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Effective Communication - A Necessary Skill

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EFFECTIVE COMMUNICATION - A NECESSARY SKILL

When Dean Figg and Frank Gary invited me to make this speech, I was initially under the impression that the audience would be limited to the Senior Class in the Law School. I was then thinking of talking tonight quite informally about the problems which beset the young lawyer during his first year or two of practice. This was a comforting thought because every older lawyer delights in reminiscing about the problems he faced (and, of course, mastered) when he came to the Bar.

But as I was contemplating this kind of talk with anticipation, a letter came advising me - tactfully but quite firmly - that the audience would include lovely ladies and distinguished judges and lawyers, and would be far too sophisticated for an evening of fatherly advice to apprentice lawyers.

This unsettling news dispelled my complacency, and put me to work trying to find a subject that might

interest both the freshman law student and the deans of your Bench and Bar.

There is an intriguing chapter in the history of the University of South Carolina, by Dr. Hollis, entitled "The Cult of Oratory". This chapter tells the story of your Clariosophic and Euphradian Societies - which evidently had a profound influence in the life of your university. In speaking of these societies, Dr. Hollis said:

> "No accomplishment was more highly respected in the old South than oratory. . . . Innumerable fluent tongues were cultivated and many a prominent career in state and national politics had its origins within the walls of these noteworthy . . . societies."

The first president of the University of South Carolina, Jonanthan Maxcy, is quoted as saying:

> "Whatever the test in other lands, here (in South Carolina) a man must speak, and speak well, if he expects to acquire and maintain a permanent influence in society."*

I must say that I hope you do not apply such high standards to a visitor from Virginia. Indeed, if there had

*Hollis, University of South Carolina, Vol. 1, Chapter XIII, p. 230.

been a full disclosure of the standards which prevail here, I would not have had the temerity to speak in these halls. But at least your great tradition of emphasis upon the power of effective speech has suggested a subject for me this evening.

All of this reminded me of a speech made a few years ago to the Virginia State Bar Association by Lloyd Paul Stryker on "The Art of Advocacy". He delivered this after a long cocktail hour and sumptuous dinner at the Greenbrier. The next day, I joined with several of my brothers in discussing what we had learned the evening before on the art of advocacy. The concensus was - very little. But we all agreed that Mr. Stryker had made a charming and ingratiating address. May I quote his opening paragraph:

> "I see before me here the proud heirs of a great tradition and a great history. The story of your coastal plan, your Piedmont Plateau, and your vast Appalachian Mountain province is a gallant and a glorious one. With it always will be tied imperishable memories of heroism and sacrifice, the record of brave men and women without whose unconquerable convictions and brave deeds there could have been no United States of America."*

*Reports of Virginia State Bar Association, Volume LXV, 1954, p. 238.

Mr. Stryker's speech went on in this vein for some thirty or forty minutes. By this time he had confirmed the predilections of the audience that Virginia was the greatest state, that our ladies were the most beautiful, our lawyers the best, and our judges the wisest. He had won us more with his oratory and charm than by his logic or profundity. He had demonstrated the art of advocacy, rather than expounded it.

There are few such orators left today. The Bar is less colorful than it was in former years, but the requirements of practicing law are far more exacting than they were when advocacy was synonomous with oral argument in court, and eloquence - in the classic sense of a Demosthenes or a Cicero - was considered a lawyer's highest talent. Today, the well rounded lawyer must be far more than an orator. One of his essential capabilities must be the capacity to communicate effectively without oratory. And here I use the term "communicate" in the broadest sense of conveying ideas and information by the written and spoken word.

The lawyer's end product is service to his client. This service may be as dramatic as representation in the sensational jury trial, or as prosaic as writing a deed. It may be in the giving of verbal advice in the privacy of a lawyer's office; in the conducting of a labor negotiation; in appearing before a legislative committee or administrative tribunal; or in the writing of a simple contract or a complex corporate mortgage. There is no end to the examples which could be given of the ways in which a lawyer renders service. While infinitely varied, one common denominator is the necessity of communicating ideas or information - by the written or spoken word.

It is, therefore, not too much to say that the power of effective communication is an indispensable attribute of the good lawyer. Indeed, without this power in substantial measure, it is difficult to be a lawyer.

The most glamorous form of communication is - and always has been - oral advocacy before a jury or a court. Although the style of courtroom advocacy has significantly changed, its purpose remains the same - to persuade judge or jury of the justness of the client's

cause. The history of Anglo-American law is happily embellished by the names of lawyers who won renown as advocates. I will, selectively, mention a few whose names will live as long as there is freedom under law.

Perhaps the greatest advocate who ever practiced at the English Bar was Thomas Erskine. A scotsman, who dominated the Bar from 1778 until he became Lord Chancellor 28 years later, Erskine made his reputation as defense counsel fighting for such causes as the right of fair trial, independence of juries and freedom of the press. It should encourage young lawyers that Erskine's first speech, delivered as one of five defense counsel before Lord Mansfield in Westminster Hall, assured him of fame and fortune almost instantly.*

*Captain Baillie's Case (a trial for criminal libel). Lord Birkett spoke of Erskine's fame as follows: "There was a time, as the Eighteenth Century closed, when Erskine's name was on every lip as the fearless defender of the citizen's rights; and he was hailed as the savior of his country. Bonfires were lit in every part of the kingdom in his honor. After some of his great victories in courts, his horses were taken out of his carriage by worshipping crowds and he was drawn in triumph through the streets of London." Lord Birkett, Six Great Advocates, Penguin Books, Ltd., 1961, p. 82.

Erskine's talent with words, even before he came to the Bar, attracted the attention of Boswell. In his Life of Johnson, Boswell wrote of Erskine:

> "There was a young officer in the regimentals of the Scots Royal Guards who talked with a vivacity, fluence and percision so uncommon that he attracted particular attention."

Lord Birkett, a distinguished advocate in his own right, described Erskine's qualities as follows:

> "Erskine set new standards of advocacy. Until his day there were few graces of rhetoric exhibited in King's Bench courts. His strength law in presentation. The clear statement of the facts, which is the first requirement of modern advocacy, was always observed by Erskine; and he combined with persuasive presentation of the facts, a clear and compelling view of the conclusions to which he desired the court to come. At a time when the bullying of witnesses was a common practice, Erskine was always courteous and good-humoured. He united cogency and lucidity; and though his style of oratory may be unsuited to modern ears, being too ornate and too prolix, it was perfectly adapted to the age in which he lived."*

*Lord Birkett, Six Great Advocates, Penguin Books, Ltd., 1961, p. 90.

There are many other English barristers whose fame as advocates will long endure.** But I shall only mention Sir Edward Marshall Hall, who is known to many American lawyers through the work of his brilliant biographer, Edward Marjoribanks. Marshall Hall was born in 1858, was called to the Bar by the Inner Temple in 1883, and for some forty years was perhaps the leading defense lawyer in criminal causes at the English Bar. He is described by Lord Birkett as follows:

> "He had almost all the qualities that go to make the great advocate. He had sympathy and understanding; he could enter fully into the lives of other people almost naturally; he had fire and passion and zeal; he was dramatic and histrionic; he could speak simply and most attractively to ordinary people; and, as his outstanding quality, he could rise to heights of pure eloquence and sway the hearts and minds of men."**

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*These include Sir Patrick Hastings, Sir Edward Clarke, Sir Rufus Isaacs, Sir Charles Russell, Sir John Simon, and more recently, Lord Birkett.

**Lord Birkett, Six Great Advocates, Penguin Books, Ltd. 1961, p. 10.

It has also been said that Hall's remarkable knowledge of human nature was an even greater asset than his superb eloquence. But he had his serious weaknesses. He was not a profound student, and would not study the law. He had a violent temper, and often quarreled unnecessarily with judges. These weaknesses no doubt deprived Hall of the reward of most great English advocates - a position on the Bench. His name and fame will, nevertheless, occupy a foremost place as one of the greatest trial lawyers of his age.

These leaders of the English bar have been fully matched at comparable times in America. And here in South Carolina the name of John C. Calhoun obviously heads the list. Although he is remembered primarily as a statesman rather than a lawyer, Calhoun expounded the South's viewpoint with a force and eloquence which assured him personally - despite the rejection of his views - a place of distinction in our history.

Calhoun's great antagonist in the Senate was Daniel Webster, who must be included among the leading advocates of all time.*

*The Senate reception room contains the portraits of only five senators selected in 1957 by the Senate as "five outstanding persons who have served as members of the Senate since the formation of the Government." Both Calhoun and Webster are among the five, joining Clay, LaFollette and Taft.

Webster's renown is usually associated with the Dartmouth College case, in which his brilliant oral argument extended for more than five hours. At least one sentence, striking for its simplicity, is familiar to all of us:

> "It is a small college, and yet there are those who love it."

The real test of a lawyer's advocacy is whether he persuades the court or jury. And this persuasion may go far beyond the winning of a particular case. Under our common law system of judicial precedent, lawyers as well as judges often play significant roles in shaping the law. Webster's influence on the development of our constitutional law is a striking example. Professor Freund has said:

> "Every schoolboy knows how large a part of Daniel Webster's arguments before the Supreme Court found their way into the opinions of Marshall. . . ."*.

Webster himself was not unaware of this influence. After the decision in Gibbons v. Ogden, in which Webster

*Paul A. Freund, On Understanding the Supreme Court, Little Brown & Co., Boston, 1950, p. 79.

was co-counsel with William Wirt, Webster commented proudly to a friend:

> "The opinion of the Court, as rendered by the Chief Justice was little else than a recital of my argument. The Chief Justice told me that he had little to do but to repeat that argument, and it covered the whole ground. And, what was a little curious, he never referred to the fact that Mr. Wirt had made an argument."*

Webster evidently performed better before the Supreme Court than he did on one occasion in South Carolina. It is said that when he addressed the Euphradian Society in 1847:

> "He gave such a lackadasical performance his auditors remarked that the youth who introduced the famous speaker made a better speech than 'Black Dan' himself."

Another famous American lawyer of the 19th Century was Rufus Choate. Although not as conspicuous a public figure as Webster, Choate was at least as widely known as a lawyer of extraordinary ability.**

I will mention only one example of Choate's technique as an advocate. In Shaw v. Worcester Railroad, he represented a bereaved widow suing for damages for the death of her husband, killed at a railroad crossing. A witness testified that the husband was intoxicated at the

*Warren, Supreme Court in U.S. History (rev. ed. 1937) pp. 610-61
**Claude M. Fuess, in his biography (Rufus Choate, Minton, Balch & Company, New York, 1928).

time of the accident, adding that he smelled whiskey on the dying man's breath. This enable Choate to display his resourcefulness:

> "'This witness,' he cried, 'swears that he stood by the dying man in his last moments. What was he there for? Was it to administer those assiduities which are ordinarily profered at the bedside of dying men? Was it to extend to him the consolations of that religion which for eighteen hundred years has comforted the world? No, gentlemen, no! He leans over the departing sufferer, he bends his face nearer to him,—and what does he do? What does he do, I ask?—Smells gin and brandy!"*

Having had some experience myself in the disenchanting task of trying to defend railroads, I am tempted to say that the lesson of Mr. Choate's tactics has not been entirely lost on the present generation of plaintiff's lawyers.

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*Claude M. Fuess, Rufus Choate, Minton, Balch & Company, New York, 1928, p. 167-168.

Perhaps the best known defense lawyers in the early part of this century was Clarence Darrow. Although his reputation was not as broadly based as a Webster or a Choate, he was supreme in the difficult art of blending psychology, logic and emotion into an argument. His eloquent plea against capital punishment saved the lives of Leopold and Loeb in the famous Franks case. His concluding passage was as follows:

> "I am pleading for the future; I am pleading for a time when hatred and cruelty will not control the hearts of men. When we can learn by reason and judgment, and by understanding and faith, that all life is worth saving, and that mercy is the highest attribute of man."*

It is fascinating to read and talk about the exploits of these and other giants of the Bar. But it must be remembered that the practice of the law has changed greatly, even since the early decades of this century. Rarely are court trials the public spectacles

*Frederick C. Hicks, Famous American Jury Speeches, West Publishing Company, St. Paul, 1925, p. 1089.

of former years. Nor is the successful modern lawyer - even the specialist in litigation - likely to be a showman who relies primarily on forensics and capacity to sway the emotions of a jury.

The law has become infinitely more complex, and the presentation of facts has itself become an advanced art. The highly skilled trial lawyer today is better educated, works,harder, and presents his cases with greater care and system than ever before in the history of our profession.

This is not to say that advocacy is no longer important. It simply takes a different form and, in the broader sense of capacity to communicate thoughts and facts, there has never been a time when effective advocacy was more important to success at the bar.

Although I have been talking primarily about oral advocacy in the courtroom, the average lawyer's daily work is concerned with less dramatic forms of persuading others.

Even the trial lawyer is likely to spend almost as much time with the written word as in oral presentation.

At the trial court level, he must write pleadings, instructions to the jury, motions, and trial briefs and memoranda. On appeal, there may be various petitions, and finally comes the appellate brief.

With the trend toward settlement rather than trial of cases, the presentation - both orally and in writing - of settlement proposals and counter-proposals is in itself a new and exacting form of advocacy.

In all of these functions, the lawyer is practicing the art of persuasion. Judge Joseph C. Hutcheson, Jr. has described this as one of the priceless skills of our profession:

> "How greatly fortunate . . . is the advocate who, in addition to having courage, character and resolution, and all the equipment and skill with which study, training, and discipline can provide him, is lucky enough to be endowed with that priceless ingredient, the power of persuasion. . . ."*

It is well to remember that the "power of persuasion," both orally and in writing, is almost as important

*Hutcheson, "The Advocate in the Trial Court", Vol. 1956, Univ. of Illinois Law Forum, No. 2, p. 179.

in office practice as it is in the courts. Many examples come to mind. Whether it be the negotiation of a divorce settlement agreement or the hammering out of the terms of a shopping center lease, the lawyer with the greater facility to persuade has a distinct advantage.

And once an agreement is reached - whatever the subject matter may be - the lawyer's next task is to reduce it to writing. Here, again, the capacity to use the English language with brevity, clarity and precision is an asset of incalculable value.

I pause here to mention a story attributed to Judge Murdock of the United States Tax Court, who is properly impatient with the tendency of many lawyers to be prolix and redundant.

> A taxpayer had testified: "As God is my Judge, I do not owe this tax!"
>
> Judge Murdock replied: "He's not. I am. You do."

It is not necessary to go as far as Judge Murdock, but conciseness and brevity are virtues often neglected.

One of the greatest lawyers of all time, John W. Davis, spoke of the use of language as follows:

> "How greatly [the] usefulness [of a lawyer] depends upon the proper use of language. Webster's declaration that 'the power of clear statement is the great power at the bar' should be hung on the walls of every law school—and every lawyer's office, too, for that matter. It is true, both in and out of the courtroom; it is profoundly true upon the Bench."*

Perhaps enough has been said to make the point that capacity to communicate effectively by the spoken and written word is - and always has been - an essential skill of the successful lawyer. This is a far broader skill than eloquence, and happily it can be acquired in large measure by study, application and self-criticism.

And now before concluding, it may be appropriate to ask, especially here in this academic setting, whether

*Theodore A. Huntley, John W. Davis, Duffield & Company, New York, 1924, p. 240. (From a speech before the West Virginia Bar Association in 1922).

enough is being done in the education of lawyers to develop this skill?

Dean Figg, and others here this evening, are better qualified than I to answer this question. But my own experience, chiefly with prelegal education, suggests a negative answer. Far too little attention is devoted at all levels of education to courses and disciplines which would improve the capacity of our people generally to speak and write the English language. There are, for example, at the high school and college levels, very few required courses in speech. While I discern a trend toward greater emphasis on training in composition, one may doubt that this is really adequate in many schools or colleges.

The head of a great theological seminary was recently discussing this subject in my presence. The boys who enter his seminary have all had four years of college, and yet the level of their achievement in ability to write and speak effectively was described as shockingly low.

This is a problem of substance as well as form. I believe it was Cicero who said: "The foundation of

eloquence, as of all other things, is knowledge. . . ." Most of the great advocates of the past century were steeped in Latin and in the classics, and had a thorough command of both the Bible and Shakespeare. I have no doubt that the freshman law student today, with an A.B. degree, has a better grounded overall education than his father or grandfather, but few would deny that there is still room for improvement in the content and quality of prelaw school education.

And now a final word, which I shall address especially to the law school students. Most of the older lawyers here tonight will agree with what I have said. They know from experience that capacity to use the English language - with clarity, precision and force - is indeed an indispensabl skill. But the truth is that most lawyers develop rather early (and dispite what they may say to the contrary) a certain pride in their own ability to write and speak. Few older lawyers will make a conscious effort to identify their weaknesses or to improve their style or effectiveness.

Happily, you who are still in law school, have both the willingness and opportunity to develop what John W. Davis called the "power of clear statement," and to attain, as Judge Hutcheson aptly said, that "priceless ingredient - the power of persuasion." You have the opportunity in the appropriate courses in law school, in your Law Review work and in Moot Court competition. Most important of all, each of you can develop and improve your capacity to communicate by wide reading and by constant practice in writing and speaking.

You have all these opportunities here in one of America's finest law schools, and in a state which has a tradition of learned and eloquent lawyers. May each of you take full advantage of these opportunities.

Lewis F. Powell, Jr.