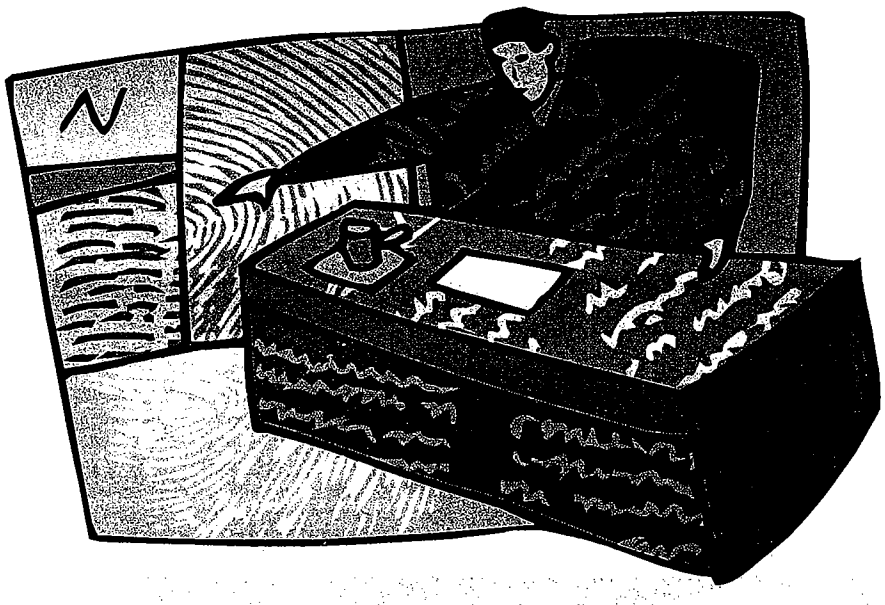
[APPELLATE advocacy]

Appellate Help Unlikely for Lawyers Stung by Abusive Judges

by MARTIN J. SIEGEL



Sitting above other people day after day and wearing an austere black costume dating back hundreds of years may gradually affect the psyche. Maybe it's seeing young associates rake in more than a judicial salary or the unrelenting workload. Whatever the cause, judges, like the rest of us, sometimes unload their troubles on others, especially the people in suits paid to stand there and take it.

Happily, as an appellate lawyer, I only encounter the species rarely, either in the cold pages of a record or once in a blue moon directly from a member of an appellate panel.

But any appellate lawyer who has been practicing awhile eventually will field calls from trial lawyers on the receiving end of some tirade from the bench, humiliation in open court, or string of belittling asides with little or no cause or relation to the case at hand. Surely, trial lawyers think, this sort of conduct cries out for an appellate spanking and sweet vindication.

Probably not.

For one thing, the stale record often fails to convey that burning sensation the wronged lawyer felt at the time. What seemed shocking and out of bounds in the heat of the moment in court can seem far less dramatic in the transcript. Before a lawyer tries to do more than lick his wounds, he should ask a colleague or other lawyer to take an independent look at the record to see if it reads as badly as it felt.

If he still contemplates pursuing appellate relief, his odds are long. In its 1994 decision, *Liteky, et al. v. United States*, the U.S. Supreme Court held that "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." The court went on to note that expressions "of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display" are not grounds for disqualification or recusal.

Moreover, a judge can mock a lawyer all he likes as long as he leaves her client out of it. Hostility aimed at counsel carries no weight unless it also evinces significant, prejudicial animus against the underlying party. And the bias usually must derive from something outside the facts and conduct of the case itself — what the case law calls an extrajudicial source.

Finally, appellate courts review a trial court's case management, even when it veers into disparagement, according to the difficult abuse-of-discretion standard. Unless the attacks reveal "deep-seated favoritism or antagonism that would make fair judgment impossible," there is no appellate relief, according to the Supreme Court in *Liteky*. Texas courts employ more or less the same rules. Usually then, there is little comfort for trial lawyers on the receiving end of a judge's wrath.

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Self-Defense

If obtaining reversal based on an abusive judge is next to impossible, handling one on an appellate panel, while tricky, is easier.

True, some of it is just blind guesswork. Years ago I appeared repeatedly before a judge who regularly yelled at lawyers for this or that. After a while, we learned that he moderated only when we abandoned some of the usual obsequiousness he was accustomed to and gave it right back to him. But who knows if that would work on someone else?

The key fact for the lawyer facing a difficult judge during appellate argument is that there are at least two others on whom to focus. If the bullying panel member makes a habit of such bad behavior, those others may well sympathize. The appellate advocate should politely but firmly stand her ground, ignore the temptation to respond to *ad hominem* attacks, steer the argument back to the substance, and focus on the other panel members, who may still be winnable. Given the time limits constraining oral argument, allowing it to devolve into a personal grudge match with one of the judges only injures the client.

In his 1994 article in *Litigation*, "Appellate Oral Argument," Gary L. Sasso describes the necessary tone as "respectful equality" — respectful since a base level of deference is always required even when the lawyer is under fire, but equal because ultimately, kowtowing and surrender aren't acceptable options.

Irving R. Kaufman, the former chief judge of the 2nd U.S. Circuit Court of Appeals, articulated the same sentiment when he advised appellate advocates in his 1978 article titled "Appellate Advocacy in the Federal Courts:" "Never give in to the temptation to quarrel, and do not be defensive or offensive."

Lawyers simply should pivot away from the scorn, return with equanimity to the argument, and train their eyes on the other judges. And remember that lunch — if the case is in the 5th U.S. Circuit Court of Appeals, *lunch in New Orleans* — is right around the corner.

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