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FORENSIC PERSUASION

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There are two distinct parts in the lawyer's work in court. The first is the presentation of evidence on direct, cross and redirect examination, a great art in itself, but the evidence alone would often fail to attain full significance without the other phase of the advocate's work, skill in forensic persuasion which enables him to make the most of the evidence. These matters are the heart of the lawyer's work. His client's life or liberty or his property interests depend on his ability to do both tasks well. Nor is this all; on his skill in the presentation of his case in court the course of the development of the law may turn, for the courts must necessarily rely largely on the research of counsel in reaching their decisions. Yet, oddly enough, the arts of forensic persuasion are not taught in any of our law schools. So hard pressed for time are we in imparting knowledge of the law and in teaching skill in legal reasoning that the acquisition of the great arts of the advocate is left to chance as if there was neither art nor science in the matter.

I hope to be able to demonstrate to you that there are some very definite laws prescribed neither by the courts nor the legislature that govern the effective presentation of every case in court quite as much as if they were written in the statute book or embodied in the rules

*[The second annual John Randolph Tucker Memorial Lectures were delivered by the Honorable Arthur T. Vanderbilt, Chief Justice of the Supreme Court of New Jersey, on April 12 and 13, 1950, in Lee Chapel. Under the general title "Forensic Persuasion," Judge Vanderbilt gave three lectures, in which he emphasized the lawyer's science and art of making the opening statement in the trial court, presenting the final summary in the trial of a case, debating questions of evidence, and arguing an appeal.]

Inasmuch as these lectures will soon be published in book form (along with the first lectures of the series, which were delivered by Mr. John W. Davis in May, 1949), the Law Review will not print them in full. However, with Judge Vanderbilt's permission, we are making at this time an advance publication of the introduction to his first lecture. For an expanded treatment of the same subject by Judge Vanderbilt, see *A Report on Prelegal Education* (1950) 25 N. Y. U. L. Rev. 200, at 267-290, and reprint by the Director of the Council of the Survey of the Legal Profession.]

of court. These laws may seem to vary as one moves from the opening of a case to the summing up after all the evidence is in. They may seem to differ when there is a jury present from what they are when the judge sits alone as both the trier of the facts and the arbiter of the law. There may seem to be little resemblance between such an opening and summation on the one side and the remarks that counsel addresses to the court on objections to the reception of his adversary's evidence or on a motion for a nonsuit at the end of a plaintiff's case or for a directed verdict at the close of the entire case. There may also seem to be little in common between any of these steps in a trial and a motion for a new trial after a jury has come in with an adverse verdict. Even more set apart may seem to be the argument of an appeal from the judgment below to a reviewing court, which is everywhere deemed to be the crown of the advocate's work. Yet in all of these various types of forensic persuasion there is an essential unity; the outward differences merely reflect either differences in the tribunal addressed or the purpose for which it is addressed. This essential unity springs from the nature of the human mind. In each step we are dealing with the impact of one mind on another in an effort to resolve a controversy between human beings according to certain very definite rules of fair play that have for their grand objective the substitution of reason for force. When the process works, we achieve justice; when it fails, we must write it down as a failure of your profession and mine.

Most of these successive steps in the forensic presentation of a cause emphasize the constructive phase of the advocate's activities; he is endeavoring to synthesize the facts and the applicable law from his client's point of view and to make the most of them. It is work that often reveals the lawyer at his best. The pleadings, his trial brief, even his appellate brief may seem cold and detached as by their inexorable logic he seeks to demonstrate to the judicial mind the soundness of his client's position, but from the very fact that lawyers and judges and jurors are men, every word that the advocate utters in the courtroom, whether in opening to the jury or in arguing to the court of last resort, will inevitably be permeated, for better or worse, by the influence of his personality, however much the wise advocate may seek to subordinate it to the facts and the law of his case. Every word that the lawyer addresses to the court or the jury is intended not merely to convince, but to persuade—to move the court or the jury to take a desired action, action I may add that is always at the expense of the adverse party. The competitive spirit of the trial court or of the appellate tribunal, although always restrained

within the limits of forensic decorum, cannot fail to quicken the pulse of the true advocate and to give him an exhilaration and glow—win, lose or draw—that cannot be equaled by any other intellectual activity of our profession.

The arts of forensic persuasion are especially important in an era such as the one in which we are living, when the velocity of social change is greater than anything hitherto known to the common law and where the course of the law, to a much larger degree than most of us suspect, depends upon the way facts and the law are presented to the court by counsel. Indeed, not long ago I received a letter from one of our most distinguished professors of law, lamenting the fact that the law had become so complex that it was difficult, if not impossible, for even the judges to know it and suggesting therefore that the primary obligation of the law schools might well be to teach their students the arts of persuasion. While I am sure John Randolph Tucker would have never accepted this concept of the aim of a law school nor, I suspect, would my friend if faced with the necessity of making a choice, I feel certain that Dean Tucker would have heartily approved of the study and the practice of the art of forensic persuasion, which his own career exemplified in such a high degree.

The Six Factors in the Work of the Advocate

Before proceeding to discuss in some detail the various types of forensic persuasion to which I have already alluded, it will be helpful to enumerate and then to comment briefly on the six factors that are involved in the work of the advocate. As I proceed, you may find it interesting to take personal inventory of your own stock in hand by way of preparation for becoming an advocate:

1. The capacity for grasping all the facts of a case in all of their interrelations and implications quickly and comprehensively.
2. A thorough understanding of the fundamental principles and rules of law and the ability to apply them to the facts of a case.
3. An understanding of human nature and an ability to get along with people generally.
4. A comprehension of the economic, political, social and intellectual environment of modern litigation, for cases are never tried in a vacuum.
5. The ability to reason concerning the facts, the law, the personalities involved in a litigation, and the environment of a case in such a way as to solve the pending problem in the most satisfactory manner possible.

6. The ability to express one's self clearly and cogently, orally and in writing.

The temptation is strong to delve into a thorough-going analysis of the part that each of these factors plays in a lawyer's life, but I must content myself with a brief comment on each.

1. Every experienced advocate will tell you that *mastering the facts* of a case is the most difficult part of his work. There are likely to be as many different versions of the facts of the case as there are witnesses and parties in interest, and it is by no means improbable that these versions may change materially—and quite without any intentional dishonesty, such is the frailty of human memory—from the time the witnesses are first interviewed to the day of trial. It is the lawyer's duty to know as many of these different versions of the facts as he possibly can before he comes to court, either from interviewing his own witnesses or through pretrial examinations of his his adversary's witnesses, and to anticipate in his inauguration those hostile versions of the facts that for one reason or another he is unable to ascertain in advance of trial. This effort to obtain a comprehensive grasp of the facts of the case from his client's point of view and to anticipate his adversary's case is seldom a routine matter; it often calls for a high degree of constructive imagination in which a knowledge of human nature that is at once broad and deep is required. This diversity of views as to the facts means that he must keep a tentative attitude toward the facts of the case that are disclosed to him, realizing full well that at the trial he will learn things that he has never dreamed of before. By knowing or anticipating the story of each witness he will often be able to explain away seeming contradictions and point up the truth. On crucial items he should be able to repeat the story of each of the witnesses in their own words, and on the argument of an appeal he should be able to tell where every statement of fact appears in the record and to refer to it quickly. Such skill rarely comes by grace; one's faculties for organizing and remembering facts must be arduously cultivated. Fortunately, it is our privilege—nay, our duty—to forget the facts of a case as soon as it is over, for otherwise the advocate's mind would soon become an intellectual junkyard.

Though the lawyer must know all of the facts of his case and everybody's version of them, it is essential that he should not harbor the notion that he is bound to tell either the trial court or the appellate tribunal all that he knows. Indeed, there could be no surer way of losing a case. Knowing all of the facts, he must confine his presentation to those which are most cogent and persuasive. His power of

selection, of arrangement and of emphasis will be the measure of his genius. He will do well to remember the force that inures in the concrete instance in contrast to vague generalities and he will never forget the wisdom of Macaulay's dictum in presenting a picture to either jurors or judges: "Logicians may argue about abstractions, but the mass of men must have images."

Not infrequently in complicated cases counsel will be called upon almost overnight to learn about an entire art or industry with which he may previously have been totally unfamiliar. Thus, years ago I was called upon to defend some insurance companies that were being sued for the loss of certain paintings which the plaintiff described as the works of certain old Italian and Dutch masters. The defense was that they were not the old masters they were represented to be, but fraudulent reproductions. The preparation and trial of the case called for a thorough knowledge of the paintings of the Italian and Dutch artists in question, of the characteristics and techniques of each of them, of the kind of canvas on which each worked, and the chemistry of the pigments each used, in contrast with the canvas and pigments disclosed by the charred remains of the pictures that had been insured. My investigation required not only much study of books but conferences on art, on canvas, and on pigments, matters with which I was blissfully ignorant before being called into the case. Every experienced trial lawyer has scores of such experiences.

2. Little need be said about the second element in the advocate's work, because the acquisition of a thorough understanding of the fundamental principles and rules of the *law* is one of the chief aims of every law student. To understand the law, however, in its proper perspective to the other factors in the lawyer's work we would do well to remember that in contrast to the facts of a case, which tend to be specific and concrete, the rules of law always are abstract and they deal with the relations between persons or between persons and things. It is therefore most important to form the habit of noting to one's self throughout every step of a case and in dealing with every one of the many versions of the facts, the rules of law that apply thereto. The advocate will, of course, be interested not only in the controlling rules of substantive law and the principles underlying them, but also in the rules of pleading by which issues are presented to the court, and of evidence by which they are proved there. This process of applying the law, substantive and procedural, to the facts of the case is the converse of the process that the student is accustomed to use in the study of cases, but it will give him no difficulty if he has done his law school work thoroughly.

3. The third element in every law suit, and quite as important as the facts and the law, is a *knowledge of human nature* and an ability to get along with people. I am referring not only to the lawyer's client and his witnesses, but also to his adversary and his client and his witnesses, and the judge, the jury and everyone with whom he has to deal in the conduct of the suit. Each of them is a unique personality. Their variety is infinite. A single mistake in drawing a jury may cost the plaintiff his case, while at the same time a single deft choice may mean victory for a defendant. "The proper study of mankind," says Pope, "is man." And of no one is this more true than of the trial lawyer. He must learn to judge character as much by the voice and by a man's manner as by what he sees in his face and what he says. It is a difficult art but a fascinating one. The prospective advocate may learn much through observation, more through conversation, but most from daily contact with people. He should school himself to make his study of human nature a lifelong habit. He may learn much through the study of the world's great literature, notably the Bible and Shakespeare, that he will not be able to discover elsewhere.

4. Next the advocate must know the economic, political, social and intellectual environment of his case and the *trends of the times*. He must know whether he is working with or against what Dicey has well called "the assumptions of the age":

"There exists at any given time a body of beliefs, convictions, sentiments, accepted principles or firmly rooted prejudices, which, taken together, make up the public opinion of a particular era, or what may be called the reigning or predominant current of opinion . . . It may be added that the whole body of beliefs existing in any given age may generally be traced to certain fundamental assumptions, which at the time, whether they be actually true or false, are believed by the mass of the world to be true with such confidence that they hardly appear to bear the character of assumptions."

All this calls for a knowledge of the social sciences in the broadest sense of the term as well as of the humanities and for insight in forecasting the trends of the future. As a profession we have been slow to recognize this responsibility. Indeed, I suspect that even you may think I am speaking not as a practical man of the law but as an erstwhile educator in urging on you desirable but not essential attainments. The matter is so vital that I cannot permit any doubt of your responsibility for preparation in this field to linger in your minds. I summon to my aid two of the great corporation lawyers in the country.

Said Edward F. Johnson, General Counsel of the Standard Oil Company of New Jersey:

"Unless the lawyer is keenly sensitive to such [social] trends, advice acted upon today is likely to fail to meet the test of judicial scrutiny years later To statute and decisions has been added a new legal dimension—the dominant public interest. A lawyer's advice based upon a two-dimensional study of the law is likely to result in as great a distortion of reality and to be as flat as a two-dimensional painting without depth or perspective. A sound lawyer—sober, hardheaded and realistic craftsman that he is—pays heed to every relevant fact, whether or not that fact is to his liking."

Hear also William T. Gossett, General Counsel of the Ford Motor Company:

"The lawyer representing business today, if he is to live up to the challenge of his new responsibilities, . . . will be alive to the social, economic and political implications of the time; he will avoid a narrow, shortsighted approach to his client's problems; he will act with due regard for the social responsibilities of the enterprise; he will have the courage to advise against a business program or device which, although legally defensible, is in conflict with the basic principles of ethics. Failing this, he not only will be ignoring his obligations to society, he will be doing a disservice to his client, who may find himself in the position of winning a legal battle but losing a social war.

5. The fifth factor in a lawyer's work is the *ability to reason* concerning the facts, the law, the personalities involved in litigation and the environment of the case in such a way as to solve a controversy in the most satisfactory way possible. There is little need to talk to law students about this, for the great educational achievement of our modern law schools has been in training their students to think as lawyers think. It is the necessity of reasoning about concrete facts, abstract law, complicated personalities, and the complex social scene that calls for such a variety of traits in the trial lawyer and that in turn makes his work so absorbing. While the lawyer thinks both inductively and deductively in the preparation for trial and the courtroom, it is important to observe here that in forensic persuasion he uses largely the deductive approach.

6. Finally, the advocate must be able to *express himself* in words. He must master the use of words or they will be likely to master him. He must cultivate the arts of both written and spoken expression until their use becomes second nature to him. I do not have in mind

any tricks such as sometimes masquerade under the guise of semantics. Many a case is won or lost according to the skill of counsel in translating his points into language that may be grasped by his particular audience. After he has completed his study of the facts, the law, the people of a case, and the environment, after he has exhausted his powers of reasoning, he will still have the problem of making himself so clearly and so forcibly understood as to be able to persuade his hearers. They must feel—and he must be able to make them feel—that he is uttering realities and not mere words. Self-expression is, indeed, a lifelong adventure.

The law student will note that with the exception of the second factor in the advocate's work, an understanding of the law, and the fifth, the art of legal reasoning, all of the elements that enter into his work are those of the educated and enlightened good citizen. They are not narrowly professional. The more the student has learned and the more he has trained his faculties in each of these fields, the easier will be his initiation in the arts of advocacy.

All advocacy involves conflict and calls for the will to win. But the conflicts of advocacy proceed under very definite rules, the first of which is that the contestants must be gentlemen. They must have character. This means that they have certain general standards of conduct, of manners, and of expression that are so habitually theirs that they do not have to stop in an emergency to argue with themselves as to whether or not they should conform to them. The prospective advocate, moreover, may learn much from a study of the functions of the several steps in forensic persuasion and of the different kinds of tribunals he will be called upon to address, so that in his hour of testing he will not have to stop, when his mind should be on the merits of his case, to debate with himself the intricate questions of trial or appellate tactics. Nothing, of course, will take the place of actual experience in developing his own skill, but a study of the problems inherent in the various phases of advocacy and of the experience of others may save him from making a multitude of unnecessary mistakes. The prospective lawyer must also learn that hard work is his daily lot. As Lord Chancellor Eldon graphically put it: "I know of no rule to give them but that they must make up their minds to live like hermits and work like horses." But the reward is great. To quote Judge Cardozo, "What we give forth in effort comes back to us in character. The alchemy is inevitable." Character, capacity for hard work, the will to win, and a study of the methods of the advocate round out the requirements for preparation for the art of advocacy.