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ORAL ARGUMENT OF APPEALS†

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I have been requested to distill from experience some helpful principles to be observed in the oral argument of appeals. In candor, I confess that this is like asking a mountain fiddler to explain to a music society the principles of harmony that came to him by instinct and ear. Truly you deserve a Beethoven, but I hope that you will tolerate a Carson Robertson.

I shall probably violate every principle of forensic statement I am about to declare, but that is chargeable to that special type of poetic license granted to the advocate.

It is like the lawyer who won a signal court victory on a certain point of law in one case, and who argued a case the following day before the same judge taking the opposite side of the same point of law. When questioned by the Bench as to how this could be, he explained, "Your Honor, it occurred to me, as it might have occurred to you, that my legal logic was so unassailable in the other case that my peculiar talents should, in all propriety be pitted against the principle—lest the law become fixed and immovable in the iron box of *stare decisis.*"

It is, then, the oral argument of the appeal that is our concern. We shall assume that the brief, adequate in all respects, has been filed.

I shall, without further ado, get into the middle of the problem. But I can not refrain from flexing a few preliminary professional muscles to show you I have been in the ring. I shall divide my proposition into logical categories, in the same way Chief Justice Taft reported that a lawyer addressed the Supreme Court, stating that he proposed to divided his argument into three parts. "In the first," he

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said, "I shall state the relevant facts; next, I shall propound the applicable principles of law; and, third, I shall make a lunge at the passions of the court."

I. Some General Principles

Like the stilling of music of the mountain waterfall by the power dam, the grandeur of legal oratory untrammeled by time limitations has given way to the necessities of our modern age. As a lover of waterfall symphonies and of sweeping oratory, I bitterly resent what the modern age has imposed, but as a modern man I reluctantly bow to the community need for electricity and, as an up-to-date advocate bent upon winning my case, I adjust my oral approach to doubting appellate judges in conformity with the necessities of modern appellate courts.

Where, in another day and time, appeals were argued for weeks on end, now only the most urgent public necessity will bring an appellate court to grant additional time for argument. Thus, brief, compact argument, powerful in impact, is the instrument that must be used in modern appellate argument. The rifle is the weapon to use—not the shotgun.

In this day, appeals are won or lost upon oral argument. The judges of every appellate court in the land with which I am acquainted could not, reading 24 hours a day, read and digest all of the printed material that is currently filed in their courts. Even with the able assistance of clerks and secretaries, it is impossible for judges to adequately cover the material.

This means that appellate judges must depend upon oral argument as the indispensable vehicle for "knowing" the cases that come before them. It means that appellate judges rely upon the vigorous advocacy of each side to light up every corner of the controversy. The court becomes the anvil and the advocates the hammer. To appellate courts, the brief is but an introduction to the problem, a guide during the course of argument and a source of after-argument reference when decisions are prepared. Oral argument, then, is a prime instrument for decision.

Is it not clear, then, that the oral argument is of essential and fundamental importance? Thoreau said, "It takes two to speak the truth—one to speak and one to hear." It is thus in the oral argument that the truth shines most clearly, if you will but sharpen your oral presentation.

All who have written about the oral argument of appeals are unanimous in saying that, in such argument, the lawyer has the opportunity to bring into play all of his resources of mind and heart and spirit. It is the highest art of the legal profession and truly serves to "separate the men from the boys."

The argument of an appeal in many ways depends upon rudimentary principles of salesmanship, drummed into every Fuller Brush salesman. The first of these principles is to "know your prospect" and in the case of the appellate advocate, to "know your judges."

I would advise you to read the opinions of judges who will hear your appeal to learn their inclinations in the broad principles you will espouse. Try to determine their mental attitudes as revealed by what they have done and what they have said in their opinions, speeches and published articles. Then look at your case in the eyes of each of those mental attitudes.

Do your best to surmise what questions each judge will ask and why he will ask them. What doubts will each judge have from a quick reading of your brief and from his memory of the external brush with the issues which he had when you applied for an appeal?

Determine, as best you can, which of the judges you believe will be with you, which will be against you, and which will be neutral! Map your argument so as to win over those who may be against you, carry the neutrals, and give no offense to those who are with you!

Keep in mind the factors which necessitate placing time limits on oral argument. If you would put yourself in the shoes of the judges, you would find you are tired physically and mentally most of the time, that you no longer have a social life or the opportunity to pursue hobbies and avocations, and that every waking hour is consumed in its entirety by the necessity of going over the flood of papers dealing with appeals. If you lived that life, think how grimly you would react to a verbose, time-consuming argument that wandered all over the lot and wasted the precious time of a court so heavily burdened. On the other hand, consider what a joy it would be to hear an advocate argue his case with an economy of words, in a style that combined clarity with spice, who said his piece in a clear but modulated voice and, most of all, who brought to the argument that intangible thing of the heart that touches every word with gold—passionate sincerity.

II. Preparation for Oral Argument

Be liberal in the time you provide yourself for preparation of your oral argument. It is a great fallacy to assume that because you

have tried the case in the trial court or written the brief that it will be a simple matter to prepare the oral argument. The only appellate argument I ever undertook in which I had adequate time for preparation was the first one I made in 1934. I took two months to prepare my argument simply because in those days I had nothing else to do. Even so, on the day of argument I felt hollow and inadequate.

Unless you are lucky enough to be selected to argue an appeal in your very beginnings when time hangs heavy on your hands, or unless you are at the top of your profession so that all of your partners and associates bear the burdens of the legal work, there is no Patmos to which the average lawyer may retire to devote himself to the important task of preparation, without interruptions. Thus, I reiterate, set aside *twice* as much time as you judge will be necessary for the preparation of the argument.

If you wrote the brief or made a major contribution to its preparation, you have the advantage of a familiarity with the record and the principles of law involved in the case. This advantage is almost nullified, however, by the fact that your point of view may have become fixed and stubborn as a result of your prior work. The only answer in either situation is for you to wipe your mental slate clean and start at the beginning and read the record, pleadings and exhibits with great care and thoroughness.

It is my practice first to read the record in this fashion without taking any notes and then to go back and reread the record, taking careful notes as I go along. You will be surprised how many points are overlooked in the first reading and how often your point of view changes after the second careful reading.

Having thus taken careful notes covering the essential points of fact, you are now ready to nail down the elusive principles of law *which govern* the case. There is no rule that I can give you as to how far your legal research should take you. Each man must satisfy his own appetite. I can only say that I have never been impressed by preparations that gave over-lengthy citations nor with the appellate advocate who attempted to buttress his point by citing a long list of cases. If there is one thing which the practice of law teaches the advocate, it is that there is no decided case which precisely fits another and the art of appellate advocacy is to distill broad principles of law convincingly so that the justice and equity which he seeks are properly reinforced by these principles.

In all that I have recommended, I have tried to say that you must *saturate* yourself with your case. First, the facts, then the law, and

from this, the broad equities of your proposition. When you have accomplished this, you should then have the confidence which comes from thorough preparation and which is so essential to the plan for the attack upon that citadel of doubt—the appellate court.

So far as my own experience demonstrates, and my opinion is fortified by the concurrence of every great appellate judge that I have ever talked with, the most important single element of successful oral argument is the ability to select the heart of your case—the hub—the core, upon which all else depends. If you have saturated yourself with your case as carefully as I recommend, you should be able to make this decision easily.

In making this fundamental decision, however, do not be afraid to take your problem to older practitioners. Most of them will be delighted to give you their advice and help. You may also want to consult the lawyer who tried the case below and others associated in the case. But in the end you, *and you alone,* must decide what is the heart of the case.

When you have decided this basic issue, then you have the task of laying out your argument on that central point, tearfully giving up all of the interesting by-roads that are so enticing and all of the subsidiary arguments intended to be security points on the long pull. This is where you become the generalissimo and make the technical legal decision of where the fight will be made.

From that point onward, a great deal of your task becomes mechanical. I suggest that you write out what you propose to say, and in writing it I suggest the elimination of all fancy phraseology and involved sentences. Stick to good Anglo-Saxon words and phrases, make your sentences pithy, distill your thoughts into simple language, and if you *can,* be vivid; but, *above all else, be brief.*

After you have satisfied yourself with the first draft, cut it in *half* and when you have done this, go over it again and cut it about *one-fourth.*

In your preparation of these drafts, I suggest the following:

First, state whom you represent and where your client is located.

State the nature of your case—that it is a tort, a question of constitutional law, or whatever it may be.

Make a brief statement of the court's jurisdiction. A lawyer now deceased, whom I knew and respected as a great advocate, argued one case in the Supreme Court before he died. In argument, he launched headlong into his case and when the Chief Justice asked him, "How did you get here?," he replied, "I came up on 42, Southern Railroad."

Next, *state the facts.* Daniel Webster said that "the power of clear statement is the great power at the bar."

It is at this point that John Davis' recommendation of the "Three C's" of appellate argument should be borne in mind: "Chronology, Candor and Clarity."

State the rules of law which you rely upon and be prepared to meet any challenge that may come to your position. Keep in mind the heart of your case and, even though questions may momentarily take you away from the main road, diplomatically avoid any extensive treatment of such issues and return to the hub of your case.

Now, reduce what you have written for oral argument into bold headnotes easy for you to read at a glance, and preferably on a very few pages.

Begin to rehearse your argument out loud. Whatever you do, avoid committing to memory your purple passages. You will need flexibility and, if you memorize, you solidify the mind.

Time the length of your argument so that you can finish it in no more than two-thirds of the time allotted. As you continue your rehearsal, plan to cover your essential argument in *half* the time, for the court's questions may prevent you from employing over half of the time.

If you have an associate or a partner in the case, have him assist you in your rehearsal by interrupting you with searching questions that you anticipate the members of the court may ask you, and rehearse your answers to those questions.

Now, you are prepared for the argument.

III. Argument

Try to go to the court a day or so ahead of your case and take time to make a friend of the clerk or one of his deputies. You will find these people most helpful in advising you of the peculiarities of the court and its rules as it pertains to oral argument, and in telling you something about the individual preferences of each of the justices. If you can, listen to the argument of a case the day before you go on, so that you can get the feel of the court at work.

Do your best to anticipate what your opponent will say about your argument and be prepared to meet it *if* he says it. But, whatever you do, do not take precious time to anticipate what your opponent may say.

If your client will stand it, get a room in a hotel where you can work in comfort and seclusion. On the day of the argument, leave

behind associates, wives and clients whose presence in the courtroom may tend to distract you from your important task.

Dress conservatively, not in slavish conformity, but because the dignity of the process in which you are engaged is not the place for the individualism found in gaudy raiment.

Leave behind all your multitude of law books and papers. By this time, you should not need them.

The essential things to have with you are, first, your notes for argument; second, the record tabbed appropriately for purposes of ready reference, should that be necessary; and, finally, your brief.

There is something psychologically persuasive about a man who comes before an appellate court unburdened by a lot of legal paraphernalia.

Remember the limitations of time which are so important to the court and to the strategy of your argument. If you are interrupted by questions, be prepared, within the limitations of time remaining, to revert to the heart of your case and cover its major aspects.

As you address the court, look its members in the eye. Avoid reading *anything* unless it is absolutely essential and, in that event, confine it to those things that are in the record so you can, by reference to page and paragraph, have the court read it at the same time you are reading it.

Joyfully embrace the questions of the court. Many of my friends among appellate lawyers are convinced that appeals are won or lost in the handling of the questions from the Bench.

Above all, never avoid a question or postpone it. Answer with sincerity and complete frankness, even if your answer is against you. Use the court's questions to return to the central heart of your case.

Avoid rebuttal simply because the time is there. Oftentimes greater emphasis is given to your proposition and to your confidence in its correctness by refusing rebuttals. Avoid it if you are convinced the court understands your proposition.

Above all, learn to sit down. If you have said your piece as you planned it and if you have covered the essential points, the court will be grateful to you if you will sit down.

Finally, do not be afraid of your inadequacies. You will find the court will exhibit its instinctive desire to help you and, if you have truly immersed yourself in your case, you will never be inadequate.

If you know your case, you should not be afraid. Once you are swimming in the stream I promise that you will forget all of your doubts and worries.

The essence of all great advocacy is sincerity. If you hammer your points with righteous zeal, your sincerity will shine through and add dignity and life to your cause. The court will be grateful for your sincerity, and even though they may not decide with you, you will have done justice to your cause.