Legal Lore for Advocates

San Francisco Law Library

Judge Mary E. Wiss

In 1989 the main branch of the San Francisco Law Library was ensconced on the fourth floor of City Hall. When the Loma Prieta earthquake struck on October 17, 1989, it caused extensive structural damage to City Hall, which forced the law library to relocate. Since February 1995, the main branch has been housed in "temporary" quarters in the Veterans Building located on Van Ness Avenue. Although the library boasts more than 340,000 works, a mere fraction of those are available for display due to limited space.

The former City Hall location included a little known and little used corner room at the back where one could prep witnesses surrounded by volumes of books, ancient and current. In the last fourteen years, the resources available to lawyers and judges have changed dramatically. Fortunately, your library continues to house these historical, remarkable works. Attorney Marcia Bell, who is director and law librarian, continues to acquire a fine collection of works. Today, the excellent staff at the law library includes attorneys and specialists with master's degrees in library and information science who have the resources and training to retrieve information at their fingertips.

Oral advocacy and persuasion has long been an interest of mine. This topic brought me to the San Francisco Law Library seeking examples of oral advocacy. Ruth Geos (one of the talented law librarians) came to my aid with an extensive list of resources. Among them is a compilation of oral arguments before the United States Supreme Court. The arguments, compiled by Jerry Goldman in CD format, are titled *The Supreme Court's Greatest Hits 2.0*. The

CD contains more than a hundred hours of oral argument in sixty-four of the most significant constitutional cases decided between 1955 and 2001 including *Gideon v. Wainwright*, *Griswold v. Connecticut, Miranda v. Arizona, New York Times v. Sullivan, Roe v. Wade*, and others.

The arguments provide remarkable historical insight into the legal, moral, and social issues before the Court. They reveal how the justices grapple with the facts before them as they tackle the difficult job of interpreting the Constitution. The arguments also demonstrate that counsel are sometimes hindered by the record in the court below, the failure to frame arguments in the court below, procedural intricacies, and lack of precedent.

The compilation of arguments illustrates lessons for today's advocates. The arguments are filled with examples of oral persuasion by formidable, well-known lawyers who frequent the Supreme Court as well as advocates whose case happens to bring them to the steps of the court. Most lawyers today freely use persuasive phrases adopted from others. The recorded arguments are replete with persuasive phrases from masterful advocates. A sampling of some persuasive phrases includes:

- a corkscrew soul
- gratuitous onslaught
- a semantic conundrum
- these acts make me despondent
- the record is replete with error
- how can we pretend this was a fair trial
- from this clash will emerge the truth
- I just want to say this and nail this
- When Clarence Darrow was accused of tampering with a jury the first thing he did was get himself a lawyer.

The arguments include examples of skilled oratory such as the rule of three. Under the rule of three, the speaker appeals to the listener with descriptive words or phrases used in combinations of three. Examples are "heinous, repulsive, and loathsome" and "wanton, reckless, and deliberate." Political speeches are replete with examples of this technique such as "compassion, commitment, and concern." President Obama began his inaugural speech with "I stand here today humbled by the task before us, grateful for the trust you have bestowed, mindful of the sacrifices borne by our ancestors." A famous historical example is General Douglas MacArthur's speech on "Duty, Honor, Country." Referring to the title of his address, he stated, "Unhappily, I possess neither that eloquence of diction, that poetry of imagination, nor that brilliance of metaphor to tell you all that they mean."

A related rule of oratory includes the use of alliteration, or the repetition of a consonant or sound, such as "untethered and unmoored." William Safire was famous for the use of such phrases, including "hopeless, hysterical hypochondriacs of history" and his famous "nattering nabobs of negativism."

The arguments are usually serious but are also sprinkled with humorous moments. In *Hustler Magazine v. Falwell* the justices speculate upon how George Washington, as a public figure, would have reacted to a cartoon parody.

The arguments illustrate the need for utmost care in preparation. Often counsel are pressed by the justices to enunciate a bright line or to respond to questions on the procedural aspects of the case. One quick-witted counsel offers a gracious way to say "I don't know"—"I plead inability to assist the court on that question."

The pace and delivery of the arguments are also noteworthy. In an era in which TV, radio, and everyday conversation are delivered at warp speed, the arguments are well paced and deliberate. Experienced counsel before the Supreme Court carefully respond to questions and are more concerned with the idea to be communicated than a rapid fire presentation of all available information.

Oral arguments also demonstrate that it is vital to respond to questioning from the judges. Sometimes a justice's ire is aroused by the lack of a direct response. Yet, it should be remembered that not every pointed question predicts the outcome of the case. Instead, questions may very well be a technique to garner arguments to bolster the opposite position than might be inferred from a particular question.

With limited time for argument, counsel do not have the luxury of discourse on the development of the law since Hammurabi. Geos's research reveals that during the early years of the Supreme Court, 1789–1849, oral argument was unlimited, sometimes extended for days, drawing crowds. In 1849, due to the rising case load, oral arguments were first limited to two hours per side, reduced to one hour in 1925, and then reduced again to the current thirty minutes per side as set forth in Rule 28.

The arguments also illustrate that the standard of review is critical to the outcome of the case. Standards of review will guide the degree of deference appellate courts will give to trial court rulings. Whether at the trial level or the appellate level counsel should bear in mind whether a judge's ruling will be reviewed utilizing a substantial evidence, abuse of discretion, or the more stringent independent judgment or de novo review standard. The standard of review may very well determine the outcome. For example, courts will disturb discretionary trial court rulings only upon a showing of a clear abuse of discretion, that is, the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. Bearing the appropriate standard in mind can be critical to counsel's arguments.

The drawbacks to the compilation are that the CD can be accessed only on a personal computer and not on a CD player. Each case includes the oral argument, the text of the opinion, the names of the justices, and a brief synopsis of the case. A further drawback is that it is not apparent which justice is speaking unless the voice is uniquely recognizable or counsel identifies the justice when responding to a question. Occasionally counsel will identify a justice by the wrong name and be duly admonished.

A visit to the Supreme Court reveals the intimacy of the room. Counsel tables are closer to the justices than we observe in most courtrooms around our state. And, technology has not invaded these hallowed halls. The recordings on the *Greatest Hits* are from a reel-to-reel tape system with each justice controlling his or her own microphone with a switch and the microphone on the lectern managed by court staff. This explains the sometimes poor quality of the sound of the tapes. Some of the recordings leave much to be desired. Papers are shuffled and coughs are muffled. Yet, these lend an aura of reality and presence to the proceedings.

Another source of oral arguments is the Web site www.oyez.org. This Web site is more easily accessed and contains some oral arguments and sometimes transcripts of arguments. However, as is often the case with a written transcript, much is lost. Listening to the recorded voices is truly stepping back in time.

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The Supreme Court's Greatest Hits and many other works are available at the library, not just works for researching a pressing legal conundrum but also works that are worthy of reflection and that exhort us to the highest standards in the profession. Despite the lack of adequate facilities, the able and highly trained San Francisco law librarians remain available to assist lawyers, judges, and the public. Visit soon, in person or at www.sfgov.org/sfll, and support your local law library.

Judge Mary E. Wiss sits on the San Francisco Superior Court in a civil trial assignment and has been the presiding judge of the Appellate Division of the San Francisco Superior Court. She is the current president of the California Judges Association. *Judge Wiss wishes to thank Ruth Geos, reference librarian with the San Francisco Law Library for her help in researching this article.*