

# Certworthy

Winter 2007

The newsletter of the DRI  
Appellate Advocacy Committee

  
The Voice of the Defense Bar



## In This Issue...

### Revisiting A Classic:

John C. Godbold, *Twenty Pages and Twenty Minutes – Effective Advocacy on Appeal: A*

Retrospective ..... 1

Appellate Advocacy Committee

Leadership ..... 2

Regional Editor Listing ..... 4

From the Chair:

Big Projects ..... 5

From The Editor:

Opportunities for Publication .. 6

Circuit Reports ..... 12

First Circuit ..... 12

Second Circuit ..... 13

Third Circuit ..... 14

Fourth Circuit ..... 15

Fifth Circuit ..... 17

Sixth Circuit ..... 18

Eighth Circuit ..... 19

Ninth Circuit ..... 21

Tenth Circuit ..... 22

Advocate's Forum:

Oral Argument Can — and Should  
— Make a Difference ..... 23

Subcommittee Reports ..... 25

Amicus ..... 25

Membership ..... 25

Program ..... 25

Teleconference ..... 26

## REVISITING A CLASSIC

# John C. Godbold, *Twenty Pages and Twenty Minutes – Effective Advocacy on Appeal: A Retrospective*

Ralph W. Johnson III  
*Halloran & Sage LLP*  
Hartford, Connecticut  
[Johnsonr@halloran-sage.com](mailto:Johnsonr@halloran-sage.com)

In 1976, Judge John C. Godbold, then a member of the United States Court of Appeals for the Fifth Circuit, published an article on appellate advocacy in the *Southwestern Law Journal: Twenty Pages and Twenty Minutes – Effective Advocacy on Appeal*, 30 SW. L.J. 801 (1976) (hereinafter “Godbold”). Today, the article is recognized as one of the most influential writings on appellate advocacy. Simply stated, it is a “must” read for appellate attorneys. The article challenges readers to improve their skills and to stop employing techniques simply because they are the way things have always been done. Judge Godbold’s insights are invaluable and indeed, for some, are inspirational.

This article revisits Judge Godbold’s

classic work on the thirtieth anniversary of its publication. The first part of this article reviews Judge Godbold’s extraordinary career. The next part summarizes selected portions of Judge Godbold’s article. The final part examines the impact of Judge Godbold’s article on others who write about appellate advocacy.

The goal of this article is simple: to convince appellate attorneys and would-be appellate attorneys to read (or re-read) Judge Godbold’s article. Anyone who invests the time to study Judge Godbold’s teachings on the appellate process and advocacy will find the time well spent.

## An Extraordinary Career

Judge Godbold’s career has been impressive, to say the least. He graduated from Auburn University in 1940.

He then began his studies at the Harvard Law School. After serving as a Major in the Army in Europe during World War II, he completed his studies and earned his law degree from Harvard in 1948. That same year, he began a law practice in Montgomery, Alabama with Richard T. Rives, who became a judge on the Fifth Circuit in 1951. Following Judge Rives' appointment to the bench, Judge Godbold became partners with Truman M. Hobbs, who was appointed a federal district judge in 1980.

In 1966, Judge Godbold was appointed to the Fifth Circuit. Two commentators who have studied the division of the Fifth Circuit have described Judge Godbold's appointment as follows:

[a]n extremely capable jurist of high integrity and with a firm, statesmanlike manner, Judge Godbold was to become one of the court's most respected leaders. Later he also became the only federal judge in history to hold the position of Chief Judge in two U.S. courts of appeals. He was such a powerful advocate of circuit division that a majority of the judges later appointed him to represent them on the subject.

Debra J. Barrow & Thomas G. Walker, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform*, 135 (Yale Univ. Press 1988) (footnote omitted) (hereinafter "Barrow & Walker").

Indeed, for more than a decade, Judge Godbold was a leading force in the efforts to divide the "Old" or "Former" Fifth Circuit into two

courts. On October 1, 1981, with Judge Godbold serving as the Chief Judge, the Former Fifth Circuit divided into the new Fifth and Eleventh Circuits. That same day, he became the Eleventh Circuit's first Chief Judge.

In 1987, Judge Godbold took senior status. That same year, he became the Director of the Federal Judicial Center in Washington, D.C. The Center is the research and training unit of the Federal Judiciary. Judge Godbold served as Director for three years, returning to the Eleventh Circuit in March of 1990. That same year, he was named the Leslie S. Wright Distinguished Professor at the Cumberland Law School in Birmingham, a position he continues to hold.

When a portrait of Judge Godbold was presented to the Eleventh Circuit in 1993, the high regard with which his colleagues hold him was quite evident. At the ceremony, then-Chief District Judge Myron H. Thompson described him as "always an artist. He is always one to turn a phrase. Anyone who reads his opinions must know this man paints with words. His decisions teach that legal writing does not have to be complicated and dry, that it can be lively and simple, and yes, beautiful." (26 F.3d at LXXXII-LXXXIII).

In 1996, Judge Godbold was awarded the Edward J. Devitt Distinguished Service to Justice Award. In connection with the award, one nominator wrote that "soft-spoken and low-key as he is, John Godbold has a remarkable ability to lead groups of his peers in making difficult and often courageous decisions." "Devitt Award

Honors Judge John C. Godbold," *The Third Branch* (May 1996) (available at [www.uscourts.gov/ttb/may96/devit96.htm](http://www.uscourts.gov/ttb/may96/devit96.htm)).

For additional materials on Judge Godbold's career, Deborah Barrow's and Thomas Walker's monograph is a great resource. It has an extensive discussion of his involvement in the division of the Fifth Circuit. Barrow & Walker, at 130, 135, 164-65, 191, 198-99, 200-03, 243-47. Jack Bass' *Unlikely Heroes* (Univ. of Alabama Press 1990) includes a discussion of Judge Godbold's appointment and his involvement in some of the Former Fifth Circuit's civil rights cases. *Id.* at 303-04, 307, 327, 329. Also, the transcript of the proceedings of Judge Godbold's portrait presentation ceremony provides additional insights into the high regard with which he is held by his colleagues and the bar. It can be found in Volume 26 of *West's Federal Reporter, Third Series*. Finally, Judge Godbold's other publications should not be overlooked. They include: "Lawyer" — *A Title of Honor*, 29 Cumb. L. Rev. 301 (1998-99) and *Fact Finding By Appellate Courts — An Available and Appropriate Power*, 12 Cumb. L. Rev. 365 (1981-82).

---

## An Overview of the Article

---

### "The Appeal Process"

Before directly addressing advocacy and by way of context, Judge Godbold's article addressed the topic of the "appeal process." Godbold, at 802. Understanding the process is critical to effective advocacy because the process sets the parameters within which the advocacy occurs. In par-

ticular, Judge Godbold described the presentation of an appellate case as involving “an assembly at a formal meeting place under the rules of a highly structured system.” *Id.* Assembled at this meeting are: (1) the attorneys, (2) the record, (3) the written positions of the parties (the briefs), and (4) “a body of official deciders (the judges).” *Id.*

The role of counsel at this meeting is “communication and persuasion, first by the briefs and then by the oral argument.” *Id.* There are “two steps in counsel’s task.” *Id.* First, he must “convince the court that what he advances is correct.” *Id.* In order to convince the court, an attorney “must impress his will upon the judges so that they will find acceptable what he urges. He cannot win until he moves off dead center the deciders who read what he has written and who listen to what he says.” Godbold, at 802.

However, before an attorney can convince, “he must inform. He must cause the court to understand him.” *Id.* Judge Godbold described this “process of linguistic communication” as follows:

‘[T]he gulf that often separates sender and receiver [of communications], spanned at best by a bridge of signs and symbols, is sought to be narrowed yet further so that ultimately the intended communication may have the same meaning, or approximately the same meaning, for those on the left bank as those on the right.’

*Id.* at 803 (citation and footnote omitted).

Judge Godbold emphasized that “[a]ll is in vain unless the court understands.” *Id.* Nevertheless, although attorneys understand this

principle, in many cases they are so dead set upon the “ultimate aim of persuasion that [they] overleap[] the threshold step of making clear to the court what [they] complain[] of, how it came about, what [they] want[] the court to do about it, and why.” *Id.*

### “The Record on Appeal”

With regard to the record, Judge Godbold challenged the accepted or standard approach taken by many attorneys. He observed that attorneys typically do not put much effort into assembling the record. Instead, without thought, they designate the sections of the record to be contained in an appendix, pursuant to Fed. R. App. P. 30. Godbold, at 806.

Judge Godbold disagreed with the standard practice and offered a few alternatives. *Id.* First, he believed that the deferred appendix was a “splendid appellate tool,” which had been “long ignored” by attorneys. *Id.* He was fond of the deferred appendix because it is only after writing a brief that an attorney knows exactly what needs to be included in the appendix. *Id.* By using the deferred appendix, “[t]he advocate’s communication with the court is consequently less cluttered, less expensive, and performed with less effort.” *Id.*

As a second suggestion, Judge Godbold pointed out that attorneys had “scarcely scratched the surface of the usefulness” of the agreed statement as the record on appeal. *Id.* He believed that the use of the agreed statement was most effective “where the relevant facts are simple and the issue precise.” *Id.* at 806. As an example, Judge Godbold recalled an appeal where the sole issue was the admissibility of a document under a

business record statute. *Id.* Everything that the court needed to know could have been set forth in a one-page agreed statement and in five-page briefs. *Id.* Nevertheless, the appendix in the case included a full trial transcript. *Id.* It was not a matter of counsel attempting to misdirect the court. *Id.* Rather, “[t]hey just wheeled up the heavy artillery, needlessly, simply because that was the familiar way to do it.” *Id.*

### “Presentation of a Case”

With respect to the presentation of a case to an appellate court, Judge Godbold emphasized that judges have an interest in attorneys’ effectively performing their tasks of informing and persuading. Godbold, at 807. They want attorneys to get the most out of their briefs and oral argument. *Id.* at 807-08. Consequently, Judge Godbold explained that attorneys must focus on providing judges with the guidance and assistance they need. *Id.* at 808. In particular, he noted:

Judges need all the help they can get in identifying and understanding the issues, legal and factual, and reaching the right answer. They are neither all-wise nor all-seeing. Whether in his library or on the bench, the judge is trying with every ounce of his capacity to traverse the path from issue to answer. Every intellectual pore is opened to receive help and guidance from what the lawyers say and write. That guidance is most telling when there is a minimum of artificial obstacles and irrelevant diversions that impede communication.

*Id.* (footnote omitted).

Judge Godbold freely admitted that appellate advocacy is not easy. Indeed, he acknowledged that “[c]ounsel can, and often does, lose with a good performance and win with a poor one.” *Id.* At the same time, however, Judge Godbold emphasized that there are opportunities for an effective advocate to make a difference. For example, the identification and treatment of the facts and the appropriate law “are often matters of reasonable difference of opinion . . . . Also, the court’s interest is not limited to identified facts but extends to inferences drawn from those facts.” *Id.* at 808.

### “Selecting and Stating the Issues”

Judge Godbold believed that one of the greatest aids that an attorney can provide to an appellate court is identifying the relevant issues. Accordingly, an attorney “must select with dispassionate and detached mind the issues that common sense and experience tell him are likely to be dispositive. He must reject other issues or give them short treatment.” Godbold, at 809. In support of his thoughts on the importance of issue selection, Judge Godbold quoted Justice Robert H. Jackson, who wrote:

‘One of the first tests for a discriminating advocate is to select the question, or questions, he will present orally. Legal contentions, like currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. Of course, I

have not forgotten the reluctance with which a lawyer abandons even the weakest point lest it prove alluring to the same kind of judge. But experience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.’

*Id.* (quoting Robert H. Jackson, “Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations,” in *Advocacy And The King’s English*, 193 (G. Rossman ed. 1960)).

In further support of his thoughts on issue selection, Judge Godbold cited John W. Davis’ “cardinal rule.” Godbold, at 809. Under it, an advocate must, “in imagination, change places with the court.” *Id.* More specifically, Davis believed that:

‘[t]hose judges who sit in solemn array before you, whatever their merit, know nothing whatever about the controversy that brings you to them, and are not stimulated to interest in it by any feeling of friendship or dislike to anyone concerned. They are not moved as perhaps an advocate may be by any hope of reward or fear of punishment. They are simply being called upon for action in this appointed sphere. They are anxiously waiting to be supplied with what Mr. Justice Holmes called the ‘implements of decision.’ These by your presence you profess yourself ready to furnish. If the places were reversed and you sat where they do, think what it is you would want first to know about the case. How and what order would you want the story told? How would you want the skein unraveled? What would make easier your approach

to the true solution? These are questions the advocate must unsparingly put to himself. This is what I mean by changing places with the court.’

*Id.* (quoting John H. Davis, “The Argument of an Appeal,” in *Advocacy And The King’s English*, 216 (G. Rossman ed. 1960)).

As an example of selecting and stating the issue properly, Judge Godbold recalled an argument where an attorney stepped to the podium and stated “my name is So & So, from Houston, Texas. The issue in this case is whether *Chambers v. Maroney* is retroactive.” Godbold, at 809. In these few words, that attorney “had laid all else aside and gone for the jugular. In two sentences he had identified himself, precisely targeted the dispositive issue on which discussion would be centered and the case decided, and had attracted the interest and attention of the court.” *Id.* As a result of his proper presentation of the dispositive issue, the “room came alive. Everyone was mentally on the edge of his chair. In seconds counsel had riveted the attention of all participants onto the question that all concerned knew was critical.” *Id.*

### “Tell It Short and Plain”

With regard to writing style, Judge Godbold emphasized that attorneys must “[c]ommunicate with the court, by pen and by voice, in terms as simple as the subject matter permits.” Godbold, at 811. As the best example of short and plain writing, Judge Godbold cited Abraham Lincoln’s Gettysburg Address. *Id.* at 816. It is “immortal, and it is ten sentences long.” *Id.*

Indeed, Judge Godbold “prefer[red]

the risk of oversimplification rather than even a whisper of an unnecessary complexity.” *Id.* at 801. Thus, he urged attorneys to write in a manner that anyone would be able to understand. *Id.* at 811. He explained that all judges “want to understand, and their understanding is the condition precedent to persuasion.” *Id.* To assist attorneys with their writing, Judge Godbold strongly recommended *The Elements of Style* by William Strunk, Jr. and E.B. White. Godbold, at 811-14.

For Judge Godbold, the corollary to the principle of “tell it short and plain,” was “tell it once — or twice at most.” Godbold, at 816. In particular, he believed that “[e]rosion by repetition [wa]s a poor way to convince. Most judges will catch the point the first time it is developed. Almost all will understand when it is run by the second time.” *Id.*

Judge Godbold also requested that attorneys “tell it early.” *Id.* He noted that the “court blesses the lawyer who steps to the podium and, Z[ap], like an arrow to the center of a target, strikes to the heart of the controversy.” *Id.*

When it comes to finalizing a brief, Judge Godbold believed that an attorney should look it over with an editor’s eye and as dispassionately as [he] can. It should be clean and clear, as taut as a violin string and as terse as a rifle shot. It should contain not one ounce of fat or an excess word. There should be a minimum of repetition and no incorrect, unclear, or misleading statements.

*Id.*

### “Tell It Accurately”

Next, Judge Godbold emphasized

that stating the facts and law “ candidly and accurately” was an “uncompromising absolute” for every appellate advocate. Godbold, at 816. “Every sentence must shine with the whole truth.” *Id.* Judge Godbold believed that “[t]he mark of really able advocacy is the ability to set forth the facts most favorably within the limits of utter and unswerving accuracy.” *Id.* (citation and footnote omitted).

### “Tell It Courteously and in Moderation”

On a related note, Judge Godbold emphasized that “[b]oth brief and argument should reflect [the] dignity and professional competence of the spokesman and respect for the courts, trial and appellate.” Godbold, at 817. Indeed, he maintained that “[i]mproper tone is a self-created impediment. The court is made uncomfortable by the lawyer who recklessly tosses out accusations that his adversary is misleading the court or misstating the facts or is guilty of improper conduct.” *Id.*

At the same time, Judge Godbold recognized that “[n]o one expects a good lawyer to roll over and play dead. But firmness, and preservation of one’s own points and rights, seldom necessitate strident accusations or even discourtesy.” *Id.* He noted that “[a]ppropriate moderation and approach keeps the court comfortable and is also persuasive.” *Id.* Judge Godbold used the term “appropriate” because he acknowledged that “a case may call for forceful hard-hitting statements.” *Id.* Nevertheless, he believed that “not every mosquito has to be killed with a sledgehammer.” *Id.*

Thus, Judge Godbold maintained that attorneys could rely on appellate

judges to discover improper tactics by an opponent. In particular, he believed that “[a] judge who has normal sensibilities and loves the law will react on his own to events that call for outrage.” *Id.* By contrast, however, that same judge might “not respond favorably to urging that he should be disturbed or outraged.” *Id.*

### “The End Result”

The final words in Judge Godbold’s article are the most insightful and inspiring. In them, he leaves appellate attorneys with the standard that they should strive to satisfy. Specifically, Judge Godbold concluded as follows:

In concluding the written words in his brief, and finally his spoken words at the podium, the advocate will endeavor to leave some parting impression fixed in the minds of the judges who have read and listened. There is no better impression to leave than this composite: ‘I understood what he said. He did not say too much. I have confidence in what he said. I am persuaded by it and I am compelled to rule with him.’

*Id.* at 819.

### The Article’s Impact

The most cursory review of articles and books on appellate advocacy confirms the strong influence that Judge Godbold’s article has had on others. It is cited and quoted extensively by those who write about appellate advocacy and legal writing. For example, Bryan A. Garner, a leading authority on legal writing, quotes Judge Godbold’s article four times in his book, *The Winning Brief: 100 Tips for Persuasive Writing in Trial and Appellate Courts*, 87, 110, 324, 341 (Ox-

ford Univ. Press 1999). Similarly, federal judges have relied on Judge Godbold's article in describing how to properly litigate cases on appeal. See Joel F. Dubina, *How to Litigate Successfully in the United States Court of Appeals for the Eleventh Circuit*, 29 Cumb. L. Rev. 1, 4 n.21 (1998-99).

Not surprisingly, both the biographical sketch for Judge Godbold on the Alabama Academy of Honor's website, ([www.archives.state.al.us/famous/academy/j\\_godbold.html](http://www.archives.state.al.us/famous/academy/j_godbold.html)), and his biography on the Cumberland Law School's website note that *Twenty Pages and Twenty Minutes* is "said to be the most widely reprinted law review piece printed in the United States."

---

### Conclusion

---

The bench and bar will be forever indebted to Judge Godbold for taking the time to share his insights. Hopefully,

fully, this article achieved its goal of convincing readers to spend some time studying Judge Godbold's article and more importantly, properly paid tribute to Judge Godbold's extraordinary career and his classic article.

*Liberty: One of imagination's most precious possessions.*  
*Ambrose Bierce (1842-1914?)*

*If a free society cannot help the many who are poor, it cannot save the few who are rich.*  
*John F. Kennedy (1917-1963)*