

Tuesday, April 29, 2008

### **Everyone is my teacher, including Justice Scalia on advocacy.**

Photo from website of U.S. District Court (W.D. Mi.). The Dalai Lama wisely said that "everyone is my teacher, starting with my enemy." As much as I often have sharp differences with Supreme Court Justice Antonin Scalia's judging -- see here and here, offset here and here -- he apparently has much that is beneficial to teach with co-author Bryan Garner's *Making Your Case: The Art of Persuading Judges*. That is my initial impression with this ABA Journal article on the book. (Thanks to Scott Greenfield for bringing this ABA Journal link to my attention.) Seeing that Justice Scalia is not known to go easy on lawyers -- no matter the plushness of their law firm's carpets nor whether they are the federal solicitor general or his deputy -- one of the book excerpts that interests me the most is about handling difficult judges: "LEARN HOW TO HANDLE A DIFFICULT JUDGE." You will sometimes encounter a judge whose questions are designed not to obtain enlightenment but to demonstrate to colleagues the weakness of your case. During your exchange with such a questioner, be sure to maintain eye contact. Don't display your discomfort by looking down at some imaginary text whence will come your redemption. Look the judge straight in the eye and continue responding in a professional, firm manner. It's always a mistake to evade questions, but especially so when the question comes from a difficult judge. That judge will persist, and you'll end up spending even more time reasoning with someone who will not be persuaded. Confront the question squarely with your best answer, and try to move on. "Sometimes such a questioner, after you have answered as best you can, will continue to press the same point, even though (indeed, because) you are unable to say anything more. You must devise a polite, nonalienating way to end this exchange, or it will consume much of your argument time. After a decent amount of time has been spent on the point, it would be appropriate to say, 'Your Honor, I cannot respond to your objection with anything other than what I have already said.' A similar problem is presented when a judge's questions about one part of your presentation are so numerous that the time remaining for an important but yet-to-be-addressed portion is growing short. You must try, politely, to regain control of the subject matter. The court will not take it amiss if, after responding to one question, you continue quickly: 'With the court's permission, I would like to turn now to...' "Whatever else you do when confronted by a hostile and unreasonable judge, don't reply in kind. Don't become hostile yourself; don't display anger, annoyance or impatience. Keep telling yourself that you owe it to your client because you do. "Even so, lawyers are entitled to take great delight in the wonderful comeuppances to judicial boorishness that some of their more rash predecessors have devised. Our favorite was also a favorite of Justice Robert H. Jackson. A noted barrister, F.E. Smith, had argued at some length in an English court when the judge leaned over the bench and said: 'I have read your case, Mr. Smith, and I am no wiser than I was when I started.' "To which the barrister replied: 'Possibly not, My Lord, but far better informed.' Smith, who later became a famous judge as the Earl of Birkenhead, could reportedly carry off such snappy rejoinders with impunity. We doubt that, but in any case we don't recommend that you emulate him." Exactly. The court presentation is about the lawyer's client, not the lawyer. If the lawyer can't stand the heat in the courtroom, plenty of other lawyering avenues exist that do not require court appearances. Jon Katz

Posted by Jon Katz in Persuasion at 00:00