

A LECTURE ON APPELLATE ADVOCACY*

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Well, Brethren and Sistren, I find myself in a completely impossible position: The Bar Association has made it clear that beginning at eight o'clock I cannot possibly talk beyond sixty minutes. And the Law School has made it clear that beginning at 8:30 I cannot possibly talk more than thirty minutes. That gives me, as far as I can judge by my watch, something like fifteen to seventeen minutes to deal with a topic which when adequately presented by Frederick Bernays Wiener—and I think rather

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adequately presented—occupies about 500 pages.¹ (Laughter.) Under these circumstances I trust that I, as I attempt to hold myself within reasonable bounds, may have unanimous consent, to, as the people in Congress say, “enlarge my remarks”? (Laughter.)

Is there anybody who objects to my quote “enlarge my remarks,” unquote? Mr. Chairman, I ask you to note that there is no objection. (Laughter.)

I’m going to try to be just as short as I can, and you understand it’s utter nuts to attempt to tell anybody how to argue an appeal in two hours.

Let’s begin with a few of the presuppositions before one even starts to talk; the things that are completely presupposed. When I was a kid at Yale, Old Hadley, the President, used to tell the Chapel speaker, “Few souls are saved after the first twenty minutes.” (Laughter.) I should alter that general approach in terms of “No appellate advocate is created inside of an hour.” (Laughter.)

One has to assume a few things. One has to assume, for example, that you know about Davis’ magnificent address in 1940, on how to handle oral argument on appeal.² One has to assume that you know about what I think is an even better job: Whitman Knapp’s job, in 1959, *Why Argue an Appeal, and If So, How?*,³ or Kenison’s beautiful study of the general problem of appeal,⁴ or that beautiful book by Fritz Wiener, now in two editions, backbone, and very little waste space, on effective appellate advocacy⁵ and the approach to appellate advocacy by way of the federal courts.⁶

I say one has to assume this. One has to assume that everybody understands that to handle an appeal without oral argument is silly. I see no reason to argue that to you.⁷ If you don’t understand that, why, what’s the use of talking to you?

1. WIENER, BRIEFING AND ARGUING FEDERAL APPEALS (1961).

2. Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895 (1940).

3. 14 Record of N.Y.C.B.A. 415 (1959).

4. Kenison, *Some Aspects of Appellate Arguments*, 1 N.H.B.J. 5 (1959).

5. WIENER, EFFECTIVE APPELLATE ADVOCACY (1950).

6. *Op. cit. supra* note 1. This book is denominated “A new edition of ‘Effective Appellate Advocacy,’” title page.

7. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 240 (1960).

One has to assume such other minor things as that the fellow who is about to have the appeal can read. A broad assumption, I know. (Laughter.) And one has to assume that he knows that a sentence must be so written that the punch word comes at the end. And if you haven't got this to work with, you just can't talk. In even the half time that I haven't got. (Laughter.)

Nevertheless, I do think that once one makes those assumptions, there are some things that one can press—at least as to aspects which are not yet in the now growing, and, in my opinion, wisely and beautifully growing, literature. I don't think, for example, that that other piece of underpinning of any theory at all in the preparation of an appeal—the study of the particular tribunal before which the case is to come—I don't think that that has been pressed with anything like the power with which it ought to be pressed.

I hear a great deal from the skillful advocates, when they get around to such a speech as I'm trying to make, about “sinking yourself in the facts.” And “sinking yourself in the law of the case.” I don't hear so much, even from the really good ones, about how you have to begin by “sinking yourself in the tribunal” to which you are to argue. And I am about to urge upon you that it is through your understanding of the tribunal that you understand what facts to look at and what part of the authorities and what shape of the authorities to build to handle the facts in your particular case.

I say again: You begin before you get your case. Not only with a fundamental understanding of the language, but with an understanding of the appellate tribunals in your jurisdiction before whom you are about to argue. For, let me say this clean, clear, hard, and unmistakably: The job of an appellate argument is to win a particular case before a particular tribunal, for a particular client. And, since that is so, it begins with the tribunal. Long before the case comes into your office, you should have been studying that tribunal, indeed any appellate tribunal before whom you may have a case to argue. It is that tribunal's view of the facts which will control. It is that tribunal's view of the authorities which will control. It isn't yours. And there is nothing out there—as Holmes put it once, there is no “brooding

omnipresence in the sky”⁸—that’s going to work for your client or for you.

So we come to the general theory of tribunals, especially of the American appellate tribunal. This I have developed at very considerable length, and, as I am told by many of my readers, with unutterable difficulty in a book called *The Common Law Tradition: Deciding Appeals*. To any of you who are lawyers, I nevertheless insist you can’t afford not to work through that unbelievably badly written book. (Laughter.) The essence of it, for our purposes immediately here at hand, is that it demonstrates, and I think it demonstrates incontrovertibly, that our authorities, be they case law authorities or statutory authorities, are truly multiform; run in not one direction, but seven. (And I don’t see anybody challenging this yet. I don’t know how many reviews your Chairman mentioned, but he didn’t mention nearly as many as there are. [Laughter.] And there hasn’t been anybody who has been ready to get up and deny that the book demonstrates this.) I didn’t say “not one but two”; I said “not one, but seven.” And if you need, I will say forty-eight. But seven is enough to make the point that when you approach the authorities you approach a malleable, a manipulable mass of material.

If the appeal has any reason to have been brought at all, or has any reason to be defended at all by the respondent, the authorities are available on each side in a letter perfect case in the hands of any really competent technician. And this is simple as pie. The question is: Which view—justifiable, decent, righteous, and rightful—which view, among the possibilities, is the Court going to accept?

The second thing that the book does—and I think this is again demonstration and not an expression of opinion—is to make it clear that as our courts go about their job of simultaneously satisfying their duty to the law and their duty to justice, both of which they understand, both of which they cherish, both of which they labor over and under, their choice among the various doctrinally correct possibilities turns on the Court’s view of what is right and decent for the community in regard to the outcome of the case.

8. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (dissenting).

And this leads, you see, to a repetition of the three things which underlie any technique of legal argument:

First, because it is the Court's choice which is going to determine the outcome, you have to begin by study of the tribunal.

Second, because the facts are not the facts out there somewhere, but are the facts as seen by the Court, you have to study the Court first and see the facts through the eyes of the Court.

And third, since the authorities which are the controlling authorities are multiform, multi-possible, you have to study the way the court sees authorities. They are in the main extraordinarily careful in their handling of authorities.

I'm not going to spend any time on that. I simply tell you: Go look at the book. They are craftsmanlike, in their handling of authorities.

But the thing that guides them into this arrangement of the available, as distinct from that other arrangement of the available, is their sense, their view of sense, for the whole of us. And thank God that this is so. It's against this background, and only against this background, that we can start thinking in terms of technique. Do I make myself clear?

What I have to say about techniques presupposes that you can read English, write English, understand your Court, and understand your basic theory. Once you have got those things clean, we can begin to talk for the little time that we have left about how to go about doing it.

Of course the first thing that comes up is the issue and the first art is the framing of the issue so that if your framing is accepted the case comes out your way. Got that? Second, you have to capture the issue, because your opponent will be framing an issue very differently. You have got to so frame yours that it "sells the Court," to use the term of the marketplace, which I abhor—so that it "captures the field," is what I prefer, because I see this not as a matter of the marketplace but as a matter of war, once you're really into a case of appellate advocacy. And third, you have to build a technique of phrasing of your issue which not only will help you capture the Court but which will stick your capture into the Court's head so that it can't forget it.

You see how all this depends upon the underpinning. Nevertheless, I go on now to matters of technique. And if I may, for just a moment, I'm going to depart from appellate advocacy in order to present to you the problem of issue framing and issue capture. I'm going to go into this, in the first instance, in two cases.

One of my instances comes out of the Gospel of Matthew, in the 22nd Chapter, and has to do with a curiously great lawyer, whose name is Jesus of Nazareth. He was in a jam, a rather curiously modern kind, when a colonial power was under severe attack by a nationalist revolt. He was representing not the respectable leaders of the national group, but folks who were regarded as not at all so nice, and he was acquiring a following that was extremely uncomfortable to the nationalist leaders of the moment. So they sent around people to put to him a nice interview. (If it had been today, there would have been television cameras and a large battery of reporters.) And the question was: "Is it lawful to give tribute unto Caesar?" ("Caesar"—that's the Roman Emperor, that's the colonial power.) And it was set up so beautifully, you see. "There's a row about this," they said, "but you're so judgmental." That's a translation, which is a very bad word for the purpose, I think, but you get the point. If he said, "Yes," all the nationalists would be down on him—(indicating); if he said, "No, damn the colonial powers"—Police, get him by the neck.

In this situation, this extraordinarily skillful lawyer posed an issue in such fashion, (a) that it solved his case, and (b) that it sold the very adverse tribunal that he was dealing with.

Do you remember the story? He said, "Show me a coin." And somebody pulled out a coin. And he said, "Whose is the head and the name?" It was a Roman coin which showed the head of Caesar, and the name of Caesar. And then he said—the issue has been posed, you see this? The issue has been accepted. The adversary was sucked in; Lord, how he was sucked in—or "they" as the case may be. The minute that coin was produced and looked at there is no other answer. "Unto Caesar," says he, "that which is Caesar's; and unto God, that which is God's."

But the answer is of no value, until first the issue has been posed. And secondly, the issue has been sold. And third, the issue has been phrased to that you can't forget it.

Do I make my point?

And then there's another instance by this same amazing lawyer—all of this applies to appellate argument, of course; I'm just picking first instance cases because these are the finest that I know—that's out of John, Chapter 8. This is the case of a lawyer who has no facts and has no law and still so poses his issue as to win his case. And this is the thing for you to think about: Most of us take weeks to approach it, but this job was done, as far as our report goes, in the course of just a few moments.

The case was this: There was woman, caught in adultery, and she was dragged in. And she was put into the center of the circle. And the accusers said, "taken in the very act"—that takes care of the facts, doesn't it? And they said, "Moses in the law said"—in the law (and they were quite right)—"such shall be stoned." I will not go into the matter of stoning. I just remind you of the situation.

The report says that at this point Jesus stooped and wrote upon the ground, and John adds a very interesting additional observation, "as if he had not heard"—and I think he was fighting for time. And, by golly, I think he really needed it. (Laughter).

At the same time I call your attention to the trial lawyer tactics: He not only got time, but he also got complete concentration of attention. Then he rose up, surrounded with complete and utter silence, and he said (you remember this one, too, don't you?—no law, no fact, but we're posing the issue just the same; we're posing it so that it's going to be accepted, and we've chosen it so that it's going to win the case) "He that is without sin among you, let him first cast a stone." And our report is that they slunk away. You can't stone unless somebody starts.

That's a very interesting observation of John, who was no mean observer; he says the eldest first. (Laughter.)

Now this is the kind of thing that you do by genius, by inspiration, by experience, or, if you have none of these, by hard work. (Laughter.) You reach for the appropriate posing of the issue. And it has to be built in terms of your tribunal.

Let me give you a couple of modern instances which show how it can be done, either well or badly, without the benefit of genius or of inspiration. As a matter of fact, the cases I've given

you are ones in which I think Jesus was suffering under the hardships of mortality, and rather transcendently. But that has nothing to do with the case.

First is a case in which an entrepreneur of the big oil operating type (an amazing fraternity; small but amazing) had put together a combine between a French syndicate and an American group, and had operated under the well-understood rule, at least in France, that when you did this kind of thing and got it all put together, you got your commission from each side because you had done your job like a decent citizen. He got his commission from the French combine and the Americans, being sweet people, told him to go to hell. (Laughter.) So he sued.

This issue turned on whether, being an agent, he had not gotten his commission from his principal. And he found in the books, or at least his counsel did, a rule of “double agency” which you will find in all books on agency. If there is a complete disclosure made to each side of all points all the way along the line, you can be entitled to a commission from each side. Thus, there was a possibility of double agency, and his counsel, being in my opinion complete idiots, argued the case on this basis.

Now if I am right about the nature of the tribunal, and the nature of the general state of facts, as seen by tribunals, they could not have been sillier. Agency connotes to the ordinary American judge (a) loyalty and (b) diligence as duties. And you can't possibly—you can't possibly simultaneously satisfy loyalty to two people. I may quote again from a gentleman whom I have mentioned earlier this evening: “Man cannot serve two masters”; this is in the minds of American judges. And, you can't have diligence in favor of both at once.

So this case was taken up on that basis, and was of course lost.⁹ I don't see how it could help but be lost. But we have sitting in our books a completely different concept, the concept of brokerage. Brokerage involves, in nobody's mind, any suggestion of loyalty and diligence. It involves only what was in the facts, to wit, complete disclosure; and the job of the broker is to bring people together into a deal that they both like, or they all like, if it happens to be a multi-party transaction. Here was

9. *Reese v. Texas Co.*, 292 N.Y. 583, 55 N.E.2d 48 (1943).

the wherewithal to put the facts into a frame that would fit a body of law available and comfortable, emotionally comfortable to the Court. Being missed, the case was lost. I do not say it would have been won had it been done this way. What I do say is, instead of a scattered shot-gun setup, twenty to one against you, you had something like an even chance. And I would have been willing, under good argument, to take the loser's half of the bet.

Let's take another: In a case known as *Jenkins against Moyse*,¹⁰ we had two utterly dirty lice opposed to each other. I have never seen a case in which the stink was less easy to take. We had on the one hand an enterpriser who was in financial difficulty and had no character; and on the other hand we had one of the money lenders who reminds you of Shylock in his worst moments.

The situation was one in which this somewhat distressed borrower was looking for money, and the lender said, "I can't possibly give it to you unless you incorporate." And this was in New York.

Now, the New York Usury Law is quite queer in two aspects; at least it's untypical of the country. If you have a usurious transaction, New York is tougher than any law I know. You don't forfeit the interest, you don't forfeit double interest, you forfeit the whole, if it's usurious at all. And there's a special provision that says that if there's any security, that's void, too.¹¹ So that the equitable attempt to save at least the principal and make the debtor—what is the old phrasing?—"do equity if he is to get equity" is gone by statute in New York if it's a usurious transaction.

But there is a later New York statute that says that a business corporation cannot plead usury.¹² So what this lender did was to say, "Look, incorporate yourself, my friend, and then I will give you \$25,000, against your note for \$40,000, at 6 per cent on the 40." (Laughter.) And the borrower incorporated himself, and he got this deal. Then, being just as sweet smelling

10. *Jenkins v. Moyse*, 254 N.Y. 319, 172 N.E. 521 (1930).

11. N.Y. GEN. BUS. LAW § 373. The 1960 Session of the New York legislature amended this provision so that if the lender is "a savings bank, a savings and loan association, or a federal savings and loan association" only the interest is forfeited.

12. N.Y. GEN. BUS. LAW § 374(1).

a skunk as the lender, he is bringing a suit to have the mortgage declared void, for usury. (Laughter.) And you know, what can you do about this? You see, you haven't got a decent citizen in striking distance. (Laughter.)

Two lower court instances decided that this was an evasion of the Usury Law.¹³ And I think this is a reasonable decision. It is not the only reasonable decision; it is a reasonable decision. What interests me is what happened in the Court of Appeals. New counsel came in, and new counsel made clear to the Court that really this provision about corporations, business corporations not being allowed to plead usury, was a defense of the defenseless. That in the absence of such a provision, people who were most in need of money would be cut off from the money market completely by the Usury Law. And the legislature, with the wisdom inherent in the New York Legislature (Laughter), had chosen to open up an avenue whereby people in desperate need of funds, and in not too good financial condition, in business transactions, could have a wherewithal to pay whatever was needed to give them the money that they needed. And the Court looked at this and said, "This is fine."

The thing that I want you to see is that even in the construction of a set of statutes, the thing that was moving the Court was what had been brought home to them by counsel. It made sense, for the situation, "to decide my way," and so the Court selected, and the Court reversed the lower court.

But the situation has to be so diagnosed, and the issue has to be so framed, and the sense had to be made so clear that this particular possible way of handling that statute carries the Court, instead of being rejected.¹⁴

Let's take a further instance, and a final one, on this particular point. There was for a long time in Pennsylvania a machinery—am I boring you? (Laughter)—There was for a long time in Pennsylvania a machinery of mining anthracite coal, which moved in terms of leaving supporting pillars of coal as you went further and further into the seam. The idea was that

13. *Jenkins v. Moyse*, 229 App. Div. 743, 241 N.Y. Supp. 901 (1930).

14. The opinion in the New York Court of Appeals was by Lehman, who understood both real estate and business finance. (See LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 228, n. 25 (1960).)

when you finally got to the end of the seam, you would come back out, and take out the pillars, because they had to be pretty big pillars. They were economically significant pillars.

Some lawyer, somewhere along the line, got the notion that the normal right of a purchase of surface rights to support against subsidence could be taken out of the rights of the purchaser by explicit clause in the deed. Do I make this thing clear?

Ordinarily, when we divided the law into surface rights and mineral rights, the guy that had the surface rights is supposed to have surface rights, and so he's supposed to be able to build or farm or do whatever he wants. But this shrewd lawyer—I will call him “a Philadelphia lawyer”—I don't know who he was, and nobody knows who he was—conceived the notion that you could cut out of your deed the right to have the surface stay even. So that when the time came that you wanted to mine out the pillar, and the surface dropped, the guy who had bought the rights on top had no objection. (Laughter.) And this got to be so firmly established in the practice of Pennsylvania law that the right to support from the bottom got a name in the practice which I think exists nowhere else in the country. It was the third estate in land. There were surface rights, mineral rights, and the right to support from the bottom. (Laughter.)

Well, this moves perfectly well, and without any trouble to anybody, until the time comes that over one piece of anthracite mines population begins to really encroach and a whole chunk of the city of Scranton finds itself built on this kind of deed, you see, which was a standard deed. (You know what happens when you buy real estate, anywhere. What kind of a deed do you get? You get the kind of deed that's customary in the community. Suppose you say, “I want a different kind of deed.” What happens? They say, with all respect to the ladies present, “Go to hell.” And this is what you get. And you just get what you get.) (Laughter.) But it did happen, I repeat, that the city of Scranton really grew out over quite a piece of this anthracite stuff.

Then came the time when they came to the end of the seam and it began to become clear that they were going to go right back, letting the pillars come out. And what would happen to the surface, the business of the people on that surface? (Laughter.) And humanitarian elements and interested elements got together, and the Legislature passed a statute, that forbade the taking out

of pillars in such fashion as to endanger life.¹⁵ I abbreviate it very greatly.

A suit by the owner of a single residence finally came before the Supreme Court and the defense challenged the constitutionality of this statute.¹⁶ John W. Davis was for the defendant coal company and I am excited by his posing of the issue, in the oral argument. (It isn't done nearly as well in the brief.) Tradition has it that Davis opened his argument before the Supreme Court in language substantially equivalent to what I am about to state: "This case involves the question of whether the Legislature of Pennsylvania has the constitutional power to donate the property of the Pennsylvania Coal Company to Mr. and Mrs. Patrick Mahon." (Laughter.) The case was won by Mr. Davis, Mr. Justice Holmes writing the opinion.

But look at what a posing of the issue; look at the way in which the entire body of interest, of the state, was removed from discussion by "Mr. and Mrs. Patrick Mahon." This is the kind of thing I'm talking about. And what I want to bring home to you is that it doesn't take axe murder and love nest, and it doesn't take a cause célèbre, and it doesn't take anything at all in the way of extraordinary stuff, to put to the appellate advocate this type of problem.

My time is running out. I'm going to give you another very simple instance of this matter of issue posing, with a twist, if I may, of thought. The twist is that if you can make your weakness into your strength, that is what you are primarily gunning for. When you can take everything that the other fellow has got, and turn it your way.

The art of ring fighting has entirely changed since I was young. But when I was young, there was a style of ring fighting that was called the "sidestep." People in those days rushed, and the skillful man, instead of meeting the rush, slid it, and then socked the rusher as he went by. I don't know how much that means to any of you who don't know anything about ring fighting anyhow, but I trust I shall make it clear as we approach the next case, which is a simple torts case, a simple traffic case.

15. Penn. Laws 1921, pp. 1198-1200 (Kohler Act) PA. STAT. ANN. tit. 52, §§ 661-71 (1954).

16. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

What you have is a railroad which, under compulsion of statute, had built an underpass in the middle of the city to avoid a grade crossing. Now, when you build an underpass in the middle of the city you have to put steel pillars in, or else, if you don't put steel pillars in, you have to build a type of arch construction which at the time of the building of this underpass was technically almost impossible, and certainly outrageously expensive. The railroad, then, had built its underpass and had protected the trains that went over the underpass by way of steel pillars. Then the railroad got worried and it built on each side of the underpass a big concrete mound in between the two traffic lanes. The concrete mound was about five feet high and fairly wide and made it possible, you see, in case of trouble not to hit the pillar head on, but to climb the mound instead. Is this clear? (Laughter.) This makes a great deal of difference, as you will see in the case.

What happened then was that on a somewhat icy night, at about three in the morning, an obviously drunken driver slipped on his way down into the underpass, got over onto the mound, and piled his car up. But he only broke in the front of the car, and stayed alive, whereas had he hit under the same circumstances a straight, steel pillar, we wouldn't have had a lawsuit. We would only have had a visit from the—from the dead man.

And now with that the situation, the plaintiff's lawyer made magnificent play of the intrusion upon the street of an outrageous interference with traffic—a construction so dangerous to human life as to be wanton and willful within the meaning of the rule that says contributory negligence is no defense.

(I don't know what the rule is in Indiana, but in Illinois, if the risk imposed by the defendant is wanton and willful, then contributory negligence, which was plainly in the case, was no defense.)

And the idiotic lawyer for the defendant didn't make clear that this mound of concrete was a safety device. That when operating under compulsion of statute to build an underpass with steel supports, you were up against the proposition that no matter what you did, little though you liked to, you endangered life, but that if you spent extra money and built a concrete

mound, you could keep life from being sacrificed, even by people like this plaintiff. (Laughter.)

See, this is the kind of thing I'm talking about in terms of setting the facts up to frame the issue your way. So this case also was lost just as *Pennsylvania and Mahon*, which I think should have been won by the other side, was lost, largely in terms of issue posing.

Will you give me ten minutes more? (Applause.)

I've got first a corollary that derives from what I have been saying, and that is that the statement of facts, be it in the brief or be it oral, is the complete guts of your case. And I'm going to give you two statements of fact, one by an utter master, and another in the exactly same case, as an effort to show you how it can be done just the other way on the same facts and the same case.

The statement by the master is Cardozo in *Wood against Lady Duff-Gordon*.¹⁷ And you will get that, as I read it to you. You must remember that Cardozo was a truly great advocate, and the fact that he became a great judge didn't at all change the fact that he was a great advocate. And if you will watch, in the very process of your listening to the facts, you will find two things happening. The one is that according to principle number one, you arrive at the conclusion that the case has to come out one way. And the other is, that it fits into a legal frame that says, "How comfortable it will be, to bring it out that way. No trouble at all. No trouble at all."

"The defendant styles herself"—now watch the way in which she is subtly made into a nasty person—"The defendant styles herself 'a creator of fashions.' Her favor helps a sale. Manufacturers of dresses, millinery, and like articles are glad to pay for a certificate of her approval. The things which she designs, fabrics, parasols, and what not, have a new value in the public mind when issued in her name. She employed the plaintiff to help her turn this vogue into money."¹⁸

Does this sound—this is an interposition—does this sound like a business deal? Does a business deal sound like a legally enforceable view? Nothing is being said about that. But watch it

17. *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917).

18. *Id.* at 90, 118 N.E. at 214.

grow on you. And if I hadn't stopped to tell you about it, it would have grown until you just took it, without a word.

"He was to have the exclusive right"—watch this language—"exclusive right"—what wonderful legal language, to make it legally enforceable—"He was to have the exclusive right . . . to place her own designs on sale, or to license others to market them. In return, she was to have one-half of 'all profits and revenues' derived from any contracts he might make. The exclusive right was to last at least one year from April 1, 1915, and thereafter from year to year unless terminated by notice of ninety days."¹⁹

My heavens, isn't this legal?

"The plaintiff says that he kept the contract on his part, and that the defendant broke it. She placed her indorsement on fabrics, dresses and millinery without his knowledge, and withheld the profits. He sues her for the damages, and the case comes here on demurrer.

"The agreement of employment is signed by both parties. It has a wealth of recitals. The defendant insists, however, that it lacks the elements of a contract. She says that the plaintiff does not bind himself to anything. It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs."²⁰

Now, is there any way to bring that case out, except one? Isn't it obvious that we are going to imply a promise on the part of the plaintiff which will satisfy the requirement of consideration and the decency of the situation?²¹

All right, now try this: "The plaintiff in this action rests his case upon his own carefully prepared form agreement, which has as its first essence his own omission of any expression whatsoever of any obligation of any kind on the part of this same plaintiff. We thus have the familiar situation of a venture in which one party, here the defendant, has an asset, with what is, in advance, of purely speculative value. The other party, the present plaintiff, who drew the agreement, is a marketer eager

19. *Ibid.*

20. *Ibid.*

21. "We think, however, that such a promise is fairly to be implied. . . . A promise may be lacking, and yet the whole writing may be 'instruct with an obligation,' imperfectly expressed. . . . If that is so, there is a contract." 222 N.Y. at 91, 118 N.E. at 214.

for profit, but chary of risk. The legal question presented is whether the plaintiff, while carefully avoiding all risk in the event of failure, can nevertheless claim full profit in the event that the market may prove favorable in its response. The law of consideration joins with the principles of business decency in giving the answer. And the answer is no.”

Same case. Entirely the same case. But it brings me to the next fundamental point, which is that if you have an intelligent appellant, to rest upon his statement of the facts, if you are the respondent, is suicide. Did you hear me? If he is any good, you’re cooked. (Laughter.) You have a positive case to make, and you can only make it by restating the facts so that they fit into your picture of what the whole thing is. And I think with that I can practically stop, can’t I, because I’ve made the fundamental point.

No. I do have to say one thing about oral, and written, before I stop. The division between your oral argument and your brief is quite clear. Your brief has to provide the Court with the technical wherewithal to be perfectly happy in deciding your way with no qualms of legal conscience at all. And your brief ought also to provide, at some place,—Kenison²² is quite magnificent on this: Kenison says that at an appropriate place your brief ought to say, “A suggested rationale for this case,” and thereby offer the court something that it can lift, verbatim, into the opinion taking care of all prior authority, phrasing the whole satisfactorily, and applying it to the case in hand.

He’s quite right. But that’s the job of the brief. The job of the oral is two-fold: It’s first to persuade the court that you ought to win; and second, to make them read that brief. (Laughter.) A much simpler thing, you see, a much simpler thing—complexity of any kind has got to be kept out of the oral. You have an opportunity in the oral to capture their attention, to make them feel that this is the most important case of this particular term. You’ve got a chance to look at them and see whether it’s getting across. You’ve got a chance to answer their particular questions. If you by any chance have, as you may have, a panel that you don’t know about ahead of time so that you have to write your brief blind—take the case of the Circuit Courts, who sit in

22. Kenison, *supra* note 4.

threes, and who knows what three are going to be drawn—you've got a chance in the oral argument to talk to them. And see what's up. And watch their faces. And answer their questions.

No, the oral is vital on that. But above all, the oral has got to make sure that no matter how the court works—whether, as some courts do, they read the briefs before the oral, or whether, as some courts do, they, on principle, never read the briefs before the oral, or whether, as some other courts do, they assign the briefs to be read by someone to be reported on—no matter which way that goes, the oral is the place where you've got a chance to talk to them all. Therefore, you need to interest them in that brief. You've got to make them feel that when they come to the brief, "Oh, baby; is it going to be hot." And they've got to approach the brief with that favorable atmosphere that you need.

Now, that is one school of thought, which says that when the respondent gets up after the facts have been stated by the appellant, he is going to kill his case, if he has the court saying, "Oh, my lord, have we got to listen to this again?" I've said before, and I hope have made it clear, that this is a vicious, utterly vicious, theory of argument. You can not join issue on a well done job by your adversary. The guy who answers the points as they appear in the appellant's brief is the guy who runs himself up against that lovely phrase from Hamlet, "The lady doth protest too much, methinks." (Laughter.) And, by the time you have made the fourth denial, it is perfectly clear to the court that there is more than smoke; there is indeed fire in the appellant's case.

You need your positive case, not only in the law; you need your positive case in the facts. I have indicated in my book a couple of ways in;²³ I'll mention just one because my time is running out. If you start to say, "The facts are different," or "These are the facts," they'll go to sleep on you, or get mad at you. But if on the other hand you say, "There is one point that I don't think my brother has developed quite as fully as he might," and pick up some fact or other that you can build on, by the time you get done with that, you can swing into the recital of the whole.

23. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS*, 239 n.238.

(Laughter and applause, as Professor Llewellyn withdraws from the podium. The applause continued, and Professor Llewellyn came forward once again, as follows:)

Now listen you folks, applause doesn't count; what counts is action.

