

What I Learned About Appellate Advocacy From the Grateful Dead

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By Howard Goodfriend

“Always Appealing” is a column addressing current issues in appellate practice and recent appellate cases written by the lawyers of Smith Goodfriend, P.S., a Seattle law firm that limits its practice to civil appeals and related trial court motions practice.

The recent deaths of Bob Weir and Phil Lesh got me thinking about the Grateful Dead’s steady presence in my life across many decades. I discovered the Dead as a teenager in the fall of 1972 with the release of their live triple album, *Europe ’72*, and attended concerts whenever I could through my college years, which was pretty easy to do in the northeast, where the band booked numerous concerts over a couple of weeks, all within a hundred mile radius.

As much as I enjoyed the Dead, I was never a true Deadhead. I never followed the Dead on tour. I preferred returning from shows to sleep in my own bed, rather than pile into a van to head to the next destination. I did not traffic in bootleg concert tapes and never had much affinity for psychedelic drugs. I gradually drifted away from the band’s music.

After law school, I married a woman who hated the Dead, having rented a room in a “Grateful Dead House,” for an entire year of college. She had no patience for their off-key harmonies and their indulgent jams. Nonetheless, by the end of her

year-long exposure to their music (as well as that of Bob Marley, whom she genuinely liked), she knew every lyric to every Dead song by heart, and would sing along (in key) when we saw other bands perform a Dead cover.

Though they were banned from our turntable, I always turned up the volume when a Dead song would hit the airwaves and, through the years, I managed to catch the band on tour when they came through the Northwest.

Along the way, I developed my law practice, which increasingly focused on briefing and arguing civil appeals. With the death of most of the Grateful Dead's original members, I ruminated on what drew me to the band over the years, and started seeing connections to my professional life. I discovered many of the qualities that first drew me to the Dead are those that make a good appellate lawyer. These qualities are by no means unique to the Grateful Dead, but the band's legendary live shows and their extensive catalogue made the connections a bit more obvious:

1. Fluidity through genres.

The Dead's sound defies neat categorization in a single musical genre. They experimented with folk rock, blues, country western, and pop rock, even venturing into disco in the late '70's.

A good litigator can try a case in very different areas of the law. That talent has less to do with mastery of a particular subject than with the ability to connect with the audience, be it judge or jury.

Appellate advocacy requires a similar skill set. Our firm's appellate practice runs the gamut, from complex commercial cases, to personal injury, to real estate, employment, probate and family law. To the extent we have earned a reputation as successful appellate lawyers, it has less to do with our substantive knowledge of the law than with the process of appellate advocacy and decision making.

2. Storytelling, improvising, and finding a theme.

Many of the Dead's songs tell a story, of love lost or found, of natural beauty, of loners and losers. Those songs are direct, lyrical and personal. The stories stay with you, as much as the music.

Effective appellate advocacy is also grounded in effective storytelling, with the caveat that the target audience is a small group of appellate judges. A good appellate brief will engender a sympathetic response before the reader even gets to the legal argument. And the story's theme should stay with the judges long after reading the brief's conclusion or after counsel sits down following oral argument.

The Dead is also known for its long (and meandering) improvisations. Those improvisations take off from a specific theme—a repeated chord progression that establishes the guts of the song. Even when the members went off in an unforeseen direction, the band was adept at returning to the original chord progression before concluding the song or moving fluidly into the next number.

A good appellate argument similarly starts and ends with a theme, hopefully a catchy one. But one never knows where an appellate judge will go. Oral argument can often veer into unforeseen territory, requiring appellate counsel's improvisation. A good appellate lawyer will return to their theme before concluding, or before moving fluidly into a different argument.

3. A communal experience.

Dead concerts, like those of Bruce Springsteen, were shared communal experiences. With some exceptions, their fans were cooperative, sharing and non-belligerent. For several hours, fans set aside their personal biases, let down their cultural barriers and joined in a communal event.

I'd be lying to characterize appellate argument as a shared communal love-fest. Nonetheless, during the brief minutes of an appellate argument, counsel and the panel are engaging in a communal experience with shared values.

Advocates must demonstrate respect for the institution of the court, for the rule of law and for the importance of judicial decision-making to a functioning democracy. A good advocate impresses upon the court its role in this process, drawing upon the common values that underlie the process of good judicial decision-making. The best advocates do this across a wide variety of cases, much like the Dead was able to create a lasting impression in songs both frivolous and profound.

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