THE ARGUMENT OF AN APPEAL BEFORE THE CALIFORNIA SUPREME COURT

BY DONALD R. WRIGHT*

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 Unpublished typescript in the collection of the Law Library of the University of Southern California School of Law.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).

whole of ten days assailed the listening ears of the court."[6] I need not mention that those days are gone forever. Now a clock sits on the podium and the advocate must keep one eye on it, the other on his or her notes.

Further, the Supreme Court of California, except for the death penalty cases, is not required to grant a hearing on any particular petition or on any specific number of petitions presented to it. We are not a court to correct error, and with over eleven hundred judges and justices in California, you may be certain that each may commit an error at least once each week, if not each day. You can easily comprehend that we cannot spend all of our time correcting deviations in evidentiary matters, legal principles, facts and/or procedures.

Our Court was, and I presume still is, a questioning Court, and the advocate can expect to be interrupted frequently, if not constantly. With most of the justices, I defy any human being to guess with any degree of accuracy how a particular justice will vote by the questions he has asked. Other justices are less subtle. Frequently, upon leaving the bench I have remarked, somewhat facetiously, to a colleague, "I thought you made the best argument of the day." Superb oral advocates such as the late John W. Davis have stated that an advocate should rejoice when the court asks questions. This conclusion, in my opinion, warrants some scrutiny. If the inquiring justice is truly seeking further illumination on a point raised by counsel, or if a member of the court is truly challenging the correctness of counsel's reasoning, the accuracy of the authorities cited or their application to the case before the court, the advocate should welcome the questioning and, by supplying appropriate answers, be able thereby to score a few points.

And may I assure you from long personal experience that few incidents in the courtroom are more frustrating than, in answer to a question, to receive a reply from counsel such as, "If the court will bear with me for just another moment or two, I will be coming to that," and then to have the argument end with the question still unanswered. In the situation I have mentioned, counsel should at once indicate what his answer will be when he or she reaches the appropriate part of the argument, and counsel should never, never sit down until the question has been laid to rest.

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[6] Hon. John W. Davis, "The Argument of an Appeal," from an address delivered before the Association of the Bar of the City of New York, October 22, 1940, reprinted as *Case on Appeal,* Trial and Appellate Practice Handbook 93 (1952).

At times it has appeared to me that a justice and an advocate will engage in extended colloquy for no other apparent purpose than for the justice to attempt to convince the advocate of the errors of the latter's reasoning. This may lead to an excellent display of oral fencing, but I have not found it generally to be productive. This occurs at all levels of advocacy from the lowest court in the land to the United States Supreme Court. John W. Davis recalled an instance when a former justice of the Supreme Court engaged counsel in a long series of questions just as the latter began his argument. Chief Justice White was heard to moan audibly, "I want to hear the argument." "So do I, damn him," growled his neighbor, Mr. Justice Holmes.[7]

And one final note on the subject. If the question calls for a negative answer, do not attempt to evade or mislead the court. Answer the question truthfully and quickly. Those you are trying to convince will be gratified that at least one issue has been disposed of *and* at a saving of time. One further word on the California Supreme Court is that we encourage argument and we do not take kindly to a statement by counsel such as "argument waived" or "submitted on the briefs and petition."

With the general guidelines or, if you will, idiosyncrasies, I have described as mandated by our Supreme Court, please permit me to address a few thoughts on the general subject of argument of an appeal. I have reviewed a great number of books selected for me by your most able librarian, Professor Albert O. Brecht, in preparation for these remarks. Reference after reference was made by various authors to an address delivered before The Association of the Bar of the City of New York almost forty years ago by the Hon. John W. Davis, the extremely talented advocate I mentioned earlier in this talk. For example, Lloyd Paul Stryker in his splendid book, *Art of Advocacy,* published in 1954, sets forth almost verbatim much of the speech of Mr. Davis. As so many references were made to that address, I tracked it down and I, too, shall refer to it from time to time. Generally speaking, Davis' remarks tally almost completely with my own experience of nearly two dozen years as a jurist. One caveat I start with, as does he: never forget that the justices are those at whom you aim your argument and that oral argument should have but one goal — a dedication to be of assistance to the court. All too frequently, I must confess, such is not the case.

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[7] *Id.* at 102.

Davis proposed a decalogue to guide argument. Some points are almost identical to those on the views I have already expressed in speaking of the California Supreme Court. Others of his ten are inapplicable to the California courts; others are so apparent that I shall do no more than mention them.

At the top of his list he proposes that the *advocate in his imagination* should change places with the court, one I confess I never entertained. As Davis said, "courts of appeal are not filled with Demigods. Some members are learned, some less so . . . . In short, they are men and lawyers much like the rest of us . . . . If the places were reversed, and you sat where they do, think what it is you would want to know about the case. How and in what order would you want the story told?"[8] In other words, prepare yourself mentally to tell the justices what the case is all about.

After going through the mental device I have described, state the facts. Of course, this rule is not so important in arguing before the California Supreme Court because, for reasons already revealed to you, the justices are generally well acquainted with such, but the advocate must point out the salient facts, the ones upon which he or she relies. And the facts must be stated with complete candor, or if you wish to characterize it by another term, they must be stated with complete honesty. In my experience, I have observed all too frequently counsel who failed to follow this principle and who were quickly caught up by a member of the Court. Much valuable time and sometimes the cause were lost as a result. Insidious is the lingering doubt that remains in the minds of the justices as they retire to their conference room. Frequently I have heard one of us remark to our colleagues, "But he wasn't honest with us!"

Of course, no one can expect the degree of honesty demonstrated by Abraham Lincoln upon the occasion of his first appearance before the Illinois Supreme Court. His entire argument consisted of the following remarks:

> This is the first case I have ever had in this court, and I have therefore examined it with great care. As the court will perceive by looking at the abstract of the record, the only question in the case is one of authority. I have not been able to find any authority to sustain my position, but I have found several cases directly in point

[8] *Id.* At 97.

> on the other side. I will now give these authorities to the court, and then submit the case.[9]

Nothing of a similar nature has ever occurred during my judicial experience, I assure you.

Davis, in his address, stated that after the factual declarations, the advocate should state the law upon which he or she relies. I have no quarrel with that procedure and would most certainly endorse it. If a statement of fact has been properly done, he says,

> the mind of the court will already have sensed the legal questions at issue, indeed they may have been hinted at as you proceed. These may be so elementary and well established that a mere allusion to them is sufficient. On the other hand, they may lie in the field of divided opinion where it is necessary to expound them at greater length and to dwell on the underlying reasons that support one or the other view.[10]

If the interpretation of a statute enacted by our Legislature in Sacramento is at issue and the particular law is honeycombed with ambiguities, as is often the case, I frequently fall back upon the spoof of a literary figure, A. P. Herbert, who wrote in one of his classic essays on "The Uncommon Law": "If Parliament does not mean what it says; it must say so." I was so intrigued with this quotation that I once suggested to my good friend, Mr. Justice Mathew O. Tobriner, that he use it in one of his opinions. This he promptly did, thereby foreclosing me from placing it in one of my own writings.

Davis further suggests that the advocate should always go for the jugular vein. "More often than not there is in every case a cardinal point around which lesser points revolve like planets around the sun."[11] Or if you prefer, like the ten moons of Jupiter, revolve around that giant planet. I too urge that the advocate go for the all-important point or points. Counsel who persist on proceeding on the theory that every point, however trivial, should be presented at oral argument may in the end simply put his or her listeners in a condition commonly labeled soporific. Such minor points

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[9] Sir Edward Abbott Party, Seven Lamps of Advocacy 19 (1924).

[10] Davis, *supra* note 3, at 100.

[11] *Id.*

can well be included in the brief to support and defend, if need be, the principal point covered by counsel at argument.

Several other of the rules formulated by Davis require little or no expansion from me. He enjoins the advocate to read to the court only sparingly and from necessity. You may be amazed at how quickly the mind wanders when counsel begins to read at length from authorities, be they well known or obscure. This is true especially, as is often the case, when he or she mumble the words, omitting anything resembling emphasis, and turns the head away from the microphone.

A further commandment in which I wholeheartedly concur: counsel must know the record from cover to cover as "it is the *sine qua non* of all effective argument."[12] I cannot tell you how many hundreds of times a member of our Court became aware that what counsel was stating *was not* supported by the record. Nothing is more devastating to an otherwise effective argument than to have the advocate fail to respond to a question from the Court: "Where do you find that in the record?" Counsel must either concede defeat or attempt to evade the question. A successful advocate has to be aware of all that has gone before and plan his strategy accordingly. "Statements off the record are just as bad in the oral argument as in the brief. The inevitable *dénouement* may or may not be close at hand, but its effect, whenever it occurs, will be equally baleful."[13] St. Thomas More, in his *Utopia,* wrote, "They have no lawyers among them, for they consider them as the sort of people whose profession is to disguise matter."[14] I feel certain St. Thomas must have had in mind in penning those lines the advocate who speaks or writes off the record. Mr. Justice Cardozo put it this way: "Nothing will forfeit the confidence of the court more effectively than the misstatement of the record or a statement of fact off the record."

The final admonition which I will shortly obey myself: *sit down*. Several of the most successful oral advocates in this state will frequently use only a fraction of the time allotted to them. Having only a few major points to impress upon the Court, they will aggressively focus argument on such issues, and, having conveyed in clear and concise language the facts, the

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12 *Id*. at 104.

13 Wilkins, *supra* note 1, at 45.

14 *Id*. At 46.

issues, and the applicable law, will yield the balance of the time. The effect is often electric and *often* most successful.

As stated by Davis,

> The process of appeal from one tribunal to another is very old in the history of human justice. No matter in what form it is carried on, the essentials of an appeal are always the same, and there is nothing new to be said about it. The need for an appellate process arises from the innate realization of mankind that the human intellect and human justice are frail at best. It is necessary therefore to measure one man's mind against another in order to purge the final result, so far as may be, of all passion, prejudice, and infirmity. It is the effort to realize the maximum of justice in human relations; and to keep firm and stable the foundations on which ordered society rests. There is no field of nobler usefulness for the lawyer.[15]

I said early in these remarks that appellate oral argument was probably the least qualitative accomplishment of the bar as a whole, but such need not be the case. As Mr. Justice Cardozo wrote in his essay, "The Game of the Law": "Skill is not won by chance. Growth is not the sport of circumstance. Skill comes by training; and training, persistent and unceasing, is transmuted into habit. The reaction is adjusted ever to the action . . . . The alchemy never fails."[16] May I extend the hope that each of you will become a brilliant oral advocate.

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[15] Davis, *supra* note 3, at 105.

[16] Benjamin Cardozo, The Law and Literature and Other Essays 172 (1913).