# Federal Trade Commission

**Ten Lessons in Appellate Advocacy**

**Remarks of J. Thomas Rosch***
**Commissioner, Federal Trade Commission**

**before the**

**Howrey LLP Antitrust Fundamentals Seminar**

**Washington, DC**

**February 24, 2011**

Last Fall at the ABA Antitrust Section's Masters Course in Williamsburg, I talked about some of the lessons—both good and bad— that I learned during the forty-plus years I was an antitrust trial lawyer.[1] There were more lessons I could have shared—like who gets to sit closest to the jury (it's always plaintiff's counsel, as Bill Schwarzer and I learned to our dismay one day when, representing Chrysler, we tried to preempt those coveted seats only to have the trial judge

* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Henry Su, for his invaluable assistance in putting these thoughts to paper.

[1] J. Thomas Rosch, *Can Antitrust Trial Skills Really Be "Mastered"? Tales Out of School About How to Try (or Not to Try) an Antitrust Case,* Remarks Presented at the ABA Section of Antitrust Law Antitrust Masters Course (Sept. 30, 2010), *available at* http://www.ftc.gov/speeches/rosch/100930roschmasterscourseremarks.pdf.

(old Judge William Sweigert) sternly tell us to take our proper places).[2] And whether there's any point, as a defendant, in contesting the seating of a 6-person instead of a 12-person civil jury (there isn't, though that would always seem to favor the plaintiff, given the unanimity requirement).[3]

But today I'd like to talk about something else: appellate advocacy.[4] More specifically, I'd like to share with you some of the good and bad things I have learned about that subject over the same forty years and a lot of appellate arguments.

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[2] This seating arrangement has become the generally accepted practice although there does not appear to be any rule mandating it as such. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, Courthouse Tour, Rooms to View, http://www.uscourts.gov/EducationalResources/CourtroomEvents/OpenDoorsToFederalCourts/CourthouseTour.aspx (last visited Feb. 16, 2011) ("There are usually two tables in the courtroom, one for the plaintiffs/prosecutors and one for the defendants. During a trial, the plaintiff usually sits at the table that is nearest to the jury while the defendant sits at the remaining table.").

[3] Rule 48 of the Federal Rules of Civil Procedure presently provides that "[a] jury must begin with at least 6 and no more than 12 members," and "[u]nless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members." FED. R. CIV. P. 48(a) & (b). *Prior to December 1, 1991,* however, Rule 48 provided that "[t]he parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury[.]" FED. R. CIV. P. 48 (repealed Dec. 1, 1991). Notwithstanding the reference in Rule 48 to twelve jurors, many district courts had enacted local rules setting the standard size of a civil jury at six. FED. R. CIV. P. 48 advisory committee's note. This trend prompted some litigants to challenge the relevant local rule as unconstitutional, arguing that the Seventh Amendment and Rule 48 guaranteed a jury of twelve. This argument was carefully considered—and soundly rejected—by Judge John Minor Wisdom of the Fifth Circuit, writing for an *en banc* court in *Cooley v. Strickland Transportation Co.*, 459 F.2d 779 (5th Cir. 1972) (en banc). The fact that so many district courts had enacted a local rule setting the standard size of a civil jury at six—without objection from the Supreme Court—eventually led to the repeal of old Rule 48.

[4] My lessons here focus on the practical aspects of advocacy in the antitrust cases I've handled. For those of you who are also interested in the strategic aspects of teeing up antitrust cases for appeal, in particular to the Supreme Court, *see* Thomas G. Hungar & Ryan G. Koopmans, *Appellate Advocacy in Antitrust Cases: Lessons from the Supreme Court,* 23 ANTITRUST 53 (Spring 2009).

The first is that practice makes perfect. And I don't mean exclusively in the appellate courtrooms either. In fact, as I recall, Bill didn't let me get near an appellate court for nearly half a decade—he did the arguing, win or lose below. No, I'm talking about the practice one gets in the district court, arguing summary judgment and discovery motions and even sitting through law and motion arguments.

For example, I recall some law and motion judges who fined anyone who was late, whether their matter was called on time or not. That taught me the critical importance of being on time.[5] Indeed, I often felt the winners before those judges were the ones who weren't held in contempt, and I learned from that to take nothing for granted, and to thank heaven for small favors. And when Judge Sam Conti sentenced an 18 year old with a clean record to life in prison for his part in trying to kill a judge who had sentenced the boy's father to life for a botched narcotics deal, I learned that federal judges frequently had more important cases to deal with than my civil antitrust case, treble damages or no. (That was a lesson repeated many times over when I began to represent individual defendants in criminal price-fixing cases.)

(As an aside, Judge Conti was probably the strictest sentencing judge in the Ninth Circuit. I recall one time when I was sitting through Judge Sweigert's law and motion calendar. Counsel for a criminal defendant who had just put Judge Sweigert through a lengthy jury trial on a pornography charge was arguing strenuously that he couldn't be available for sentencing at a time convenient to the Judge. Judge Sweigert, with a twinkle in his eyes, promptly said he would turn the sentencing over to Judge Conti at a time that was convenient to counsel. At that point counsel completely changed course and said he'd be there on the date suggested by Judge

[5] On this point of punctuality, it is equally important to check in with the courtroom clerk when you arrive so that you can be marked down as present (and on time), and the presiding judge isn't sending the marshal or the bailiff to track you down.

Sweigert. I think it was the only time Judge Sweigert tolerated a roomful of laughter from those of us assembled.)[6]

Additionally, responding to questions or comments from the bench occurs whether you are arguing an appellate case, arguing a summary judgment or pre-or post-trial motion or a

[6] Humor—or more specifically, the use of it—is dangerous because it can misfire during oral argument. Perhaps one of the most well-known misfires is the Respondent's counsel's attempt to start off his argument with a joke in the original December 13, 1971 argument in *Roe v. Wade* (the case was reargued):

> Mr. Chief Justice, may it please the Court.
>
> It's an old joke, but when a man argues against two beautiful ladies like this, they are going to have the last word.

Not only was the joke not funny given the importance of the moment, but Chief Justice Warren Burger reportedly scowled at counsel. *See* Antonin Scalia & Bryan Garner, *Making Your Case: The Art of Persuading Judges*, 94 ABA J. 41, 41 (May 2008) (reprinting excerpts from their book with the same title).

As a point of contrast, on occasion *it is possible to respond* with humor when the Court makes the attempt first, as Justice Stanley Mosk of the California Supreme Court illustrated with the following exchange, at the start of oral argument, between the Chief Justice and counsel for a fortuneteller who was challenging a local ordinance that prohibited fortunetelling within city limits on First Amendment grounds:

> Chief Justice: Counsel, you have us at a disadvantage.
>
> Attorney: Why, Your Honor?
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> Chief Justice: Well, hasn't your client told you how this case will ultimately turn out?
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> Attorney: No, Your Honor, you must remember I did not consult my client for advice. She consulted me.

Stanley Mosk, *In Defense of Oral Argument*, 1 J. APP. PRAC. & PROCESS 25, 28-29 (Winter 1999) (citing Spiritual Psychic Science Church, Inc. v. City of Azusa, 703 P.2d 1119 (1985)).

discovery motion.[7] Indeed, I think one of the greatest pleasures I ever got from an argument was when the Magistrate before whom I was arguing a discovery motion for General Motors

too. But it is critically important that one learn what interests the panel and what doesn't.[8] I recall one Ninth Circuit panel, for example, on which Judge Pam Rymer was sitting. I'd known of course that she'd been a trial judge before being elevated to the Ninth Circuit.[9] But I was still somewhat surprised to see how procedural arguments resonated with her. I tore up my script after watching her react through several arguments. That lesson not only stayed with me that day, but lingered on whenever a district court judge was sitting by designation on the panel—which often happens, as your appellate specialists can attest.

Conversely, imagine that while waiting for your antitrust argument to be called, you are listening to an elegant argume

the most liberal judges in the Ninth Circuit.[10] (Those of you who've argued there know that the Ninth Circuit is the largest circuit, and there are some very liberal as well as very conservative judges, and the outcome in your case depends very much on what panel you draw.)[11] In Larry's case, the panel was having none of this argument. So sitting there watching how Larry was faring, you will want promptly to tear up your script to make your defense of summary judgment more palatable to that particular panel.

That brings to mind a third lesson: don't be afraid to throw away your script. The acid test of that for me was the argument I had before Judges Posner, Easterbrook and Bauer in the *Brand Name Prescription Drugs* opt-out case in the early 2000s.[12] I had read every article and case those judges had written on antitrust and appellate advocacy in preparing for that argument.[13] I had also mooted the argument several times before my very able co-counsel. But

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[10] *See* Chroma Lighting v. GTE Prods. Corp., 111 F.3d 653 (9th Cir. 1997) (Browning, Norris & Reinhardt, J.J.) (affirming a jury verdict in favor of the plaintiff, a distributor of Osram Sylvania lighting products, on claims of competitive injury under the Robinson-Patman Act, Larry Popofsky's advocacy notwithstanding).

[11] Interestingly, Judge Posner has performed an empirical analysis of sorts from which he concludes that the larger the size of a judicial circuit, the lower the quality of its output of opinions. Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711 (June 2000). The debate continues to rage on about whether the Ninth Circuit should be split up into two circuits, as was previously done with the Fifth Circuit, and if so, where the geographic

when David Boies showed up to argue for plaintiffs (his wife had argued below), I threw away my script and simply engaged in a dialogue with Judge Posner.[14] The result was gratifying.

That does not mean, however, that your script is unimportant. It is, and that is a fourth lesson I would share with you. I recall two instances in which I suffered a senior moment even though I was very junior. The first was in *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*,[15] one of the few non-antitrust matters I handled. I was arguing an appeal for the City in the Ninth Circuit, when my memory of the relevant case law failed me entirely. The seconds it took me to walk back

but she was kind enough to suggest that I go to counsel table and give her the cite I was groping for.[18] I thanked her and did that, realizing she had known what the cite was all along.

That brings me to a fifth lesson. It is that things are never as they seem. That was never so much true as in *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau*,[19] an antitrust summary judgment case I argued

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seemingly invited briefs supporting en banc review.[24] But after the briefs were submitted, much to our surprise, the court simply stuck by the panel decision.[25] A much more ancient lesson in this respect was an antitrust case from the 1980s in which the California Supreme Court granted our writ and agreed to review a decision that had gone against our client, General Motors, over in Alameda County. But much to our consternation (and dismay), the court ended up agreeing with the Alameda County court.

A seventh lesson is that sometimes brevity is best.[26] The best appellate argument I ever gave was on behalf of Greyhound in the Ninth Circuit.[27] It was scheduled for 15 minutes, and it

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[24] *See id.* at 110 ("However, we believe there are compelling reasons to revisit *Tamoxifen* with the benefit of the full Court's consideration of the difficult questions at issue and the important interests at stake. We therefore invite the plaintiffs-appellants to petition for rehearing in banc.").

[25] Ark. Carpenters Health & Welf. Fund v. Bayer AG, 625 F.3d 779 (2d Cir.) (denying rehearing en banc, albeit with a dissent written by Judge Pooler, one of the members of the merits panel, and joined by Judges Newman a

lasted precisely that long (though I lost). Another time I represented clients who were sort of "tag-along" defendants in an antitrust case that John Alioto brought against the Hawaii Medical Association in the early 2000s.[28] I bet he would forget about us in his opening argument, and he did.[29] I therefore spoke for about two minutes. We won. The same thing happened when I represented General Motors in the mid-2000s in an antitrust case in which the Professional Golf Association was the primary target.[30] Sometimes it is best just to let the primary target carry the ball (or the clubs—pardon the pun).

Many times it is best just to close your briefcase and get out of the courthouse as fast as you can, regardless of what your client thinks or how much time you have spent preparing for the argument. I recall one time, for example, when a member of the panel in an antitrust case leaned

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[28] Int'l Healthcare Mgmt. v. Hawaii Coalition for Health, 332 F.3d 600 (9th Cir. 2003) (Goodwin, Rymer & Nelson, J.J.) (affirming the district court's grant of summary judgment to the defendants based on lack of evidence to support a conspiracy among the Hawaii Medical Association, the Hawaii Coalition for Health and a physician group to fix prices or to boycott the Hawaii Health Network, which had been established by the plaintiffs to provide a network of doctors for a managed care health plan). I represented the physician group.

[29] Judge Posner has made a point of remarking that "tag-along" defendants and the like, if left unintroduced, may befuddle the appellate judge: "A common puzzler is when there are multiple parties in the caption of a case yet the briefs are silent about most of them, who may have fallen by the wayside in the course of the litigation or may have been named as parties for technical reasons or completeness of relief. Tie up the loose ends; do not make the judge approach your argument with furrowed brow or waste your time at argument dispelling mysteries that a sentence in your brief could have cleared up." Posner, *supra* note 13, at 3-4. To Judge Posner's admonition I would add the observation that if your client happens to be one of those multiple parties "who may have fallen by the wayside" and you are the appellee, then the less that is said about them in the briefs and in oral argument, all the better.

[30] Toscano v. PGA, 258 F.3d 978 (9th Cir. 2001) (Schroeder, Lay & Thompson, J.J.) (affirming the district court's grant of summary judgment in favor of the defendant tournament sponsors for the Senior PGA Tour based on the absence of any direct evidence or alternatively, circumstantial evidence meeting the requirements of *Matsushita*, of concerted action between the sponsors and the PGA Tour in violation of Section 1 of the Sherman Act). As the Ninth Circuit noted in its opinion, my client, General Motors, had even less connection with the PGA; as a title sponsor, it contracted directly with the local sponsors, and not with the PGA.

down and told the appellant (Chicago counsel who shall remain nameless) that he'd compared the record against the record citations in the appellant's brief and found no comparison between the two. The other two panel members chimed in by way of agreement. There was little more to say, and so I said virtually nothing.

In another case, a Ninth Circuit panel that included Stephen Reinhardt was openly skeptical about the antitrust plaintiff's counsel's bona fides. Thus, although the panel included a notoriously liberal judge, and plaintiff's counsel was one of the most renowned in the country, I just referred briefly to a few other misrepresentations by counsel and let it go at that. (The other members of the panel were Alfred Goodwin and Proctor Hug, who also would have normally been inclined to rule against our shipping clients but who joined a unanimous opinion in our favor a few weeks later.)

An eighth lesson is that you should get to know as much as possible about your panel before you ever walk into the courtroom.[31] This means of course that you should determine as soon as possible the judges who are likely to hear your matter. In the Seventh Circuit, for example, the panel is not identified until just before the argument.[32] But you can frequently

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[31] *See* Llewellyn, *supra* note 8, at 177.

[32] Just because you don't know the composition of your panel well in advance doesn't mean you can't do your homework properly. There is a wealth of information available on the Internet today, starting with brief biographies of every judge on the Federal Judicial Center website. FEDERAL JUDICIAL CENTER, History of the Federal Judiciary, http://www.fjc.gov/history/home.nsf/page/judges.html (last visited Feb. 16, 2011). Also bar associations and law firms who want to showcase their local expertise with the "hometown bench" may have published articles on the various judges. With respect to the Seventh Circuit, for example, I would commend to your reading a 1994 in-depth evaluation of Seventh Circuit judges prepared by the Chicago Council of Lawyers. CHICAGO COUNCIL OF LAWYERS, EVALUATION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (1994), *available at* http://www.chicagocouncil.org/projects/fd_evaluations/7th_district/seventh.htm and *reprinted in* 43 DEPAUL L. REV. 673 (1994). Although the report is going on seventeen years old, it continues to provide insight on the judges who remain on the Seventh Circuit bench and who have shown a great affinity for antitrust cases (i.e., Posner, Easterbrook and Wood). and

guess who is likely to participate in the panel beforehand by determining their interests and conflicts. (Based on these factors I always knew that Judges Posner, Easterbrook and Diane Wood were likely to show up in any antitrust appeal that I was arguing unless Judge Wood was conflicted out.)

In the Ninth Circuit, the panels are unveiled about ten days ahead of the argument. This also means of course that reading every antitrust opinion authored by the panel members is mandatory. It also means, however, that you should be a lawyer representative to the circuit courts if at all possible.[33] This is harder than it may seem. For one thing, it is hard to get appointed because a lot of lawyers want to hobnob with the judges. For another thing, you have to be on your best behavior: it turns out that a lot of alcohol is consumed at judicial conferences, and district judges as well as circuit judges attend. So you're likely to run into everyone you're likely to appear before. But only at these conferences are you likely to get to know the spouses of the judges, as well as the judges themselves. And that's critically important because I've known judges who are very mild mannered only to have their spouses absolutely demand respect for them. And as an old-timer, I believe in "pillow talk." (Notice I said "spouses" rather than "wives" because some of the most demanding spouses I've encountered have been husbands who insist that their judicial wives be treated with the utmost respect.)

A ninth lesson is that an amicus may not always be a friend. It is tempting to think of amici and to invite everyone you can think of to join in your argument. But sometimes, so-called "friends" may provide you with little or only lukewarm support. More often, they will file briefs that are so terrible that they will hurt, rather than help, the argument you are trying to make. And

[33] *See, e.g.,* NINTH C

sometimes they will insist on sharing time at oral argument, thereby raiding the precious time you have to persuade a panel of the righteousness of your case.

Tenth, and finally, it goes without saying (but I'll say it anyway) that it is imperative to be absolutely polite to the panel. I recall one oral argument in which I was representing Sonora Community Hospital in the 2000s.[34] The plaintiffs' counsel was being questioned closely by Judge John Noonan. Finally, she exploded, exclaiming to him "That is one of the dumbest questions I've ever heard."[35] She made my job very easy for not only was he offended—he was no fool either—but the rest of the panel, who were inclined to rule for her, were offended too. And it's not just that an outburst like that may be offensive. It's interrupting a member of the panel who is trying to ask a question. But not interrupting is a cardinal rule that one practices in every argument one makes, whether in the district court or in an appellate court.[36]

So here are ten lessons. There are many more. But I'd like to save time for your questions.

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[34] County of Tuolumne v. Sonora Community Hosp., 236 F.3d 1148 (9th Cir. 2001) (Schroeder, Noonan & Tashima, J.J.) (affirming the district court's grant of summary judgment to the defendants on the plaintiffs' claims under Section 1 of the Sherman Act and state law based on an alleged change in the cesarean-section credentialing criteria for physicians holding privileges with Sonora Community Hospital).

[35] *Cf.* Ginsburg, *supra* note 7, at 569 ("To take an example still vivid in my mind, an advocate won no friends at court when he responded