THE ARGUMENT OF AN APPEAL BEFORE THE CALIFORNIA SUPREME COURT

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I cannot adequately express to you how honored I feel to have been selected to deliver the first lecture of the newly created Justice Lester W. Roth lectureship on advocacy in our trial and appellate courts. As many of you must know, a very generous individual who desires to remain anonymous has endowed these lectures through a donation to the Law Center of the University of Southern California, and the lectures will continue annually for the next quarter century. By the year 2004, I am inclined to the view that almost everything that can be said about the skills, duties and responsibilities of the trial and appellate advocates will have been spoken. I am indeed fortunate; I have a clean slate upon which to write; I can map out as broad or narrow a trail as I choose to travel as no one has preceded me.

But first, I cannot allow this occasion to pass into history without paying my own tribute to the great justice and gentleman in whose honor this series of lectures has been created. I was indeed fortunate, when, in 1968,

* Chief Justice of California, 1970–1977. Remarks delivered as the First Annual Lester W. Roth Lectureship on Trial and Appellate Advocacy at the University of Southern California, April 18, 1979. Unpublished typescript in the collection of the Law Library of the University of Southern California School of Law.

I was appointed to the court of appeal, to have been placed on the division presided over by Justice Roth. Never was a neophyte given a warmer welcome that was I; no one could have been treated with more thoughtfulness and kindness than was I. Justice Roth did not even chide me when shortly after my arrival on the court, I foolishly fell out of an orange tree, breaking my right arm and incapacitating myself for some weeks from performing the very duties I had been appointed to undertake.

Almost immediately, we became good friends and my wife, Margo, and I cherish the warm relationship that we soon enjoyed, not only with Lester but with Gertrude, his most gracious and charming wife of over a half century.

Justice Roth has presided over Division Two of the Second Appellate District for over fourteen years with great distinction, and his many published opinions are models of legal scholarship, clarity and, generally, of brevity. I shall always be grateful that I served my apprenticeship as an appellate justice under his guidance. He was the finest boss under whom I served in the appellate structure. I say that *not* because he was the *only* boss I ever worked under, but because it would have been impossible to find a warmer, kinder and more helpful human being anywhere in the judiciary of this state. Lester, I personally thank you; I salute you, and my one wish is that the few remarks I make today will be at least partially worthy of you and of the anonymous donor who made these lectures possible.

I have discovered that the subject "Trial and Appellate Advocacy" is an *all* encompassing theme, and many lawyers, judges and professors can talk for hours and hours and even days and days upon various facets of the topic. Rather than taking a hit or miss approach or attempting to cover too broad a field, I intend to confine my remarks primarily to my most recent experiences as a member of the judiciary. It is the area with which I am most familiar, as for a period of seven years ending in 1977 I served as chief justice of California.

But having served as a judge or justice for almost two dozen years, and at every level of the judicial structure, I have, of course, been exposed to almost every type of legal legerdemain which might possibly be termed "advocacy." Therefore, this afternoon I shall confine my remarks almost exclusively to argument of an appeal before the California Supreme Court, a tribunal before whom many of you have appeared or will appear in the

days and years which lie ahead. Of necessity, of course, I will be compelled to include a few remarks on oral advocacy which would be applicable in any court, trial or appellate.

"Although appellate argument is a common occurrence and represents the culminating competitive effort in the legal contest, it is probably a fact that this is the least qualitative accomplishment of the bar as a whole."[1] That is one reason I wholeheartedly endorse the clinical programs which have been included in the curricula of this law school and of others throughout this country. And this also is the reason I strongly support the moot court programs which have become of increasing importance since I entered law school a half century ago this fall.

I cannot describe in a few words what makes successful oral advocates. I can tell you how one of our legal giants describes them. Bernard E. Witkin tells us that the successful and "[e]xperienced appellate advocates get their kicks out of winning an appeal on the merits of their clients' cases or their own skill; *and* the reversal or affirmance of a judgment, *coupled with a sizable fee,* brings all of the fulfillment which their psyches desire."[2] I think even the whimsical Bernie would concede that his description is slightly simplified.

Before launching into my "case in chief," I should define some of the rules or procedures which proscribe the activities of those who would present their clients' cases to the California Supreme Court. You will forgive me if in the talk I mix my tenses. Sometimes the past tense will be used as frequently as the present. It is difficult to break a habit of some years and I still think of the tribunal most fondly as "my court" or at least, "our court."

You are probably aware that throughout this nation appellate tribunals are divided between "hot" and "cold" courts. The California Supreme Court and, I believe, most of the divisions of the courts of appeal, are "hot" courts. This means quite simply that at the time argument begins on any matter all of the justices have read a rather lengthy memorandum prepared by a colleague, generally with the assistance of his or her staff. Only that particular justice who is responsible for the preparation of the

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[1] Raymond Wilkins, *Argument of an Appeal,* 33 Cornell L.Q. 44 (1947) (lecture delivered at Cornell Law School on May 2, 1947).

[2] Bernard E. Witkin, talk to students of Justice Friedman's class at UC Davis School of Law, November 20, 1978 on "The Joys of Appeal."

memorandum has *at that time* reviewed the briefs and supporting documents. We will all so do at a later time.

And if that justice is diligent, and almost all whom I have known possess that trait, the calendar memo, as we call it, will state the facts of the dispute in a forthright manner and will indicate how the matter reached our Court. Also contained in the memo will be found a statement of issues that are to be resolved, a résumé indicating what the justice believes the current law *is* or *should be* and a recommendation, sometimes in the alternative, as to what disposition should be made of the appeal. Briefly stated, a justice who has done his homework, who has read the memo and who has made innumerable notes on that memo addressed to himself for use at the time of argument, comes onto the bench with a pretty fair knowledge, occasionally erroneous, as to what the case is all about.

A "cold" court, on the other hand, consists of a tribunal in which the justices or judges generally have little and sometimes no knowledge of what lies ahead and will seek enlightenment from the counsel who appear for argument.

Our California Supreme Court adheres to a rather rigid time allocation, allowing each side one-half an hour to present argument of counsel. In certain instances when we had a matter before us of monumental importance, such as *People v. Anderson*,[3] the first opinion in the United States outlawing the death penalty as being both cruel and unusual, or *Serrano v. Priest*,[4] the first opinion holding that a right to an education is fundamental, or the reapportionment cases, *The Legislature of the State of California v. Reinecke*,[5] we were more generous with time, allowing each side a full hour or more for argument. Appellants may, of course, reserve time for rebuttal, but such time must be deducted from the overall allotment and should be (but seldom is) limited to true rebuttal.

In earlier days when courts, lawyers and litigants apparently had considerable time at their disposal, a single argument might frequently extend for days and days. "It has been stated for instance, that the arguments of Webster, Luther Martin and their colleagues in *McCulloch v. Maryland* consumed six days, while in the *Girard* will case Webster, Horace Benney and others for the

[3] 6 Cal.3d 628 (1972).

[4] 3 Cal.3d 580 (1971).

[5] 10 Cal.3d. 196 (1973).