ORAL ARGUMENT ON APPEAL: GO FORTH AND SIN, SIN, SIN

by Roger D. Townsend

I've never been very good at following anyone's commandments, much less the Big Ten. I don't see the purpose in many of them. And for the others . . . well, stuff happens. There's probably only one that I haven't broken at one time or another. And even then, who can say what the future may hold?

When the Ten Commandments were handed down by the renowned John W. Davis,[1] America looked very different from today. For instance, America had yet to enter World War II. The average *annual* salary was less than $1300. Only about one-half of American homes had indoor plumbing. Television was new, and no one had heard of the yet-to-be created *I Love Lucy*. Virtually no "respectable" women worked. Leon Trotsky had just been assassinated in Mexico City, and future-Beatle John Lennon was less than two weeks old.

The American legal system looked different, too. The typical oral argument lasted one hour, and judges even on busy courts wrote only about 60 decisions per year. Charles Evans Hughes was Chief Justice of the United States. Turning to Texas, there was no court of appeals in Houston and would not be for almost another 20 years.

Thus, Davis was speaking to another time, in fact to another culture. Taking myths from one time and culture and applying them in a literal fashion to a different one usually results in big trouble. Because the Ten Commandments are no exception, I'm going to summarize each of Davis's Commandments and exhort you to break most of them as often as you can.

Thus spake the appellate Moses during the Bronze Age of appeals:

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[1] John W. Davis, *The Ten Commandments of Oral Advocacy*, 26 A.B.A. J. 895 (1940). In case you are young or historically challenged, and don't know who he was, see William H. Harbaugh, *Lawyer's Lawyer: The Life of John W. Davis* (1973). Or just try wikipedia.

1. “Change places with the Court.”
2. “State first the nature of the case and briefly its prior history.”
3. “State the facts.”
4. “State the applicable rules of law on which you rely.”
5. “Always go for the jugular vein!”
6. “Rejoice when the court asks questions.”
7. “Read sparingly and only from necessity.”
8. “Avoid personalities.”
9. “Know your record from cover to cover.”
10. “Sit down.”

Now let’s discuss their applicability, if any, for our modern-era of truncated arguments, sizzling courts, crowded appellate dockets, and duration-challenged attention spans.

First, Davis recommends changing places with the court. Davis, of course, meant only in your imagination. If you try walking toward the bench today, a marshal will probably stop you one way or the other. Few oral advocates are at their best when wounded. And an opening shout of “Don’t tase me, bro” is yet to be preferred over the traditional “May it please, the Court.”

Davis really meant that you should try to imagine what the court would want to know in order to decide the case. In Davis's time, of course, there were fewer cases and fewer judges. Thus, like all great advice, it’s much easier to say than to do. For starters, you would need to know your judges’ habits as well as what they have done regarding your specific case. Do they ordinarily read the briefs themselves, or work from a law clerk’s memorandum? Were they watching the Michael Jackson memorial service and didn’t get around to reading your particular

brief? Are they usually interested more in the facts or in the law? Do they care about policy arguments and equities, or do they simply decide cases based on precedent? Are they procedural specialists? Could they fairly be called “waiver-happy”? Are they experts or novices in your substantive area of the law? Have they ever had a personal or professional experience that will be triggered in their memory by your case? Unless you know the answer to all these questions, then the judge you imagine may bear little relation to the one actually sitting in a black robe on the bench that day.

Second, Davis says to begin with the nature of the case and its procedural history. In the old days of cold courts and leisurely arguments, that might have worked. There's the apocryphal story of Chief Justice Hughes stopping an advocate at the Supreme Court to ask how he had arrived at the court, meaning the procedural history of the case. Missing the point or perhaps just flustered, the advocate supposedly replied, “By the Baltimore & Ohio Railroad, your Honor."

But today, detailing the nature of the case and its procedural history is a waste of time, unless your appeal turns on a particular procedural issue. If the court has any familiarity with the case at all, it will at least have skimmed the first page of your brief to know whether you are representing the defendant in a criminal necrophilia case rather than Macrohard in a civil antitrust case. And unless jurisdiction is disputed, one can safely omit telling the court whether you are appealing from a final judgment rather than an interlocutory order.

Third, Davis commands next stating the facts. This sounds promising, for the facts are the heart of most cases. Often the law is settled, and the primary question is which line of cases should be applied to a particular set of facts. Further, most appellate courts know a lot of law in a lot of areas. What they don’t know so well are the facts in your particular case.

Nevertheless, if you begin with much factual information today, most appellate courts will cut you off by noting that they have read the briefs and are familiar with the facts. Appellate courts sit primarily to decide questions of law. Those questions are informed by the facts, but a detailed factual summary at the outset will cause the court to believe you are making a jury argument. The better practice today is to frame the legal issue quickly and then to weave the facts into your argument. This is especially true with a cold court, for until the court is given a legal framework to contextualize the facts, it cannot comprehend them.

Fourth, Davis suggests stating the applicable rules of law upon which you rely. Again, Davis apparently presupposes a cold court that has not read enough of the briefs to know which are the key cases or statutes at issue. He seems to expect that he will be allowed to speak for several minutes without interruption. (Nice work if you can get it.) Merely stating abstract rules at the outset will leave the court wondering about the context. You also will probably invite a dispute about which line of "applicable rules" should control. Before you know what has hit you, the court will have taken over the argument, leaving you only to respond to its questions with "yes" or "no" answers and debating arcane distinctions among holdings, judicial dicta, and obiter dicta. You then may never get to the facts that may be the heart of the appeal — which may be why Davis urged one to talk about the facts before turning to the law.

Fifth, Davis advises appellate advocates to strike at the jugular vein. Of all his Commandments, this one is probably the most long-lived (and the one that appellate vampires are most likely to be comfortable with). This is a good Commandment, even more essential today than in Davis's time. By the jugular vein, Davis means the key point on which the appeal should turn. This requires you to frame the legal issue precisely, explicitly state your conclusion and the

premises leading to that conclusion, and argue the law or facts (including procedural rules such as the standard of review) supporting those premises. Finally, you can add policy reasons to bolster the legal principles and equities to bolster their application to the facts.

And this is where you can briefly work in the nature of the case and main procedural history — when you frame the legal issue at the beginning of your argument. For instance,

> May it please the Court. In this appeal from a final judgment, the principal question is whether the jury's finding that the defendant breached the contract is excused as a matter of law by the plaintiff's preceding material breach.

That quickly reminds the court that you are appealing from a final judgment, that there was a jury trial, and that the case concerns a breach of contract. Moreover, by framing the issue at the outset, you make the court ready to receive what Davis called "the implements of decision." In other words, the reasons why you should prevail.

The logic of your argument could then look something like this:

First premise:	When one party materially breaches a contract, the other party is excused from performance.
Second premise:	The plaintiff materially breached the contract.
Conclusion:	Therefore, the defendant is excused as a matter of law from performing.
Result of conclusion:	Hence, the judgment against the defendant for breach of contract must be reversed.

You would support your first premise by hornbook law, surely reflected by settled case law from the highest court in your jurisdiction (or by statute in Louisiana). To show off, you could add a "*see also*" citation to a treatise. Because the conclusion is a formally logical

deduction, it needs no support ― though you can probably find a case reversing a judgment in similar circumstances.

The real fight in this hypothetical appeal would be over the substantive validity of your second premise ― that the plaintiff's preceding breach was material. You will want to establish that premise by legal rules demonstrating what constitutes a material breach of contract. You will also want to support it with either undisputed facts or facts that you can neutralize by challenging their admission into evidence. This will require you to take into account the standard of review. At the same time, you can discuss the policy reasons why the excuse rule makes sense and why your facts should constitute a material breach. If the equities also favor your client, this is the point at which to mention them.

As you can see, Davis's advice to go for the jugular counsels you to focus on what will affect the decision of the appeal. In today's era of short oral arguments and hot courts, his Fifth Commandment ― not to be confused with the Fifth Amendment ― should always be obeyed.

Nevertheless, what happens if you have inadvertently aimed at the wrong vein? In other words, what happens when what *you* consider the dispositive issue differs from the one the *court* views as dispositive? This can easily happen if you are unable to follow Davis's First Commandment about correctly changing places with the court. If you guess wrong about what the court thinks is dispositive, to continue Davis's Biblical homology, "May the Lord have mercy upon your soul." When this happens ― and some day it will ― you might consider yielding the remainder of your time and slinking back to your office ― or the nearest bar.

Sixth, Davis encourages one to rejoice when the court asks questions. My own reaction depends on the question being asked. If the court is eviscerating my opponent with a question,

then I do sometimes secretly rejoice. But when the judicial knife is carving its way through my entrails, rejoicing is not usually the first thing that comes to mind. Instead, I instantly start grinding my teeth, feeling sheer panic, looking for the savior of a red light, and hearing a recurring voice in my head asking just why it was I decided to become a lawyer rather than a brick mason.

Answering the court's questions truly is essential to winning the case, provided they are in fact relevant, open-minded questions. Most are, but some are not. Most questions sincerely seek information about the record, whether a particular precedent is factually distinguishable, or what might be the practical result of the rule under consideration. But a few questions seem to be designed to prove the judge is smarter than the advocate, to see how quickly the advocate will wilt under the onslaught, or even to embarrass another judge on the panel. And then there are the devil's advocate questions sometimes to test a theory, but at other times seemingly to encourage the parties to settle before the court has to write a complex opinion. While in his day Davis may have rejoiced, today I more often cry.

Seventh, Davis admonishes one not to read from a prepared text. This is good advice — as is brushing one's teeth (though not during the argument). Nothing is more boring, and less persuasive, than an advocate reading from a canned text. It suggests a lack of confidence in oneself, or even in one's case. It also suggests that someone else may have written the text for a "big name" simply to read and that the big name didn't even take the time to learn the text by heart.

Moreover, because today's appellate courts usually ask lots of questions, trying to read from a text runs the additional risk of automatically responding with what's written on the page

even if it has no relation to what was asked by the court. That's a recipe for losing a case, as well as for public humiliation — very possibly in front of your client, or even posted on the Internet.

The Eighth Commandment counsels against personal attacks. This, too, is excellent advice. If only the judges themselves would abide by it, but then Davis handed down his Commandments only for advocates. It's been reported, for instance, that Judge Learned Hand — yes, *the* Learned Hand — was one of the greatest judicial pitchers of all time. When dissatisfied with a brief or oral argument, Hand was known to throw the briefs at the offending advocate — who once happened to be the future Justice John Marshall Harlan Jr.[2] (And you think Judge _____ is bad! At least he hurls only verbal abuse at counsel.)

Furthermore, Davis himself had enormous trouble practicing what he preached. It's reported that he once struck opposing counsel, hurled an inkwell at another, chased one man down the street with a buggy whip, and engaged in a protracted, unseemly ethical fight against another leader of the bar.[3] That's what it was like to practice law in the good old days before the Standards for Appellate Conduct made everything so professional — and so boring.

Davis's Ninth Commandment, like the Ninth Amendment, seems often to be neglected. Yet it is sound advice to know the record from cover to cover. That probably was not too hard when trials lasted two or three days. But most trials today last much, much longer than trials in Davis's era. Trials of three or even nine months are not unheard of. Tens of thousands of exhibits are sometimes introduced into evidence. Although a huge trial record must be mastered, unless

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[2] Marvin Shick, *Learned Hand's Court* 16 (1970).

[3] Harbaugh, *supra* at 60; *In re Levy*, 30 F. Supp. 317 (S.D.N.Y. 1939); *New York Times* Aug. 5 & 8 (1939).

one is blessed with a photographic memory it will be difficult to know such a record from cover to cover. One usually must focus on the parts of the record relevant to the issues on appeal, hoping that the court will allow a post-submission letter to fill in the answer to an unanticipated question on an irrelevant topic.

A problem can arise, however, because what should have been anticipated or what is irrelevant often lies in the eye of the beholder. To be absolutely safe, therefore, you must both memorize and have instant recall of every single detail in the record, as well as every word in all the briefs and in all the authorities cited in the briefs. When you find a client willing to pay for that process, please let me know.

Davis's Tenth Commandment is undoubtedly his best: When one has said what needs to be said, sit down and shut-up. I will now follow that advice.