

## ADVOCACY BEFORE THE UNITED STATES SUPREME COURT\*

Robert H. Jackson\*\*

The invitation to deliver this lecture is a signal honor, and the temptation is to respond with a discourse upon some tempestuous issue of world-wide reverberations. But it will encounter less competition and be more useful to the profession to choose a workaday subject on which I have some experience to support my opinions and you have personal experience to warrant criticising them. Let us consider together the problems which confront a lawyer when his case reaches its journey's end in the Supreme Court of the United States.

More than ten years ago, Mr. John W. Davis, in a wise and stimulating lecture on "The Argument of an Appeal," shared with our profession the lessons of his own rich experience. He suggested, however, that such a lecture should come from a judge—from one who is to be persuaded, rather than from an advocate. With characteristic felicity, he said: "Who would listen to a fisherman's weary discourse on fly-casting . . . if the fish himself could be induced to give his views on the most effective method of approach?"<sup>1</sup> I cannot add to the available learning on this subject.<sup>2</sup> I can only offer some meditations by one of the fish.

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\*\* Address by Hon. Robert H. Jackson, Associate Justice, Supreme Court of the United States, delivered upon the Morrison Lecture Foundation before the California State Bar on August 23, 1951.

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

2. In addition to the lecture in note 1, the students of the subject should see Birkett, *The Art of Advocacy*, 34 A.B.A.J. 4 (1948); Birkett, *Law and Literature—The Equipment of the Lawyer*, 36 A.B.A.J. 891 (1950). Weiner, *EFFECTIVE APPELLATE ADVOCACY* (1950) is a comprehensive and instructive text on appellate advocacy in general, but with especial reference to the United States Supreme Court. STERN AND GRESSMAN, *SUPREME COURT*

Let me confess that, when dangling bait before judges, I have not always practiced what I now preach. Many lessons that I pass on to you were learned the hard way in the years when I was intensively occupied with presentation of government litigations to the Court. And if I appear to overrate trifles, remember that a multitude of small perfections help to set mastery of the art of advocacy apart from its counterfeit—mere forensic fluency.

### IS ORAL ARGUMENT DECISIVE?

Lawyers sometimes question the value of the relatively short oral argument permitted in the Nation's highest Court. They ask whether it is not a vestigial formality with little effect on the result. In earlier times, with few cases on its docket, the Court could and did hear arguments that lasted for days from such advocates as Webster, Pinkney, and Luther Martin. Over the years the time allotted for hearing has been shortened, but its importance has not diminished. The significance of the trend is that the shorter the time, the more precious is each minute.

I think the Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations. Most of them form at least a tentative conclusion from it in a large percentage of the cases. This is not to say that decisions are wholly at the peril of first impressions. Indeed, deliberation never ceases and there is no final commitment until decision actually is announced. It is a common experience that a Justice is assigned to write an opinion for the Court in accordance with a view he expressed in conference, only to find from more intensive study that it was mistaken. In such circumstances, an inadequate argument would have lost the case, except that the writing Justice rescues it. Even then, his change of position may not always be persuasive with his colleagues and loss of a single vote may be decisive. The bar must make its preparations for oral argument on the principle that it is always of the highest, and often of controlling, importance.

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PRACTICE (1950), devote a chapter to "Oral Argument," in which perplexed counsel will find detailed guidance.

## WHO SHOULD PRESENT THE ARGUMENT?

If my experiences at the bar and on the bench unite in dictating one imperative, it is: Never divide between two or more counsel the argument on behalf of a single interest. Sometimes conflicting interests are joined on one side and division is compelled, but otherwise it should not be risked.

When two lawyers undertake to share a single presentation, their two arguments at best will be somewhat overlapping, repetitious and incomplete and, at worst, contradictory, inconsistent and confusing. I recall one misadventure in division in which I was to open the case and expound the statute involved, while counsel for a government agency was to follow and explain the agency's regulations. This seemed a natural place to sunder the argument. But the Court perversely refused to honor the division. So long as I was on my feet, the Justices were intensely interested in the regulations, which I had not expected to discuss. By the time my associate took over, they had developed a lively interest in the statute, which was not his part of the case. No counsel should be permitted to take the floor in any case who is not willing to master and able to represent every aspect of it. If I had my way, the Court rules would permit only one counsel to argue for a single interest. But while my colleagues think such a rule would be too drastic, I think they all agree that an argument almost invariably is less helpful to us for being parceled out to several counsel.

Selection of leading counsel often receives a consideration after the case arrives at the high Court that would have been more rewarding before the trial. But when the case is docketed in Supreme Court, the question is, shall counsel who conducted the case below conduct its final review? If not, who shall be brought in?

Convincing presentations often are made by little-known lawyers who have lived with the case through all courts. However, some lawyers, effective in trial work, are not temperamentally adapted to less dramatic appellate work. And sometimes the trial lawyer cannot forego bickering over petty issues which are no longer relevant to aspects of the case reviewable by the Supreme Court. When the trial attorney lacks

dispassionate judgment as to what is important on appeal, a fresh and detached mind is likely to be more effective.

No lawyer, otherwise fairly equipped for his profession, need hesitate to argue his own case in Supreme Court merely because he has not appeared in that Court before. If he will conform his arguments to the nature of its review and his preparation to the habits of the Court, he has some advantages over a lawyer brought in at that late stage. Sometimes even his handicap will work out to his advantage. Some years ago, a country lawyer arguing a tax case gleaned from baffling questions from the bench that his case was not going well. He closed by saying, "I hope you will agree with me, because if you don't, I certainly am in wrong with my best client." Such a plea is not enough to win a decision, but its realism would assure a most sympathetic hearing from any judge who can still remember what it is to face and explain to a defeated client.

Many litigants, and not a few lawyers, think it is some advantage to have their case sponsored by a widely known legal reputation. If such counsel is selected because of his professional qualifications, I have nothing to say against that. Experience before the Supreme Court is valuable, as is experience in any art. One who is at ease in its presence, familiar with its practice, and aware of its more recent decisions and divisions, holds some advantage over the stranger to such matters. But it is a grave mistake to choose counsel for some supposed influence or the enchantment of political reputation, and above all, avoid the lawyer who thinks he is so impressively eminent that he need give no time to preparation except while he is on a plane going to Washington. Believe me when I say that what impresses the Court is a lawyer's argument, not his eminence.

On your first appearance before the Court, do not waste your time, or ours, telling us so. We are likely to discover for ourselves that you are a novice but will think none the less of you for it. Every famous lawyer had his first day at our bar and perhaps a sad one. It is not ingratiating to tell us you think it is an overwhelming honor to appear, for we think of the case as the important thing before us, not the counsel. Some attorneys use time to thank us for granting the review, or for listening to their argument. Those are not intended as favors and it is good taste

to accept them as routine performance of duty. Be respectful, of course, but also be self-respectful, and neither disparage yourself nor flatter the Justices. We think well enough of ourselves already.

The time may come when you will be sought out to argue a case for other lawyers. In that event, you should consider whether it is not due yourself to insist on full responsibility for its presentation. Divided command is as disastrous to a litigation as to a military campaign. Either you will be in control of the litigation or someone else will be in control of your professional reputation. Some of the wisest leaders of the bar decline to participate in a case, even with most amiable and reputable associates, unless they are given undivided command.

The claim recently was given publicity that leading members of the bar refused professional employment in support of the Communist challenge to the constitutionality of the Smith Act. Every accused person has a constitutional right to counsel and there is a correlative duty on the bar to see that every accused, no matter how unpopular, is represented competently. In addition to this sense of duty, many eminent lawyers would welcome the professional challenge involved in that case. Knowing this, I examined with care the allegations filed in Supreme Court that the Communists could not get counsel. They did not disclose that any so-called leader of the bar had been asked, or would be allowed, to assume full responsibility for argument of the case. The most that appeared was that they were asked to associate themselves with attorneys who were in control of it and whose conduct of it already had resulted in a sentence for contempt. No American lawyer is under a duty to become the tail to another lawyer's kite, or to submit himself to control of counsel or clients whose tactics in the case he does not approve. No lawyer becomes too eminent to consult and cooperate with other members of our brotherhood, but those who, by a lifetime of hard work and fair dealing, earn enviable reputations at the bar rightly reject any employment that will impair that independence of judgment and freedom of action which becomes an officer of the Court. He is not obliged to become anyone's mere hired hand.

### WHAT QUESTIONS WILL YOU PRESENT?

One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. Of course, I have not forgotten the reluctance with which a lawyer abandons even the weakest point lest it prove alluring to the same kind of judge. But experience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.

If you are called in after assignments of error have been filed, or feel impelled to raise many in your brief, at least forego oral argument of all but one or two. The impact of oral presentation will be strengthened if it is concentrated on a few points that can be simply and convincingly stated and easily grasped and retained.

The successful advocate will recognize that there is some weakness in his case and will squarely and candidly meet it. If he lost in the court below and needs appellate relief, that fact alone strongly suggests some defect in his position. If he is responding to a writ of certiorari, he should realize that several Justices have been tentatively impressed that the judgment below is dubious or in conflict with that of other courts, otherwise certiorari would not have been granted. The petitioner should never dodge or delay but give priority to answering the reasons why he lost below. The respondent should ask himself what doubts probably brought the case up and answer them. They will then be covering the questions that the Justices are waiting to hear answered. To delay meeting these issues is improvident; to attempt evasion of them is fatal.

### IN WHAT ORDER SHOULD THE ARGUMENT BE ARRANGED?

The order and progression of an argument are important to its ready comprehension, but in the Supreme Court these are not wholly within the lawyer's control. It is difficult to please nine

different minds, and it is a common experience that questions upset the plan of argument before the lawyer has fairly started. I used to say that, as Solicitor General, I made three arguments of every case. First came the one that I planned—as I thought, logical, coherent, complete. Second was the one actually presented—interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.

I can offer no formula that will guarantee unbroken argument, for the Supreme Court is much given to interrogation. Perhaps the opening argument will have the best chance for an uninterrupted interlude if counsel will begin with a concise history of the case, state the holding of the court below and wherein it is challenged. He should follow with a careful statement of important facts, and conclude with discussion of the law. Argument of a respondent is more variable. Sometimes it may be necessary to restate the case and establish justification for the decision below. At other times it may be more effective to strike a few selected weak spots in appellant's attack upon the judgment.

For whichever side he appears, the choice of his materials and arrangement of its sequence will test the skill of the most experienced craftsman. The purpose of a hearing is that the Court may learn what it does not know, and it know least about the facts. It may sound paradoxical, but most contentions of law are won or lost on the facts. The facts often incline a judge to one side or the other. A large part of the time of conference is given to discussion of facts, to determine under what rule of law they fall. Dissents are not usually rooted in disagreement as to a rule of law but as to whether the facts warrant its application. Sometimes facts are best unfolded chronologically, and at other times it will be more effective to assemble them about particular topics. The presentation is sometimes aided by maps and charts, which counsel is at liberty to use. Courage to drop irrelevant or unimportant details and to avoid becoming entangled in interesting or hotly contested questions which do not go to the result is an aid to clarity.

Counsel must remember that the function of the Supreme Court is to decide only questions of law. If the appellant, or petitioner, attempts, or so puts his facts that he appears to be

attempting, to reargue a verdict or findings of fact, he will meet with an embarrassing judicial impatience. Both sides should strive so to present the questions of law that it will be clear they are not depending upon a reweighing of conflicting evidence.

Oral argument may be simplified by integration with the brief. Some issues are technical and must be resolved by study of exact language in statutes, patent claims, or the like. Such precision is more readily communicated if the eye of the judge is called to aid of his ear. Some counsel meet this problem by making a brief general statement of their ultimate contention and requesting the Court to consult the brief for the close analysis in its support. Others fully expound their contention orally, reading the decisive language, requesting the Justices to follow it for themselves, and pointing out the page in the record or briefs where it is to be found.

In discussing questions of law, the advocate must sometimes hazard a guess as to how much of the law applicable to his case the judges already know. He is too polite—and discreet—to enter upon a long legal exposition that will insinuate a lack of judicial acquaintance with elementary propositions. On the other hand, it is his duty not to risk omission of the many matters that judges are presumed to know but often do not.

It does not seem to me safe ever to assume that a judge is able to recall exact words of a statute or document, even if he is known to be familiar with its general terms. Statutory language is artificial, elusive and difficult to carry in mind. Dates, relationships of persons named, and other details escape memory.

But I should make the contrary assumption about the Court's own precedents, particularly its recent precedents. I can think of no more dismal and fruitless use of time than to recite case after case, with explanations why each is, or is not, applicable. If the authority for your contention is a decision, of course you must make clear its meaning and application. But if the one or two best precedents will not convince, a score of weaker ones will only reveal the weakness of your argument. I always look with suspicion upon a proposition with a page full of citations in its support. And if the first decision cited does not



support it, I conclude the lawyer has a blunderbuss mind and rely on him no further.

It would surprise you to know how frequently counsel undertake to expound a recent decision to the very men who made it. If the exposition is accurate, it adds nothing to the Court's knowledge and if it is not, it discredits counsel's perception or fairness. My advice is to presume judicial familiarity with recent decisions, accept them at full face value and read nothing more into them, and thereby avoid entanglement in any disagreements that may have occurred within the Court when they were written.

Now and then a lawyer invokes or quotes a dissent in aid of his cause. By identifying his contention with a recent dissent, he may close some minds to the rest of his argument. Of course, majority decisions are sometimes overruled and dissents become the law, but usually after considerable time has elapsed. If the overruling of a decision is all that will save you, go about asking it directly and candidly. But if your case can be supported by Court decisions, it will not be wise to confound it with even a good quotation from a dissent. Sometimes counsel is confronted with the dilemma of inconsistent lines of authority where the Court has recently overruled its own not-very-old decision. In such cases, the sitting Justices are apt to be sharply divided as to which rule will apply to slightly varied facts. I have no advice to offer in this situation—you will just have to get out of that dilemma by your own wit.

Whether one will invoke extrajudicial writings or speeches of a sitting judge is a matter of taste—usually, I may say, of bad taste. I do not recall any instance in which it helped. A collegiate court entertains as many different views as it has colleagues. Individual expressions, such, for instance, as this lecture, may or may not accord with the views of other Justices, and reliance upon controversial writings of one Justice may alienate others. But if an individual judge is to be quoted, by all means let it be in matter-of-fact fashion and without tossing compliments to the writer, for nothing depreciates one's position more certainly and quickly than to fawn upon one of the judges whom he appears to think he can capture by flattery, and nothing is less welcome to the judge.

Regard for his professional standing will deter the lawyer from intentional misleading, but it is twice prudent not to quote out of context or ascribe a strained meaning to writings of a sitting judge. I have been, and I have seen other Justices, indignant at the distortion of some writing. It is hard to retrieve the confidence forfeited by seeking such an advantage.

The rules permit opening counsel, after making a fair opening, to reserve time for rebuttal. I would not say that rebuttal is never to be indulged. At times it supplies important and definite corrections. But the most experienced advocates make least use of the privilege. Many inexperienced ones get into trouble by attempting to renew the principal argument. One who returns to his feet exposes himself to an accumulation of questions. Cases have been lost that, before counsel undertook a long rebuttal, appeared to be won.

#### WHAT AIDS TO DELIVERY OF THE ARGUMENT ARE APPROPRIATE?

The manner of delivery must express the talents and habits of the advocate. No one method is indispensable to success, and practice varies widely. Few lawyers are gifted with memory and composure to argue a case without papers of any kind before them. It is not necessary to try. The memorized oration, or anything stilted and inflexible, is not appropriate. Equally objectionable is the opposite extreme—an unorganized, rambling discourse, relying on the inspiration of the moment. If one's oral argument is simply reading his printed brief aloud, he could as well stay at home. Almost as unsatisfying is any argument that has been written out and is read off to us, page after page. We like to meet the eye of the advocate, and sometimes when one starts reading his argument from a manuscript he will be interrupted, to wean him from his essay; but it does not often succeed. If you have confidence to address the Court only by reading to it, you really should not argue there.

The first step in preparation for all exigencies of argument is to become filled with your case—to know every detail of the evidence and findings, to weigh fairly every contention of your adversary, and to review not only the rule of law applicable to

the specific issue but the body of law in its general field. You never know when some collateral or tangential issue will suddenly come up.

My practice was to prepare notes, consisting of headings and catch-words rather than of details, to guide the order of argument and prevent important items from being overlooked. Such notes help to get back on the track if one is thrown off by interruptions. They will tend to limit rambling and irrelevance, give you some measure of confidence, and at the same time let you frequently meet your judges eye to eye.

Do not think it beneath you to rehearse for an argument. Not even Caruso, at the height of his artistic career, felt above rehearsing for a hundredth performance, although he and the whole cast were guided and confined by a libretto and a score. Of course, I do not suggest that you should declaim and gesture before a mirror. But, if you have an associate, try out different approaches and thrash out every point with him. Answer the questions that occur to another mind. See what sequence of facts is most effective. Accustom yourself to your materials in different arrangements. Argue the case to yourself, your client, your secretary, your friend, and your wife if she is patient. Use very available anvil on which to hammer out your argument.

If one is not familiar with the Court and its ways, it may be helpful to arrive a day or two early to observe its procedure, to see how the Court deals with counsel and how counsel gets on with the Court.

When the day arrives, shut out every influence that might distract your mind. An interview with an emotional client in difficulty may be upsetting. Friends who bear bad news may unintentionally disturb your poise. Hear nothing but your case, see nothing but your case, talk nothing but your case. If making an argument is not a great day in your life, don't make it; and if it is, give it everything in you.

By all means leave at home the associate who feels constantly impelled to tug at your coattails, to push briefs in front of you, or to pass up unasked-for suggestions while you are speaking. These well-meant but ill-conceived offerings distract the attention of the Court, but they are even more embarrassing and confusing to counsel. The offender is an unmitigated pest, and even if he is the attorney who employed you, suppress him.

I doubt whether it is wise to have clients or parties in interest attend the argument if it can be avoided. Clients unfortunately desire, and their presence is apt to encourage, qualities in an argument that are least admired by judges. When I hear counsel launch into personal attacks on the opposition or praise of a client, I instinctively look about to see if I can identify the client in the room—and often succeed. Some counsel have become conspicuous for the gallery that listens to their argument and, when it is finished, ostentatiously departs. The case that is argued to please a client, impress a following in the audience, or attract notice from the press, will not often make a favorable impression on the bench. An argument is not a spectacle.

You should be warned that, in acoustical qualities, the Supreme Court chamber is wretched. If your voice is low, it burdens the hearing, and parts of what you say may be missed. On the other hand, no judge likes to be shouted at as if he were an ox. I know of nothing you can do except to bear the difficulty in mind, watch the bench, and adapt your delivery to avoid causing apparent strain.

The time allotted to you will be one hour ordinarily, and half of that if the case is on summary docket. Time is sometimes, though rarely, extended in advance if the case appears to require it, but seldom do we find extended time of much help to the Court. In any event, do not waste time complaining that you do not have enough time. That is a confession of your own inadequacy to handle the case as the Court's experience indicates it should be. Keep account of your own time, or, if you cannot, have an assistant do so. Some lawyers ask, and some even ask several times, how much time they have left and wait for it to be calculated. Why will a lawyer interrupt his effort to hold the attention of a Court to his argument in order to divert its mind to the clock? Successful advocacy will keep the Justices' minds on the case, and off the clock.

This, above all, remember: Time has been bestowed upon you, not imposed upon you. It will show confidence in yourself and in your case, and good management of your argument, if you finish before the signal stops you. On the other hand, if the warning that your time has expired catches you in the middle of

an argument, the chances are that you have not made good economy of your time.

### TO BE, OR NOT TO BE, QUESTIONED FROM THE BENCH?

The Supreme Court, more than most tribunals, is given to questioning counsel. Since all of the Justices gave the case preliminary consideration when certiorari was granted or jurisdiction was noted, tentative opinions or inquiries are apt to linger in their minds.

Questions usually seek to elicit information or to aid in advancing or clarifying the argument. A question argumentative in form should not be attributed to hostility, for oftentimes it is put, not to overbear counsel, but to help him sharpen his position. Now and then, of course, counsel may be caught in a cross-fire of questions between differing Justices, each endeavoring to bring out some point favorable to his own view of the law. That tests the agility and diplomacy of counsel.

Some lawyers feel an ill-concealed resentment at questions from the bench. It is not hard to see that if they had the wit they would have the will to respond as did a British barrister in an incident related to me by Arthur Goodhart, K.E.B., K.C.: The Judge said: "I have been listening to you now for four hours and I am bound to say I am none the wiser." The barrister replied: "Oh, I know that, my Lord, but I had hoped you would be better informed."

A Justice may abruptly indicate conclusions which tempt a lawyer to reply as one did long ago in a local court in the county where I practiced. He had barely stated his contention when the judge said: "There is nothing to your proposition—just nothing to it." The lawyer drew himself up and said: "Your Honor, I have worked on this case for six weeks and you have not heard of it twenty minutes. Now, Judge, you are a lot smarter man than I am, but there is not that much difference between us."

But I always feel that there should be some comfort derived from any question from the bench. It is clear proof that the inquiring Justice is not asleep. If the question is relevant, it denotes he is grappling with your contention, even though he had not grasped it. It gives you opportunity to inflate his ego by letting him think he has discovered an idea for himself.

When I was at the bar, it seemed to me that I could make no better use of my time than to answer any doubt which a judge would do me the favor to disclose. Experience in the Court teaches that a lawyer's best points are sometimes made by answers to pertinent and penetrating questions. A lively dialogue may be a swifter and surer vehicle to truth than a dismal monologue. The wise advocate will eagerly embrace the opportunity to put at rest any misconception or doubt which, if the judge waited to raise it in the conference room, counsel would have no chance and perhaps no one present would have the information to answer.

Some lawyers complain that questioning is overdone; and sometimes colloquy between Court and counsel is undoubtedly carried too far. If cases were uniformly well presented, perhaps the best results would be obtained if few questions were asked. Generally, an argument that from its very outset shows that it will be well-organized and thorough tends to ward off questions. At all events, nothing tests the skill of an advocate or endangers his position more than his answer to questions, and in nothing is experience, poise, and a disciplined mind a greater asset.

I advise you never to postpone answer to a question, for that always gives an impression of evasion. It is better immediately to answer the question, even though you do so in short form and suggest that you expect to amplify and support your answer later.

Counsel should be prepared to deal with any relevant question, but, if he is not, he ventures less by a frank admission that he does not know the answer than by a guess. Counsel need not fear that he will be prejudiced by declining to be drawn into a discussion of some proposition that is irrelevant to his case. To refuse might seem like a rebuff to the inquirer, but it might delight eight colleagues.

#### HOW SHOULD COUNSEL BE ATTIRED?

It may seem a trivial matter, but I am told that one of the questions most frequently addressed to the Clerk's Office concerns the apparel in which counsel must, or should, appear. Formal dress is traditional and I understand once was required.

Some amusing stories of those days linger among Court attaches. It is said that Chief Justice Taft once refused admission to the bar to a candidate who appeared without necktie or waistcoat, with the suggestion that he renew his application when properly attired. The Marshal's Office kept in active service, and still keeps in moth balls, one or two cutaway coats to lend to counsel in need. Apparently he was expected to be equipped with his own trousers.

Those days have passed away, but the tradition remains that appearance before the Court is no ordinary occasion. Government lawyers and many others, particularly older ones, adhere to the custom of formal morning dress. The clerk's Office advises that either this or a dark business suit is appropriate. But the informality which permeates all official life has penetrated the Court. It lays down no rule for its bar.

No toleration, however, can repeal the teaching of Polonius that "The apparel oft proclaims the man." You will not be stopped from arguing if you wear a race-track suit or sport a rainbow necktie. You will just create a first impression that you have strayed in at the wrong bar. For raiment of counsel, like the robe of the judge, is taken as somewhat symbolic of his function. In Europe the advocate, as well as the judge, is expected to robe for his appearance in court. The lawyer of good taste will not worry about his dress, because instinctively it will be that which is suitable to his station in life—a member of a dignified and responsible profession—and for an important and somewhat formal occasion.

#### WHAT REMEDIES HAS THE DISAPPOINTED LAWYER?

In most courts the folklore of the profession gives the aggrieved lawyer a choice of remedies: One is to appeal, the other is to go down to the tavern and cuss out the court. He may, and usually does, pursue both simultaneously. But the tavern cussing of the Supreme Court has to be stronger than usual, to compensate for the lack of any appeal. In Washington it will be easy for a disappointed lawyer to find sympathetic companions. We are never surprised nor angered when disappointed counsel avails himself of the one relief left to him. Sometimes one or more dissenting Justices would like to join him.

I think it was Mr. Justice Brandeis who said that a judge often must decide a case as if he were 100% convinced one way or the other, although usually he is not more than 55% convinced. Many decisions prevail by a narrow margin of Justices, and the decisive Justices admit a large margin of doubt. More than a few Court opinions represent a compromise of reasoning, if not of result. While I recognize the annoyance to the bar of dissenting and concurring opinions, I think they are the lesser of evils. A Court opinion which puts out a misleading impression of unanimity by avoiding, or confusing, an underlying difference is a false beacon to the profession. Far better that the division be forthrightly exposed so that the profession will know on what narrow grounds the case rests and can form some estimate of how changed facts may affect the alignment in a subsequent case.

If you are inclined to think the Court has given too little time to your case, or too superficial consideration to your contention, it may be some comfort to know that in most cases I, for one, would agree with you. Few decisions are handed down that I do not wish it were possible for me to give more time and study. From the viewpoint of the bench, yours is but one of a dozen cases to be argued in the same week; it is but one of over two hundred cases to be decided on the merits during the term and is but one of a thousand or twelve hundred cases in which we have to pass on petitions for relief during the year. The printed pages filed in these cases are several times those which any judge, if he could give twenty-four hours a day to the task, would be able to read.

Some of the most thoroughly prepared men, by learning and practice, that have come upon the Supreme Court bench have found it necessary to “scorn delights and live laborious days” to satisfy their own sense of duty. Justices Brandeis and Cardozo were almost as retired as hermits and Chief Justice Hughes withdrew from all social engagement, except one night a week which he allowed Mrs. Hughes to bestow on their friends. Judges practicing self-denial under such pressure may well be impatient of surplusage, irrelevance, and professional incompetence.



## IS ADVOCACY A LOST ART?

Certainly not. So long as controversies between men have to be settled by judges, proficiency in the art of forensic persuasion will assure one of first rank in our high calling. In the judicial process, as practiced among English-speaking peoples, the judge and the advocate complement each other, for, as Thoreau said, "It takes two to speak the truth—one to speak and another to hear."

But if not a lost art, advocacy is an exacting one. When he rises to speak at the bar, the advocate stands intellectually naked and alone. Habits of thought and speech cannot be borrowed like garments for the event. What an advocate gives to a case is himself; he can bring to the bar only what is within him. A part written for him will never be convincing.

If you aspire to such a task, and I address particularly the younger men at the bar and in the schools, do not let your preparation wait upon a retainer. There is not time to become an advocate after the important case comes to you. Webster, when asked as to the time spent in preparing one of his memorable arguments, is said to have replied that his whole life was given to its preparation. So it is with every notable forensic effort.

The most persuasive quality in the advocate is professional sincerity. By that I do not mean that he believes in his case as the Mohammedan does in his Koran. But he must believe that under our adversary system both sides of every controversy should be worthily presented with vigor—even with partisan zeal—so that all material for judgment will be before the Court and its judgment will suffer no distortion. He must believe with all the intensity of his being in law as the framework of society, in the independent judicial function as the means for applying the law, and in the nobility of his profession as an aid in the judicial process. He will feel equal disdain for a judge partisan in his favor and one partisan in his opposition. The opportunist, the lawyer for revenue only, the cynic, will never reach the higher goal.

The effective advocate will not let mastery of a specialty foreclose that catholicity of interest essential to the rounded life and the balanced judgment. He will draw inspiration not alone from the literature of the law, but from the classics, history, the

essay, the drama, and poetry as well. It is one of the delights and intellectual rewards of the legal profession that it lays under tribute every science and every art. The advocate will read and reread the majestic efforts of leaders of his profession on important occasions, and linger over their manner of handling challenging subjects. He will stock the arsenal of his mind with tested dialectical weapons. He will master the short Saxon word that pierces the mind like a spear and the simple figure that lights the understanding. He will never drive the judge to his dictionary. He will rejoice in the strength of the mother tongue as found in the King James version of the Bible, and in the power of the terse and flashing phrase of a Kipling or a Churchill. And the advocate will have courage, courage to assert his conviction that the world is round, though all about him men of authority say it is flat. Most memorable professional achievements were in the face of opposition, abuse, even ridicule.

The advocate may be summoned often to other forums, but he will appear in the Supreme Court of the United States only when that tribunal has been satisfied that decision of his cause is important to the body of federal law. Emphasis on the public interest in a just and uniform legal system has submerged emphasis on special equities and individual interests which properly prevail in trial and intermediate courts.

Adequately and helpfully to present a case—as it is about to be transformed into a precedent to guide future courts, to settle the fate of unknown litigants, perhaps to become required reading for a rising generation of lawyers—will challenge and inspire the true advocate. Decisional law is a distinctive feature of our common-law system, a system which can exist only where men are free, lawyers are courageous and judges are independent. To participate as advocate in supplying the basis for decisional law-making calls for vision of a prophet, as well as a profound appreciation of the continuity between the law of today and that of the past. He will be sharing the task of reworking decisional law by which every generation seeks to preserve its essential character and at the same time to adapt it to contemporary needs. At such a moment the lawyer's case ceases to be an episode in the affairs of a client and becomes a stone in the edifice of the law.

As I view the procession of lawyers who pass before the Supreme Court, I often am reminded of an old parable. Once upon a time three stone masons were asked, one after the other, what they were doing. The first, without looking up, answered, "Earning my living." The second replied, "I am shaping this stone to pattern." The third lifted his eyes and said, "I am building a Cathedral." So it is with the men of the law at labor before the Court. The attitude and preparation of some show that they have no conception of their effort higher than to make a living. Others are dutiful but uninspired in trying to shape their little cases to a winning pattern. But it lifts up the heart of a judge when an advocate stands at the bar who knows that he is building a Cathedral.



