

Highlights of Judge David Ebel's Comments Comparing and Contrasting Trial and Appellate Practice*

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Judge Ebel offered the FFA his observations on the differences between federal trial practice and appellate practice, based on his experience on the U.S. Court of Appeals for the Tenth Circuit, and his trials sitting by designation in the U.S. District Court for the District of Colorado.

Judge Ebel began by summing up the difference:

“The District Court is like going to the circus.
The Court of Appeals is like reading about going to the circus.”

Differences Between Trial and Appeal from a **Lawyer's** Point of View

1. The Role of the Lawyer's Personality
 - a. At trial, the lawyers' personalities are incredibly important. The first thing that jurors often want to talk about after trial with Judge Ebel is how much they liked (or disliked) a particular lawyer.
 - b. On appeal, personality counts for less. The briefing and oral argument process make the intellect and the persuasive reasoning of the contending lawyers the overriding concern.
2. The Relative Importance of the Facts v. the Law
 - a. At trial, lawyers spend too little time on the law and legal issues. Consider having a “shadow lawyer” whose job, exclusively, is to pay attention to the legal issues that need to be addressed, with particular attention to jury instructions.
 - b. On appeal, lawyers do not pay enough attention to the facts. Approximately 75% of the questions asked by appellate judges relate to the facts. “Was there testimony on this subject at trial, and if so, what was it?” The attorneys at oral argument often do not know the answer, particularly if they were not trial counsel.
 - c. So, should trial counsel handle the appellate argument? Yes, except when they shouldn't. Trial counsel knows the facts, but may be too caught up in the emotion and detail of the trial. It's a case-by-case analysis.
3. Time Management Problems
 - a. At trial, lawyers have too much time to present their case, and as a result, they in fact use too much time, without focusing.

* Notes by John Walsh, Hill & Robbins, PC

- i. Studies show current American attention span is approximately 20 minutes, due to 30 minute television programs, with 20 minutes of content.
 - ii. As a result, lawyers should find a way to change the subject, the tone or the manner of presentation ever 20 minutes or so, in order to keep the attention of jurors (and judges).
 - b. In appellate arguments, lawyers have too little time: 15 minutes.
 - i. Strategy: Imagine you're a dying person, and that you've got two minutes to make your most important point. Prepare to make that point in two minutes. If you get beyond it, make your next point.
 - ii. The best oral argument Judge Ebel ever heard was from Rex Lee, former Solicitor General of United States.
 - (1) Lee stood up and said: "My name is Rex Lee. There are three ways I can lose this case."
 - (2) Lee went on to explain how his arguments overcame each of the three vulnerabilities.
 - iii. Appellate oral argument can and should be boiled down to three points:
 - (1) Your strongest argument
 - (2) Your biggest vulnerability, and how it can be overcome
 - (3) Why the court should want to rule in your favor
4. Body Language
- a. Body language should be used less at trial, and more at appellate argument.
 - b. In trials, lawyers often try to signal their opinion of testimony or argument by body language, e.g., rolling eyes, making faces, sighing. Jurors (and judges) hate this sort of body language, and are offended by it. Stop doing it.
 - c. At appellate argument, the judges are used to "wooden" performances, in which counsel maintains a "death grip" on the lectern. Loosen up and use your hands; show some enthusiasm. The judges will appreciate it.
5. Who Has Control?
- a. At trial, the trial lawyer has control of themes, facts, approach and witnesses. The trial judge is only a "traffic cop."

- b. In the appellate process, the lawyer does not have control -- the legal issues control. As result, an appellate lawyer has to focus rigorously on his or her arguments in the short time available.

Differences Between Trial and Appeal from a **Judge's** Point of View

1. The Role of Equity and Fairness in Decisionmaking
 - a. At the District Court, equity and fairness are constantly in play in the judge's decisionmaking.
 - b. At the Court of Appeals, equity and fairness are far less important than the intellectual question of the right interpretation of the law.
2. The Burden to Do the Right Thing, Legally
 - a. At the District Court, the judge can take great comfort from the fact that the Court of Appeals will review and correct any errors of law. And there isn't time to get worked up about every legal issue presented.
 - b. At the Court of Appeals, judges feel great pressure to "get it right." The Supreme Court does not review 99.5% of the cases decided at the Circuit level. As a practical matter, that means the almost always, a Court of Appeals panel finally decides a legal question for the entire circuit. This can be a heavy burden.
3. Time Pressure
 - a. Both the District Court and the Court of Appeals have staggering workloads. Judge Ebel once calculated that he should be reading approximately 1000 pages of case-related materials every day, just to keep up.
 - b. At the District Court, however, the feeling of time pressure is much greater. Everything is tightly calendared, so that a delay in one task has a cascading delay effect on other matters. The Court of Appeals has more flexibility in its work.

Judge Ebel's Advice and Practice Tips to Lawyers

For Trial Lawyers

1. Adopt and embrace modern technology to present your case at trial.
 - a. Jurors expect to see documents immediately.
 - b. Jurors expect to be entertained, and for the trial presentation to be interesting.
 - c. Consider how your videotaped depositions will look. Videotaped depositions can be vivid, or utterly boring. Consider telling the video technician to change the angle of filming every 20 minutes or so.

2. Be nice, and make sure your main witnesses are nice: Jurors care about this.
3. Explain missing witnesses, missing exhibits, missing arguments.
 - a. Jurors notice when there is a “gap” in the presentation.
 - b. Have an explanation ready to avoid speculation by jurors.
4. Have a theme.
 - a. Plaintiffs generally have a theme in mind, but not always.
 - b. Defendants often don’t, other than “Plaintiff’s wrong.” This is a weak approach.
5. During trial, give the judge advance notice of difficult legal or evidentiary issues. Judge Ebel is very appreciative of the advance notice, which enables him to do a better job, and to avoid unanticipated delays.

For Appellate Lawyers

1. Focus, focus, focus. Eight or ten or twelve issues on appeal are too many.
2. Don’t use all the pages allotted, *i.e.*, 50 pp. opening; 50 pp. responsive; 25 pp. reply
 - a. A 50-page brief telegraphs that the lawyer did not use any judgment to focus the issues.
 - b. Even a few pages fewer than 50 shows an effort to organize and focus.
 - c. Judge Ebel gets “goose bumps” when he sees a 39-page brief. He spends more time on a 39-page brief than a 50-page brief, out of gratitude and a sense that the lawyers who wrote it were paying close attention to what matters.
3. Eliminate personal attacks and most adjectives. Simple declarative statements are the most powerful tools. Rhetoric and hyperbole show doubt and potential weakness.
4. At oral argument, speak loudly and use the microphone.
 - a. Tenth Circuit judges are not “spring chickens.”
 - b. The Tenth Circuit courtrooms are not good acoustically, and the speaker system is weak.
 - c. Stay within about four inches of the mike, like a kid with a good lollipop. If you lean back and away from the mike, it won’t pick up your voice.