Friedman Lecture in Appellate Advocacy

Frank H. Easterbrook*

Introduction

I’m delighted to have the chance to honor my mentor and friend, Daniel Friedman, by doing just what he loved: talking to a bunch of lawyers. I met Dan when I joined the Solicitor General’s Office in 1974. He had arrived in 1959 and had participated in its work even earlier, while he was posted to the Antitrust Division during the 1950s. He overlapped with Oscar Davis, Robert Stern, Ralph Spritzer, and other legends of the Office. By the time he became Deputy Solicitor General in 1968 he was the Office’s institutional memory and the custodian of its traditions.

Today there are four deputies, but in 1968 there was just a Deputy Solicitor General. Earlier Dan had been “Second Assistant,” a position that today be ranked among the deputies. Solicitor General Griswold, who promoted Dan to Deputy Solicitor General, later appointed some other Deputies, including Lawrence Wallace and Andrew Frey. The positions of “First Assistant” and “Second Assistant” were abolished.

In June 1973, when President Nixon appointed Robert Bork as Solicitor General, he named Jewel Lafontant as Deputy Solicitor General. Perhaps the White House thought that this would displace all existing deputies, or perhaps that the new appointee would become the principal deputy, a post established during the Reagan Administration when Solicitor General Lee brought in Charles Fried to handle especially sensitive cases and to serve as Acting Solicitor General where Lee was disqualified. Fried’s position has

* Chief Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, The Law School, The University of Chicago. This talk—the inaugural Daniel M. Friedman Lecture on Appellate Advocacy, established in his memory by the Federal Circuit Bar Association and Judge Friedman’s law clerks—was delivered at the United States Court of Appeals for the Federal Circuit on November 16, 2012. Copyright 2012 by Frank H. Easterbrook.
since become known as the “political deputy” and has been filled by many distinguished people, including John Roberts. But Solicitor General Bork did not want a political deputy. He sought experience and continuity, treating Dan Friedman as the first among his deputies. That’s why Dan became the Acting Solicitor General for two months in 1977, between Bork’s resignation at the end of the Ford Administration and the arrival of Wade McCree with the Carter Administration.

Dan Friedman began his career in private practice in New York following his graduation from Columbia Law School in 1940. But it was a short stint, and not just because of the war. He encountered widespread prejudice against Jews. Like other forms of ethnic and religious prejudice, this was hard to understand. By 1940 three Jews had sat on the Supreme Court (Justice Frankfurter had just been appointed) and many had served in the Cabinet. But lots of prominent law firms would not hire Jews, and others kept their numbers down. Dan Friedman found the federal government a more tolerant employer and moved to the SEC, where he worked both before and after his time in the Army. He observed later that the federal government was the major beneficiary of the New York bar’s prejudice against Jews and women. The Department of Justice had an easier time hiring the best minds in the profession then, than it does today.

The Antitrust Division was Dan’s next stop, followed by the Solicitor General’s Office and the judiciary. When Dan became Chief Judge of the Court of Claims in 1978, Solicitor General McCree transferred his portfolio of civil cases (including labor, securities, and antitrust) to me. I may have filled his slot, but not his shoes.

When Dan was under consideration for the judicial appointment, supporters of another candidate objected to Dan’s age: sixty-two. He had a medical exam, and the physician concluded that he was fit enough to fly military jets. Members of the Solicitor General’s Office then asked the judicial-vetting staff in the Department of Justice what they really wanted: fifteen years of a good judge, or thirty years of a mediocre one. The President picked the good judge—and it turned out that Dan gave not fifteen but thirty-three years of service as a bonus to the profession and the citizenry.

Before Dan Friedman’s promotion to the judiciary, I benefitted from his accumulated wisdom and skill. He spent four years editing my petitions and briefs, and providing pointers to all of the Office’s staff. His briefs and oral arguments—he delivered about eighty—were a model to us all.

I want to talk today about what that model was—about what made and makes the Solicitor General’s output distinctive. I also want to talk about whether the Office’s practices and qualities are possible or desirable in private practice.

Effective appellate advocacy depends on three things: good substance, good exposition, and good presentation. It is impossible to win without a strong
substantive position. It is hard to get your substantive position across without good exposition—meaning good organization, diction, grammar, and rhetoric. And a brief does not put the point across if the judges have trouble reading it. Poor exposition discourages reading, but so does poor typography and the other aspects of physical presentation. Judges read a lot. Advocates have to make their documents accessible so that they receive the attention they deserve and can be absorbed on the single reading they are likely to get. I plan to cover all three aspects of advocacy: substance, exposition, and presentation.

I. Good Substance

Perhaps you will luck into a case that can’t be lost. Few of those reach the Supreme Court, however, and the United States already had lost all of the cases it presented to the Justices in petitions for writs of certiorari. How do you turn an established loss into a victory?

You start by knowing your audience. Appellate judges are busy generalists. Judges in this building are the Nation’s most specialized, but the mixture of patent, tax, contract, civil service, international trade, and other matters is a broad portfolio. Justices of the Supreme Court are less busy than judges of the federal appellate courts—and the Justices hear only half as many cases per year as they did when Dan Friedman and I were in the Solicitor General’s Office—but they still are busy. The first step in crafting a good presentation is to know both the busy part of the judge’s life and the generalist part of the judge’s life. It means that the appellate advocate serves as translator, taking a specialist’s knowledge and making it accessible to a generalist. What goes for knowledge goes double for jargon and acronyms. These must be turned into English. Perhaps failure to write for an audience of generalists is why the case has been lost. Making the right kind of generalist-centered presentation, with the background and concrete examples that generalists need to grasp the situation, may turn the case around.

Here’s an example from my own experience. A litigator from a major law firm recently argued an air pollution case in the Seventh Circuit. His brief and oral presentation were crammed with industry-specific jargon and acronyms that made the situation impenetrable to the judges. We couldn’t figure out what the defendants were doing or why the regulator cared, let alone how the statutory sections in dispute fit with the rest of the Clean Air Act. The judges asked the lawyer to use English words of one syllable. He replied that it had taken him a long time to learn the specifics. I said, in my best imitation of Yoda: “You must unlearn what you have learned.” Knowing your audience ensures that counsel will first learn and then translate for generalists; the lawyer in my example never reached that second step, but the Solicitor General’s Office always does.

It is easy to preach that the appellate advocate must show the judge how the industry works, what the problem is about, and how the statute under
analysis deals with this problem—and to do all of this by concrete examples rather than generalities that leave non-specialists adrift. How does the Solicitor General’s Office turn aspirations into reality? In two ways. First, the Solicitor General’s Office exists. Second, lawyers in the Office communicate with one another all the time.

Existence is the hardest thing for the private bar to replicate. The Solicitor General’s Office is a body of appellate litigators—all generalists themselves, the better to speak effectively to the judicial generalists. They take over a case after the court of appeals is done with it. Generalists speaking to generalists ensures effective translation; the lawyers in the Solicitor General’s Office must learn the subject themselves, and having learned it can communicate better with the audience. This also means that bad arguments are likely to be jettisoned; no one at the Solicitor General’s Office is wedded to the clinker that lost the case the last round. Starting over with generalists is the very best step to better substance.

It is possible to replicate this in private practice by having appellate groups. Robert Stern founded the first at Mayer Brown. Others have sprung up, often started or staffed with lawyers who come from the Solicitor General’s Office. But it is expensive to have an appellate group start over on a case and re-do research and writing. When the client won’t pay for an appellate-practice group, there still remains the second distinctive practice in the Solicitor General’s Office: exchanging briefs and talking all day long.

The best way to test an argument designed for a busy generalist, such as an appellate judge, is to present it to another busy generalist, such as an Assistant to the Solicitor General. When Dan and I were there, talk was continual—at lunch, while playing darts in the afternoon, and when wandering down the hall and ducking into colleagues’ offices—on the cases pending in the Supreme Court. A lawyer who has been working on a case for a week can talk with another who is fresh to the problem. The exchange strengthens the work of both. And this aspect of the Office’s organization is easy for a private firm to replicate. There is some expense; the client will be billed for time spent talking. But that time is extraordinarily valuable. Having a generalist talk through the problem and review the brief can do wonders for the strength of the argument. The extra set of eyes will catch problems and suggest lines of argument. It is something Dan Friedman encouraged all the younger lawyers to do. It is something you should do yourself.

The Office also distributed all of its petitions and briefs to every lawyer, and everyone was expected to read everything. It gave a good sense of the shared mission and provided an excellent base of knowledge for new cases. This, too, can be done in private practice—not only for cases pending at a given firm, but also for the output of the Solicitor General’s Office itself. Every petition and brief the Solicitor General files is posted online. Get them and read them. You learn about the Court’s docket, about how a generalist lawyer
communicates to a generalist judge, and about effective physical presentation, a subject to which I’ll return.

I have said that good substance comes from knowing that appellate judges are a pack of busy generalists, for whom all specialized knowledge must be translated. It also helps a lot to know who, in particular, your audience is. The Solicitor General’s Office has just one audience: The Supreme Court, which always sits en banc.

Dan Friedman encouraged everyone, both newcomers and those who had been at the Office for years, to learn about that audience by doing two things: first, reading all of its new opinions; second, watching oral argument. The Department of Justice had a motor pool, and it was busy on argument days shuttling the Solicitor General’s staff to and from the Court. It was rare for any case to be argued without several members of the Solicitor General’s staff in the audience.

The Court’s work is of a piece; Oliver Wendell Holmes would say that particular decisions were just fragments of a single fleece. To see what happens in one case is to know how best to approach the next. Interpretive principles and strategies are common across cases. Both reading the opinions and watching the arguments tells you what kinds of contentions are congenial and what kinds are not. Justices can reveal this information by facial expressions as well as by spoken questions or expressions of exasperation in opinions.

Reading everything and watching many arguments is easy for the Solicitor General’s staff but hard for a private lawyer, especially one who practices in multiple appellate courts. Still, it is essential to have a base of knowledge. You can read twenty or thirty of a court’s opinions to get a sense of its approach to adjudication. You can spend a day or two in the audience before giving your own oral argument. I presented arguments in most of the federal appellate courts during the years after I left the Solicitor General’s Office and before I joined the Seventh Circuit, and I would not have dreamed of arguing without the kind of preparation I’ve just discussed. It is an important part of Dan Friedman’s message to all appellate lawyers.

By the way, when Dan Friedman told lawyers to know their audience, he did not mean to look up what particular judges had written on a topic and spout it back to them. That’s not knowing your audience; that’s toadying, a very different strategy. Nothing causes an appellate judge to look askance faster than an effort to make a judge-specific argument. I’ve seen distinguished lawyers destroy their credibility, and perhaps their cases, by using that strategy.

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1 Oliver Wendell Holmes, *Preface to Collected Legal Papers* (Harcourt, Brace & Howe 1920). In thanking the writer Harold Laski for his help in the publication of *Collected Legal Papers* Holmes writes, “I owe him thanks for gathering these little fragments of my fleece that I have left upon the hedges of life . . . .” *Id.*
in the Supreme Court. In the Seventh Circuit, we let one mention go by and
on the next remind counsel that the opinion speaks for the court. When
the lawyer says that he knows this, we ask why he made an ad hominem
argument. Counsel’s face turns red. Don’t let that happen to you. Prepare to
face the court as a whole. You need to know how the institution works and
what arguments are congenial to it.

So far I have discussed how generalist lawyers help when dealing with
generalist judges, and how the private bar could be more like Dan Friedman’s
ideal. Now I’ll turn to three fundamental strategies the Solicitor General’s
Office used to present a strong substantive argument.

John W. Davis, a former Solicitor General, wrote a famous essay on appellate
advocacy in which Rule #1 was “Trade Places Mentally with the Court.”
That’s what I’ve been talking about so far. It is the single most important
strategy. Davis’s Rule #2 was to present a strong statement of the facts—not
a slanted statement (that will be exposed and cheapen your advocacy), but a
rhetorically effective statement. Organize the facts; show which matters; set
up the narrative so that the facts fit naturally into the legal categories that
generalist judges know.

Dan Friedman taught that approach in the Solicitor General’s Office, and
he also taught a related strategy: couple a statement of the regulatory system
with a statement of the facts. Lawyers new to Supreme Court practice may
be surprised to pick up one of the Solicitor General’s briefs and discover that
the “Statement of Facts” is full of stuff that they don’t think of as “facts” at all.
The Statement of Facts may begin with a brief history of telecommunications
regulation, followed by a description of a statute that was added in 1956 and
amended in 1994. Only then does the brief mention the case-specific facts
and describe what the district judge and court of appeals did—always in the
form of a narration, not a witness-by-witness summary.

Why was that Dan Friedman’s style? Because facts don’t exist in the abstract,
and because the Supreme Court does not grant review to decide one case
on its facts. Which facts matter, and how they matter, depends on the legal
landscape; and in the Supreme Court the case is about the legal landscape
more than it is about how these litigants got themselves into a jam. So for the
Supreme Court, and often for a court of appeals, the legal structure is a fact
to be laid out. Knowing this makes for better advocacy: concentrating the
Court’s attention on what matters is the best substantive start. This technique
won’t rewrite statutes to be more favorable, but it helps you make the best
you can of the law in relation to the facts.

Dan Friedman’s next piece of advice to all of the new arrivals in the Solicitor
General’s Office was this: be positive. Too much litigation gets into a cycle

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of denial. The answer denies whatever was in the complaint. The motion for summary judgment denies whatever was in the answer. The opening brief on appeal denies whatever the district judge said. The appellee’s brief denies whatever the appellant said. The petition for certiorari denies whatever the court of appeals said. And so on.

This is a trap. You don’t win cases by explaining where the other side messed up, or where some judge erred. You win cases by presenting the winning argument. That is, explain why you are right, and not why someone else is wrong.

The structure of the Solicitor General’s Office helps. A new group of lawyers coming to a case after the court of appeals has made its decision is apt to sit down and re-think the issues. What is the dispute really about? What is the best line of argument? That helps lawyers concentrate on why their client should win. And the way the Solicitor General’s Office formulates a position helps. Different agencies of the government, and different divisions within the Department of Justice, make presentations to the Solicitor General and his staff. After resolving all differences within the Executive Branch, the Solicitor General decides what position to take, and then his staff devises the best line of argument. This is the tradition Dan Friedman passed on.

Replication in private practice is hard, because there is less internal competition before the position is selected. But it is possible. Lawyers can and must resist the tendency to deny whatever preceded them. Even when the client will not pay for a new team of lawyers in an appellate practice group, the advocate can and must sit down and work the problem through from scratch, in search of the argument that explains why the client is right rather than why someone else is wrong. And when looking for this winning line of argument, the lawyer naturally comes up against obstacles. This leads to Dan Friedman’s next rule.

That rule is: know your adversary’s position better than your adversary does. When thinking the subject through from the beginning, consider all of the possible counterarguments. Then deal with them in your brief—not by saying “it could be argued that X, which is bad because Y.” That’s negative. Instead you think of these arguments and then deal with them as part of your positive theme. Weave the answers into the main presentation.

You’ll do better anticipating the stumbling blocks if you follow the parts of Dan Friedman’s method that I’ve already mentioned. Think like a generalist. Discuss with other generalists, who may see obstacles that generalist judges would see. Exchange drafts with other generalists and get critiques. Then deal with the obstacles in the main line of argument.

Judicial opinions frequently deal with opposing contentions in footnotes or addenda tacked on in response to a dissent. That’s because the authors have obtained approval from their colleagues before the dissent is circulated, and they don’t want to jeopardize the majority by reworking the fundamental
argument. But lawyers should not write that way; roll everything into the argument from the start. Actually judges should not write that way either. I try to write so that my opinion anticipates the dissent, and any necessary responses are part of the main line. That’s because I learned from Dan Friedman.

The Friedman approach has several benefits. One, it makes the argument tighter and more cogent. Two, it often avoids the need to file a reply brief—I worked on approximately one hundred merits briefs during my time in the Solicitor General’s Office and filed fewer than a dozen reply briefs. Three, it helps deal with the problem of the bright law clerk.

Why are law clerks a problem? Because they may well be brighter than your opponent! If your strategy is to make a one-sided argument, then use a reply brief to deal with your opponent’s responses, you can get into trouble if your opponent does not make his best argument—or, worse, if your opponent omits something that a neophyte will think is a good argument, but to which you have a crushing comeback. If you wait for an argument that never appears, you miss your chance to show the judge why the apparently bright idea that his law clerk has just devised is all wet. And most bright ideas in law are all wet; just as most mutations in biology are deleterious.

Your positive argument thus must anticipate and deal not only with counterarguments you expect from your adversary, but also with arguments that your adversary is likely to omit. Some people call this intellectual honesty. Dan Friedman called it that—and he also called it sound strategic planning. He was right. Nothing is worse than receiving an opinion that rules against you on the basis of an argument never made, or a better variation of an argument that was poorly made, and to which you had an effective antidote that never appeared in your brief. Don’t turn to your keyboard and bang out a petition for rehearing. That’s a waste of time in the Supreme Court and rarely succeeds in a court of appeals. You have to anticipate the argument before things go wrong. Dan Friedman made sure that all arrivals to the Solicitor General’s Office knew this, and he insisted that they practice it. Now you too know Dan’s secret.

I could continue all afternoon with Dan Friedman’s approach to substantive argument, including his constant advice to fight the battle of characterization in a way congenial to generalists. Edward Levi thought that much of law lay in choice of analogy; Dan Friedman agreed and thought of generalist judges as having minds full of established categories. Try to make your problem fit categories that judges already know, because these categories often come with legal rules attached. If you can make a new problem seem old, you are ahead of the game. The plaintiff in an antitrust case tries to make a novel collaborative practice look like a cartel, which is unlawful per se; the defendant tries to make it look like a joint venture, which is covered by the Rule of Reason. If you want to see a battle for characterization from a case that Dan and I handled at the very end of his tenure, look at *Broadcast Music, Inc.*
But it is hard to explain this process well without a series of examples, and time is short. So I’ll let this topic go and turn to the second major heading.

II. Good Exposition

Appellate staffs in the Department of Justice prepared drafts that were submitted to the Solicitor General’s Office. An Assistant to the Solicitor General revised or rewrote the draft and submitted it to a Deputy Solicitor General. Dan Friedman and the other Deputies first dealt with substance and then turned to style, because good exposition is essential if you are to get your substantive argument across to a busy audience that will read your brief just once.

What does good exposition entail? You can get good advice in Stern & Gressman’s Supreme Court Practice, which was on the bookshelf of every lawyer in the Solicitor General’s Office. The book’s descendant is Gressman, Geller, Shapiro, Bishop & Hartnett, Supreme Court Practice, and it’s still helpful, though it has become much longer. A more accessible and punchy version can be found in Justice Scalia’s book with Bryan Garner, Making Your Case: The Art of Persuading Judges 107–36 (2008). But Dan Friedman was there ahead of them.

Good exposition means not writing like a lawyer, with arcane terms, plentiful acronyms, and lots of jargon. That might work well for an audience of specialists, but it is a disaster for an audience of generalists. The goal in the Solicitor General’s Office was to write for an audience of generalists, which meant writing in plain English without jargon, and with only well-known acronyms (NLRB but never MPPAA or IIRIRA). Dan Friedman insisted on plain talk using simple words. That’s a vital rule. Any private practitioner can and should do the same—though pulling it off requires careful editing with the goal of simplifying and shortening briefs. That was Dan Friedman’s goal in reviewing.

His style was bone dry. He went through a brief and deleted almost every adjective and adverb. “Very” and “massive” vanished. No instance of “clearly” or “plainly” or “simply” escaped his red pencil. Good thing too. “Clearly” signifies that some question has just been begged. If you must say that something is clear, it usually isn’t.

Adjectives and adverbs designed to intensify a point actually weaken it. Instead of shouting at judges through intensifiers or exaggeration, use the space for a better line of thought. For the same reason nothing other than a case name belongs in italics. If you are tempted to shout at the judge through passages of italics or boldface, resist. Remember the old adage: if you are short on the facts, pound on the law; if you are short on the law, pound on the facts; if you are short on both the law and the facts, pound on the table. Adjectives, adverbs, “plainly,” and italics are forms of pounding on the table.
Leave them out, and your argument comes across better. Dan Friedman made sure you left them out.

A variant of the no-intensifiers rule is the no-overstatement rule. Never overstate what a case holds. It was unnecessary for Dan to tell the assistants not to misstate what a case holds. Never overstate a fact. Never omit a vital fact favorable to the opponent. Never make an error in summarizing a case or citing the record.

Easy to say, hard to do. Dan Friedman had help. The Solicitor General’s Office employs a staff of cite-checkers and fact-checkers. Every fact, every citation, had to pass quality control before it went into a brief. A staff of paralegal aides to brief writers may be beyond the budget of small firms, but it would be easy for large firms to afford. Every firm with an appellate practice group can and should emulate the Solicitor General’s Office on this front. Other large firms should do it too.

Dan Friedman also favored short sentences in active voice, arranged in short paragraphs. Anything that Strunk & White disparaged in *Elements of Style*, Dan Friedman disparaged. Briefs from the Solicitor General do not use passive voice unless absolutely essential; it matters who did what to whom. Short, active-voice sentences also are easier to grasp and retain—and Dan Friedman never let lawyers forget that the Justices and judges would read the brief just once before a case is argued, and even the judges who wrote opinions would not necessarily read it cover to cover a second time.

Again following Dan Friedman’s advice is something every practicing lawyer can and should do. Get the legal profession’s version of Strunk & White: Bryan Garner’s *Elements of Legal Style*. The time devoted to reading it annually is well spent. If you learn nothing else, you will learn the phrase “noun plague”—the self-referential description that Garner and Wilson Follett apply to piling up strings of nouns to modify other nouns. Here’s an example: “Consumers complained about the National Highway Traffic Safety Administration automobile seat belt rule.” That’s nine nouns in a row, with the subject postponed to the end! Phrases such as this give briefs the consistency of oatmeal. Know your parts of speech. Use nouns as nouns, verbs as verbs, and adjectives as adjectives. Dan Friedman may not have heard the phrases “noun plague” or “zombie nouns,” but he knew and abhorred the practice. He insisted on respecting parts of speech and including verbs to make sentences move. Private practitioners can and should do the same.

All lawyers can prepare to write good, persuasive prose by reading good, persuasive prose. Read *The New Republic* and *The Weekly Standard*, where smart people try to persuade other smart people through essays that span

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only three or four pages. Learn how the craft works. Liberals should read *The Weekly Standard* and conservatives *The New Republic*, or everyone should read *The Atlantic* or other intellectual journalism. If you write like that for judges, you will get your ideas across.

Dan Friedman would never let a show of pique or temper get past him. No insults to the judges below, or the lawyers, or the litigants, no matter how they have misbehaved. If they really need a thrashing, administer it by quoting them without commentary. Never editorialize; even the worst events were not “awful” or “tragic” or even “unfortunate.” State the facts and let others supply the judgments; if you marshal your facts and arguments well, the judgments you favor will be supplied spontaneously by the judicial audience. Once again, all of these precepts are as practical for private practitioners as for the Solicitor General’s Office—though carrying out the program requires editing. Most lawyers, like most writers of all kinds, are poor editors of their own work.

### III. Good Presentation

We arrive at the last of the three essential elements of advocacy. Most discussions stop with substance and exposition. Not Dan Friedman. His goal was to produce this: The grey brief. The place the Justices would start, and not just because of its cover.

The Solicitor General’s Office had established ways to produce an attractive physical product—one easy to read, and therefore more likely to be read first and retained after one reading. If the document was over a certain length, it was sent to the Government Printing Office, which often passed the work to Wilson-Epes Printing. It did a terrific job of setting legal texts in hot lead type. When the brief was shorter, it went to the print shop in the basement of the Department of Justice, which used a simpler process that was less attractive but still could be stapled into booklet form and was easy to read. Both Wilson-Epes and the basement print shop gave us page proofs, which were read carefully by both lawyers and paralegals, the better to eliminate errors.

That’s the old way to produce a brief: turn the job over to specialists, the practitioners of Gutenberg’s profession who know what they are about. Today even when a court requires booklet-style printing, as the Supreme Court continues to do for all paid cases, the work is likely to be done inside law firms or the corner FedEx Print & Ship Center. The lawyer uses word-processing software, hits “print” or sends an Acrobat file over the Internet, and a version of a photocopier produces, collates, and binds the pages. No proof stage. And, more important, no sense of design or care about how type works.

The result is frequently horrid.

Not because the software or machinery is deficient. It is because lawyers’ seven years of university education does not include a course on typography. And why should it? That’s a job for another profession. Yet desktop publishing changed the world, and now lawyers can prove not only the adage that a little
knowledge is a dangerous thing but also the adage that absolute typographic
power corrupts absolutely.

Things became particularly bad in the courts of appeals when WordPerfect
introduced a feature called “make it fit.” Select a menu item, and type was
shrunk, and margins scaled, until enough words had been crammed into each
page to make the total come to fifty. Federal Rule of Appellate Procedure
32 was amended to set limits in words rather than pages. Judges hoped that
lawyers would produce attractive briefs, once squeezed type no longer gave
a leg up. How wrong we were!

Many lawyers seem to think that judges love the typewriter look, and they
choose typefaces where every character has the same width. Then they put
two spaces between sentences, turn on right justification, and neglect to allow
hyphenation. Case names are underlined, just as with typewriters, and many
elements are set in all-caps text, because typewriters did not offer any other
form of emphasis. The result is ugly. It is impossible to imagine something
harder to read.

Look at any professionally printed book. It is printed in proportionally
spaced serif type, with one space between sentences, includes hyphenation,
and uses italics for case names and emphasis, and boldface rather than all-
caps. Both experience and several studies show that this approach makes text
easier to read and remember.

Some briefs get half way to print quality. They use proportional spacing,
but only because they stuck with the word processor’s default—Times New
Roman or Cambria. Times was designed for newspapers and has small lower-
case letters such as the a and x. This works in narrow columns but not in
wide ones, and briefs use wide columns. No good book is set in Times or
any other face with relatively small lower-case letters (what typographers call
a small x-height).

Things got so bad at the Supreme Court that the Justices amended their rules
to specify what typeface briefs must employ. Every brief must be set in a font
with the word “Century” in its name. See S. Ct. R. 33.1(b). Century, Century
Extended, New Century, Century Schoolbook, New Century Schoolbook—
they are fine. Anything else comes back to the lawyer postage due.

But choosing a good font is not enough. Reading depends on getting right
all the details of justification, hyphenation, leading (that’s the vertical spacing),
and kerning (the space between glyphs), as well as picking a good typeface
and avoiding typewriter conventions such as extra spaces after periods.

What’s a lawyer to do? It is still possible to turn the brief over to a professional
typesetter and have the job done right. The Solicitor General’s Office does
that. The brief I showed you was produced this year in the Department of
Justice’s print shop. Any moderately sized law firm could have a printing staff
of its own, to go with a staff of proofreaders and cite checkers. No architect
would dream of making a pitch to a potential client without professionally
produced drawings and models; why do lawyers ever make a pitch to a judge with ugly, amateurish documents? But very few law firms have an in-house print department. If you want to achieve the Solicitor General’s success, however, you should follow its production practices.

If lawyers are not going to employ typographic professionals, they should learn a little more about type. Fortunately, this is easy. The Seventh Circuit has posted advice on its web site. Get it and follow it. And good models are readily available. The Solicitor General’s professionally typeset briefs are posted on its web site. Download them and replicate the look. The Supreme Court’s professionally typeset opinions are posted on its web site. Download them and use the same conventions.

Just as you can improve a brief’s exposition by following the advice in Strunk & White’s Elements of Style and Garner’s Elements of Legal Style, you can improve a brief’s presentation by following the advice in Robert Bringhurst’s The Elements of Typographic Style. Notice a pattern in the titles? Both Garner and Bringhurst are trying to do for their fields what Strunk & White did for general prose style. Unfortunately for lawyers, Bringhurst’s book is aimed at book and magazine publishers plus advertising agencies, which produce much more type than law firms do. Bringhurst assumes a professional audience.

Until last year there was no typographic equivalent of Strunk & White for lawyers. Now there is. A type designer who went to law school and today is an appellate advocate is just the person to bridge the gap. That person is Matthew Butterick, and his book Typography for Lawyers provides all the tips and examples any lawyer needs to produce readable briefs. Typography for Lawyers can be had for $25 in paper or for $10 electronically, in Kindle or iBooks. Never be without it. There’s also a web site that contains the most important hints.

Conclusion

I began by promising to relay Dan Friedman’s wisdom on appellate advocacy. What I have just said about typography and other aspects of physical production can’t be attributed to him, but following my advice will bring any lawyer’s work

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closer to the Solicitor General’s style. There is no better, or more successful, appellate practice group than the Office of the Solicitor General.8 It is costly to emulate the Office’s collection of specialists in being generalists, with its multiple layers of review and experts such as Dan Friedman who have twenty or more years’ knowledge about how to persuade a single appellate court. But it is cheap to emulate the Office’s physical presentation. Of all the tripod of ingredients—substance, exposition, and presentation—the physical part is easiest for everyone to achieve, yet remains the rarest.

I commend to you every ingredient that makes up the grey brief of the Solicitor General. Dan Friedman was for decades the custodian of the traditions that produce the grey brief. He passed them on to his successors, where they are still in use. You should use them too.

And with that I will follow John W. Davis’s Rule #10.9 When you have made your point, sit down.

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8 Forget the win-lose record for a moment. The leading private practitioners at the Supreme Court’s bar spent time in the SG’s office. See Kedar S. Bhatia, Top Supreme Court Advocates of the Twenty-First Century, 2 Journal of Law (1 J. Legal Metrics) 561 (2012). They learned Daniel Friedman’s lessons while there, and that knowledge has paid off.

9 See Davis, supra note 2, at 898.