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A Case on Appeal — the Advocate's Point of View

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A CASE ON APPEAL—THE ADVOCATE'S POINT OF VIEW*

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This is a subject which so distinguished an advocate as John W. Davis has characterized as "well-worn," and if there can be any justification for my discussing it with you today, it must lie in such applicability as I may make to our local courts in Nebraska, or in such things as I may say to the younger lawyers who have not yet had the time (or to the older ones who have not had the diligence) to read some of the tremendous literature that exists on the subject. When Judge Goodrich, John W. Davis, Mr. Justice Jackson, Chief Justice Arthur Vanderbilt and the late Chief Justice Charles Evans Hughes have written profusely on a subject, there is certainly nothing additional that I can contribute to the discussion. Those things which I shall say represent only an appropriation of ideas, I hope with consent, from these and other distinguished barristers.[1]

Wiener remarked that "Counsel defeated in the trial court—the licked lawyer—is recognized as having twin rights: (1) he may go down to the inn at the county seat, or to his club in town, and cuss the court and/or jury; and (2) he can take an appeal."[2]

This is one of the few places in which I suspect that verbal monstrosity "and/or" may have been appropriately used.

So we have lost our case and have perfected our appeal. Our appeal is docketed in the Supreme Court and we now have thirty days in which to write our brief. And this does not mean that our briefs should be prepared between the twentieth and thirtieth days—an admonition that too frequently is appropriate.

The Briefs

We have some rules promulgated by our Supreme Court, and all other courts have their rules, too, about the preparation of briefs.

My first admonition is to read the rules. I assume that most lawyers are sufficiently competent to read, but I am also informed that the number of them who do read and follow what are perfectly clearcut

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[1] I am deeply indebted for the substance of these remarks to the observations of many friends of the Nebraska Bar, some of whom are long since departed. More formally I am indebted to the following: Davis, The Argument of an Appeal, 25 A.B.A.J. 895 (1940); Goodrich and Carsons, A Case on Appeal, A.L.I. Series (Aug. 1952); Jackson, Advocacy before the Supreme Court, 37 A.B.A.J. 801 (1951); Simmons, Behind the Scenes, 22 Neb. L. Rev. 39 (1943); Vanderbilt, Forensic Persuasion (1950 Tucker Memorial Lectures at Washington and Lee University); Wilkins, The Argument of an Appeal, 33 Cornell L. Q. 40 (1947); Wiener, Effective Appellate Advocacy (1950).

[2] Wiener, Effective Appellate Advocacy 3 (1950).

instructions as to the preparation, sequences and style of handling material in a brief casts some doubt on my assumption.

There is nothing complicated about the rules of our own Supreme Court. They have been evolved out of long experience to promote efficiency and save the time of the Court, to make it possible to readily locate points, authorities and argumentative material, and to reduce what might otherwise frequently be rambling discourses to some semblance of legal order.

First, therefore, read the rules, and no matter how many briefs you have already written, I suggest they be read again. Memory is a tricky thing. The lawyer who relies on his memory of a statute is courting disaster, and so may he who relies upon his memory for the form and style of a brief.

I shall not deal with the rules in detail. I assume you can and will read. I shall deal with some general suggestions under the suggested sequences.

Statement of the Questions Involved

The requirement is that there shall first be a "Statement of the Questions Involved," and it is here, on line one of the brief, that the outcome of litigation may be determined. It is an unusual lawsuit, especially in our State courts, that involves more than two or three really important questions worthy of note, except in those cases, perhaps, where the Court makes an original review of the facts. Yet I have seen briefs with as many as fifteen to twenty questions, involving all kinds of argumentative statements and factual statements submitted as part of the statement of questions. They testify largely to the inadequacy of analysis of counsel and muddled thinking. They are apt to create an impression in the beginning that if counsel has not analyzed his lawsuit any more clearly than is evidenced by his "Statement of Questions Involved," the chances are his later statements of the errors of the trial court are likely to be equally confused.

"A "Statement of Questions Involved" should be a statement of those propositions of law about which there is disagreement between appellate counsel and the rulings of the trial court.

Statement of the Case

We are next directed to make a "Statement of the Case," and here, again, it is a rare occasion indeed that one or two sentences, properly phrased, will not convey to the Court exactly what the lawsuit is all about. Under this heading we are further directed to outline the issues as set forth in the pleadings and state how they were decided. It is not necessary or proper to recopy a long and involved pleading. After all, the Court can read the transcript, if detailed matters of pleading are involved, or they may be quoted at length in the argument if they are critical.

What the Court wants to know is the material allegations of the petition, what, in substance, are the defenses pleaded in the answer, and how the trial court determined the issues.

Assignment of Errors

This brings us then to the "Assignment of Errors." It is at this point that we must take a look backward to the trial record. After all, we can't assign errors in an appellate proceeding unless we can point out the errors in the trial court record. I cannot emphasize too strongly the absolute necessity of tying down supposed errors in the course of the District Court trial. I think many of us have a tendency to feel that our record is better than it is. In rulings made by the trial court we are apt to read hopefully into the record the look of the judge, the tone of his voice, the manner in which a statement is made, all those undefinable things that create an impression. For appellate purposes the only things worthwhile are the actual words as transcribed by the reporter. Therefore, it seems to me that in the trial of cases, when complicated and sometimes foggy situations develop as to exactly what counsel has offered by way of evidence or as to exactly what ruling the trial court has made, that counsel should be extremely careful, even asking a question of the Court, if necessary, to make clear in the record the ruling of the Court.

Then the question arises as to how many errors should be assigned, whether to stand on only the most important and vital ones, or all of them. I tell you frankly there are two schools of thought. I know that some of the finest lawyers have adopted the plan of raising only two or three of the assignment of errors in an appellate brief, or at least of arguing and discussing only these few, feeling that unless the two or three most obvious errors will stand up, there certainly is no use to argue the others.

On the other hand, I have known many equally good lawyers who have told me that it was amazing how many times, by raising a multitude of issues, they have succeeded in securing reversals on points in which they themselves had little confidence, while the Court disregarded the major errors on which counsel at least thought the case should have been decided. This is the theory, of course, of the more hooks, the more fish (no odious reflections intended). But I do give the admonition that nothing is more disgusting to an appellate court than to have a tremendously long list of assignments of error, in many of which there is obviously no merit, and I have always had the feeling that a cause was weakened by the assertion of a multitude of doubtful propositions, no matter how much merit there might be in a limited number of others.

Propositions of Law

That brings me to the "Propositions of Law." In the "Propositions of Law" counsel are supposed to state what they believe to be the law that governs the appeal. As a minimum, it seems to me, those propositions should be stated in lawyer like—Supreme Court like, if you wish—language that could appropriately be a headnote of the case in the event the appeal is successful. Therefore, purported propositions of law which undertake to state the facts of the particular litigation, which undertake to make reference to particular documents in the litigation and such matters of a limited nature, are not truly propositions of law. They are simply statements about the individual case.

Citations

And now let me discuss for a moment the matter of citations. Our rules are definite on this point, and yet they are repeatedly violated. Quite apart from the rules, certainly a proper respect for our own Court would require that the citations given be referred to the volumes of our own Court's opinions. Certainly, as has been well remarked, the collection of a page of miscellaneous citations, while it may testify to the industry of the brief writer, may also indicate a shotgun approach to a proposition. On matters on which our own Court has passed, especially where they have passed two or three times, it would appear that citations from other Courts are superfluous, unless the validity of the proposition is under direct attack, in which case the Court may wish to find itself fortified by similar decisions of other Courts.

Statement of Facts

We come now to the most important part of the brief, that is, the "Statement of Facts." It has been said that the power to collect and summarize facts in a clear and logical manner is the greatest attribute of the lawyer. The facts should be reduced to narrative form. They should be made readable; they should be related, so nearly as possible, in consecutive order of their occurrence, and there is certainly no rule against making the statement of facts interesting. Above all, every statement of fact in the brief ought to be documented to the page and question number of the Bill of Exceptions from which it is taken or summarized. This is a laborious job in a big bill of exceptions, and that is especially true where several witnesses in different volumes of the bill of exceptions have testified about the same thing. A job such as this can represent dozens of hours of effort which will never be apparent to anyone except to opposing counsel and the judges of the Supreme Court, but if all of the testimony on each factual statement made can be collected from each witness and brought together, the impact of the factual statement made is tremendously more im-

pressive than if it is scattered throughout the testimony of a dozen witnesses over eight or ten separate pages, even though it be accurately cited in connection with each one of them.

We are all familiar with the old maxim that "A case well stated is a case half won." Our Court hears many cases. This maxim is perhaps more applicable to the oral argument than it is to the brief, but nevertheless, since the Court and the individual judge working on an opinion may have a half-dozen matters under consideration at the same time, it is just as important that a clear consecutive, documented, factual statement be in the brief as in the oral argument.

Argument

This brings me to the argument in the brief. Personally, I feel that the argument in the brief should be complete and all inclusive. While the oral argument may cover all the points, after all, it is always possible that its delivery might be interrupted, the Court's attention temporarily distracted or it might just be forgotten, and, therefore, the argument on both the facts, if they are involved, and the law should be adequately set out in the brief. At this point may I give some admonitions:

If you value your lawsuit, if you value your reputation, don't ever —*EVER*—misquote a citation, garble a quotation, or take excerpts of only part of an opinion which is weakened or nullified by the remainder of it; never misquote and never mislead.

I have heard it said many times by the judges of many appellate courts that one such trick—or slip—and only one, may ruin a lawyer's entire future. I know of a large firm whose standing at the Bar is supposed to be great, and yet whose briefs are never accepted by appellate courts without checking every citation and every quotation. The man who has acquired that sort of reputation has at least one strike on him whenever he appears to argue another appeal.

It is sometimes a great temptation to quote favorable parts of an opinion and ignore the rest. When they say what we want them to say and say it convincingly, the temptation to quote only that part is almost irresistible, but I repeat, it is most deadly of all sins if we omit anything to the contrary.

Let me relate a little experience with one of the large law firms in Denver a few years ago. They had a very important piece of litigation in the Supreme Court of the United States. The case had been argued and submitted. One of the propositions of law was obscure. They had a fine staff, with one of these typical bookworm lawyers who had worked for months upon it and had finally found two cases in all of English and American law that were in point on his proposition. He had said in the brief, "These are the only cases on the subject," which incidentally is a thing one never should say. I went into that office one

afternoon to find him substantially in tears, embarrassed and humiliated. He had by accident found another case. It was partially in his favor, but he was writing a letter to the Clerk of the Supreme Court of the United States, citing the case and apologizing for the rashness of the statement he had made. That represents the highest type of appellate court practice and the highest level of legal integrity.

In this same connection, let me comment on the use of quotations from the Digests, particularly from Corpus Juris and similar texts. I am sure we all realize, first, that it is never safe without reading them to quote cases which are summarized in the texts of these encyclopedias, and furthermore, that there is hardly a proposition on which there is not conflicting authority cited in the same encyclopedia. Some of the volumes, it is true, are authorized by outstanding legal scholars whose opinion as to the weight of authority makes the text itself of some value; others are not. Certainly, therefore, except upon the most elementary and well settled proposition, a quotation of digests of that nature lends little weight to a brief and has slight convincing quality with the appellate court, except only and solely as it has been checked and the cited cases read. A digest citation of course is helpful if used only to direct attention to the general discussion of the field of law involved.

Next, the question of how extensive excerpts from other cases should be set forth in the brief. I find myself one of the worst sinners in this connection; when a court in California or New York has spent a page beautifully arguing the proposition which I am trying to sustain, I find it almost irresistible to copy that portion of the opinion into the brief. I like to have it there; I hope the Court will read it; but I also remember that in many respects I am insulting the Court. I am practically saying to the Court, "I don't believe you will read this case if I cite it, because I think you are too busy or too lazy to get the book and read the opinion, and, therefore, I will quote what it said." I have found several times, however, that the Court is not content with the happy little quotation which I have given, but that they have gotten the book and have studied the entire opinion of which I gave them such a long, and I may add, expensive, excerpt. I am sure we all could save many dollars of the printer's bill if we only convinced ourselves that the Court is not going to rely solely on any particular excerpts which we quote. They are still going to read that original opinion, and the only real purpose that our excerpt serves is possibly to excite curiosity to the point where the opinion will be read more carefully than it might otherwise have been.

So much for some suggestions about the preparation of briefs. Certainly the composite should be in such form that the Court, if they had never heard of the case before, by reading the brief from cover to

cover should be advised what the legal issues are, exactly what the case is about, exactly what the facts are, exactly what the law is governing that set of facts, followed by the most persuasive argument of which the writer is capable, to induce the Court to apply the law as he sees it to the facts as he has honestly stated them. The test is this: if the Court had no other information before it, is the brief so clear and so convincing that in the absence of an opposing brief, the Court would inevitably find for the writer? Unless the brief is of that nature, the lawsuit is obviously half lost before it is ever argued.

So the briefs have been finished and filed—we hope on time. At any rate, it has been done, and your opponent has filed his brief. If you have done an adequate job in the first instance, you have already expressed your views of the principal issues in the case. If your analysis of the case is correct, there is not much reason for a reply brief. Alas, however, your opponent very likely has evolved some brilliant theory of which you were completely unaware. Perhaps he has discovered authorities which you have overlooked; perhaps he has committed some other sins which, of course, you would not have committed, but which for some reason your opponent always persists in committing. Perhaps you don't even meet on common ground on the issues of the case. Perhaps the record is misstated by your opponent. Under some of those circumstances, of course, a reply brief is essential. Certainly nothing is to be gained by reiterating the propositions of the principal brief. Certainly the reply should be confined to those matters not previously discussed; to correction of the record, if necessary; to the answering, if able, of propositions raised by an opponent, illogically, we hope, but nevertheless of sufficient plausibility to disturb you. In hard fought litigation the temptation to write reply briefs and say it all over again is a difficult one to forego. Let us remember, however, that repeated reiteration can ultimately exhaust the Court and make everyone begin to wonder whether you were not trying to make up by repetition that which your argument lacks in merit. In any event, you have replied or not, as the circumstances indicated.

You have received the Clerk's notice that you are on the final call, and on such and such a day and hour your case will come on for hearing, at which time you will be allowed thirty minutes to present your side of the controversy.

The Oral Argument

The skillful argument of Appellate causes has been denominated by many lawyers as the highest form of the advocate's art. It involves not only making the convincing and plausible argument which meets the ear, but if it is well done, it involves vast preparation which does not meet the eye.

First of all, for a successful oral presentation one should know the Court. There are courts and there are courts. An argument which

may be highly effective in the Supreme Judicial Court of Massachusetts may be an utter failure in the Supreme Court of Kansas. An argument before most of the high Courts of our States is not appropriate in the Supreme Court of the United States, and vice versa. The lawyer, therefore, presented with a problem of oral argument of a case on appeal needs everything by way of background that he can possibly learn. He needs, if possible, to know the judges, not personally but something of their manner of thinking, the manner in which their court is conducted, of their background, of their viewpoint if expressed in opinions, of their eccentricities, if any, of their mode of thought. After all, the task of the advocate is to convince appellate judges of the correctness of his position, and to that task he will bring every art of persuasion of which he is capable, and he will have to try to bring it under what have grown to be somewhat adverse conditions.

First, he will be talking against time limitations. The good old days in which counsel might argue for six days before the Supreme Court of the United States as in *McCulloch v. Maryland* or ten days as in the *Girard Will* case are long since gone. The day in which a lawyer can move from one case to another and orient himself to his argument as he goes along is gone. Crowded dockets and the tremendous multiplicity of authority on most propositions still further complicate his task. The question is, how and what to do and say in a limited time to an overburdened court.

There are still as many styles and manners of oral argument on appeal as there are lawyers. It is not possible for most of us to bring to the Bar that facility and succinctness of expression, that whimsical humor, that extreme earnestness of purpose on critical matters which can be brought by a man of the caliber of Hughes, John Davis, George Wharton Pepper, and others. All we can do is to generalize about the do's and don't's, and most of us can profit by following even such simple rules as would be apparent to all of us if we stopped and thought the matter through.

Mr. Davis says, and rightly, that the first thing in the arguing of any Appellate cause is to mentally change places with the court. Suppose you, as a total stranger who had never heard of the case, were sitting there waiting for someone not only to explain it to you but to convince you of the righteousness of his cause. What would you like to hear? It must be remembered that appellate judges are honest, impartial, earnestly trying to reach a correct conclusion. It must be remembered that, in only about half of the appellate courts of the United States do the judges read the briefs before argument. Our own Chief Justice is authority for the statement that on our own court, some of the judges do and some do not read the briefs before argument. Therefore, we must approach the matter on a presumption that

the court has never heard of the causes before we stand up and say, "May it please the Court." Our impressions on the Court begin even before we open our months. Chief Justice Vanderbuilt has well summarized it as follows:

> In the few seconds that it takes after his case is called for the advocate to rise from the counsel table, gather his papers and approach the lectern and utter the magic words, 'May it please the Court,' he will be giving the Court a preview of his entire argument. If he stumbles over his chair as he leaves it, if he bundles his books and his papers, his glasses and his pencil in his arms like a schoolgirl, if he waddles to the scene of action, if he puts on his glasses and then takes them off before he starts to talk, the Court will know just about what it is in for.[3]

Is it not obvious that we must begin by a statement of the nature of the case and briefly state its prior history? The case which is so well known to us and with which we have lived for months and perhaps years, the Court has never heard of. We are frequently emotionally wrought up, not to mention nervous. We are well aware of the critical points. We sometimes are writhing under what we think is gross injustice of the the trial Court. The temptation to plunge into the middle of the argument is great, and it is so great that it has overcome men even in the Supreme Court of the United States, who, after an opening ten or fifteen minutes, have had to be asked, "Will you please tell us what this case is about." I regard the opening sentence of an oral orgument and the opening five minutes of a oral argument as its critical point. The middle section may be filled with plausible argument. The conclusion may sound very convincing, but, if I have not aroused interest, have not stated my facts and noted my disputed propositions of law with absolute clarity so that they are completely understood by every judge on the Bench, then my argument is wasted and my logical conclusion goes for nought. It is here that the maxim previously quoted, that a case well stated, convincingly stated, and argumentatively stated, is half won. I am indebted to George Turner for the story of a member of our Bar, long since deceased, who fumbled to the lectern and exploded his case before the Court with the startling sentence, "This is the case about the rent." Contrast that, if you will, with the opening statement, in a denaturalization case before the Supreme Court of the United States in which counsel said, "the issue is whether a good Nazi can be a good American."[4]

By way of further preparation before the argument is begun, the universal command is to know your record. After all, the record, the transcript of the pleadings, and the bill of exceptions is all that the Appellate Court will ever see, or all that they will ever know about.

[3] Vanderbilt, Forensic Persuasion 32 (1950 Tucker Memorial Lectures at Washington and Lee University).

[4] Knauer v. United States, 328 U.S. 654 (1946).

Whatever play of conduct or emotion may have transpired in the trial, however much the jury may have been influenced by their general knowledge of the parties, or the scene of the accident, or the community understanding, will never appear in the appellate record. You will stand or fall by what is within its binders. Your statements must be substantiated and you must know your record so well that (without fumbling for five minutes) you can put your finger on the testimony relating to any question that may be asked about the lawsuit. This is no mean task. It is not accomplished by skimming the record the evening before an argument or by reading it while sitting in the waiting room. If there is merit in your argument it can be substantiated from the record at every point. It is an insult to the Court to say, "It is somewhere in the record," or, "I just can't put my finger on it."

So the question arises, "What do you say to the Court?" It is here that the true skill of the advocate has full play. It is here that no mechanical process can quite replace a native gift for stating facts and arguments plausibly, sincerely, and convincingly.

Pause a little and consider the circumstances under which you appear before an Appellate Court. "The presentation of a case to an appellate court, like any other instance of advocacy, is an exercise in persuasion: You seek to make the judges decide in your favor. Everything must be bent to that end—every sentence in the brief, indeed every footnote; every sentence in the oral argument; every mannerism, every gesture, even the advocate's attire. Every form of oral advocacy involves the impact of one personality on others. In an appellate court, it is the impact of the lawyer on three, five, seven, or nine judges. Though the number on the Bench may vary, the advocate's aim remains the same: He must always, persistently, constantly, unflaggingly seek to persuade a majority of his listeners to agree with him.

"That being so, he does not help his cause if he antagonizes his judicial audience—or any of them. One never persuades by antagonizing. You may take a dim view of a particular judge, or of a particular decision . . . but when you appear before the judges on behalf of a client, your job is to win that client's case, not to tell them off, or any of them. . . ."[5]

The frequency with which counsel fight a court or show in their mannerism the contempt for a judge or the contempt of a previous opinion always amazes me. That is not one of the ways to "win friends and influence people." Lawyers afflicted with that irrepressible desire "to tell off the court" or abuse its previous decisions should all be required to take a course with Dale Carnegie.

Many techniques have ben tried in the orgument of Appellate causes. Some have tried writing an oral argument and committing

[5] Wiener, Effective Appellate Advocacy 232 (1950).

it to memory, but, unfortunately, a question from the Bench may be completely devastating, not only to memory but to the logical sequence of that which has been memorized. Others have tried to write an oral argument which they can follow at the lectern. Here again the same problems arise. Others rely on following the points in a brief. But, after all, the Court can read a brief. There is nothing more conducive to a loss of interest by the Court than to stand and read excerpts from a brief which some of the judges have read before and which others are capable of reading long after you have departed thence. The oral argument that is convincing and effective is the one that is spontaneous, which flows along smoothly from point to point, never in the language of the brief except and only as it states propositions of law and authorities generally, but which is such an argument as you would address to a friend whom, in all sincerity, you were endeavoring to convince of the righteousness of your cause.

I repeat, there is no substitute for the natural endowment that some people have in this connection. I think it is now generally agreed that an oral argument of an appellate cause should be made from not more than a single page of notes or perhaps if you have glasses trouble, two or three pages if the writing is in half-inch letters. How many times have we seen lawyers addressing appellate courts, trying to follow typewritten manuscripts that were single spaced or written with a dim ribbon that draws the eyes of the speaker to the manuscript till he finds himself reading instead of speaking. He not only loses all of the convincing qualities of his manner and voice but he is actually liable to lull everyone into a state of sleepiness. Are there any of us being addressed who don't wish a speaker to look at us, to talk to us straight from the shoulder as though he meant what he said and believed every word of it? Certainly, a man adequately prepared to make an oral argument needs, at most, careful study of the two or three points that he is going to cover. If he has a dozen assigned errors (which are probably too many in the first place) he stands no chance of covering all those errors adequately in the time allotted to him by the average State Court. If he has pay dirt in his brief, he had much better take one, two, or three, at the most, of his telling points and argue those fully and completely and pray that the others will be adequately examined in the brief if they have merit.

When I was first admitted to this Bar, Judge John J. Sullivan, who had been Chief Justice of this Court, had a very extensive practice in Omaha. Judge Sullivan was a fine lawyer with a tremendously large practice. His technique in all appeals was extremely simple. The Court used to tell me that Judge Sullivan rarely used over 10 or 15 minutes in the presentation of a case. His technique when he was appellant was simply to take one, or two at the most, of the principal

points, lay them out clearly and convincingly, and say to the Court, "On this ground there is error in this record and this cause must be reversed. There are other grounds which your Honors may consider at your leisure." After all, it only requires one substantial point of error to secure a reversal, and that one is worth more than the other ten if it is adequately and convincingly made.

Next, so far as I know, there is no law prohibiting people in oral arguments being reasonably entertaining. Of course, it entriely depends on the case. I don't know of very much that can be said of an entertaining nature about corporate litigation or real estate titles. And yet I sometimes suspect that by draping a little of the human element over them, they are given life and vitality they would never have as cold legal propositions. After all, the advocate of an Appellate cause is entitled to all of the "tricks of the trade" of the public speaker. He is entitled to employ all the modulations of the voice, all of the effects of emphasis, all of the rhetorical questions, and all other devices which make his argument effective. How many of these he will use and how appropriate they may be will have to depend entirely upon the Court to which the argument is addressed and may have to depend even upon the particular circumstances of the moment of the argument. Appellate judges, sitting as they frequently do for four to five hours at a time, being human like the rest of us, cannot but appreciate the appropriate clever aside or the entertaining witticism that comes out of a play on words, or any other device that a speaker uses to hold his audience, always remembering, however, that he is trying to convince and not entertain, and that there is a time and a place for all things.

I need hardly say that the day of the courtroom orator is passed, and that is especially true of appellate causes. The Supreme Court is not a jury, and a harangue is not only distasteful but ineffectual. On the other hand, occasionally on grave questions involving great social and economic consequences, restrained oratory has still not left the Appellate courtroom.

One of the most moving statements made in the Supreme Court of the United States, according to many persons who heard it and according to the results that it achieved—was the closing of Senator George Wharton Pepper in the AAA case in which he said:

> My time is fleeting and I must not pause to sum up the argument I have made. I have come to the point at which a consideration of delegation is the next logical step, and that is to be dealt with effectively by my colleague, Mr. Hale. But I do want to say just one final and somewhat personal word.
>
> I have tried very hard to argue this case calmly and dispassionately, and without vehement attack upon things which I cannot approve, and I have done it thus because it seems to me that this is the best way in which an advocate can discharge his duty to the Court.

> But I do not want our Honors to think that my feelings are not involved, and that my emotions are not deeply stirred. Indeed, may it please your Honors, I believe I am standing here today to plead the cause of the America I have loved; and I pray Almighty God that not in my time may 'the land of the regimented' be accepted as a worthy substitute for the 'the land of the free.'[6]

In our court, counsel are not bothered so much as in many others with running fire questions from the Bench. Many lawyers are terrified or at least thrown off balance when their train of argument is interrupted by a question. On the contrary, a well prepared lawyer should welcome the questions. It shows the judge is interested in his case. If his case is so weak and his knowledge of the record so frail that he is devastated by a single question from the bench, he will probably not prevail in any event. Whereas, if his knowledge of the record is perfect, his examination of the law involved and related fields is adequate, a question from the bench is a magnificent opportunity to continue the argument in the language of the judge who has asked the question. It exposes completely the judges own thinking, is a guide to that which should be said or not said, and a question completely and convincingly answered may do more to attain the ultimate objective than fifteen minutes of uninterrupted argument when the speaker has no idea whether the court is agreeing with anything that he says or not.

There are a great many very simple do's and don't's that can be rapidly condensed. For instance, don't do those things which distract the court's attention from that which you are saying. Don't fuss with papers on the rostrum, don't read, don't make unusual or distracting gestures, don't appear in dress that is unusual and distracts attention, don't interrupt opposing counsel, don't make disparaging remarks about opposing counsel unless they have invited it in the presence of the court and even then its worthwhileness is doubtful, don't show irritation with the Court because of interruption, don't interrupt co-counsel by passing up notes unless it is extremely critical, unless he has misstated the record or seriously misspoken himself, don't cast aspersions on the trial court. The fact that you have appealed is adequate notice to the Supreme Court that you don't think much of the trial court. Don't follow the classic example of saying, "This is an appeal from a decision of Judge So-and-So and there are other reasons also for reversal" no matter how enticing such a wisecrack may seem.

To summarize: know your record, know your court, so far as possible know your judges, know your law thoroughly and completely, and be prepared to discuss it, and then approach your oral argument as you would to a total stranger, telling him of your wrongs and the

[6] Id. at 218.

reasons they should be set right. Do it earnestly, do it sincerely. Never do it hypocritically, never do it casually, and when you have finished telling your story in the best manner you can, then stop, whether that is fifteen minutes, twenty minutes, or thirty minutes. There is no more you can do. Repetition or half hearted closing sentences have ruined many a good argument. You have done your best.

Permitte divis cetera—for the benefit of you commoners, your lawsuit is in the lap of the Gods.

The Motion for Rehearing

After all of the preparation and all of the skill and persuasiveness that has gone into our brief and argument, suppose the blankety blankety so and so's, because of their innate stupidity and all of the other curses which afflict the human race, have rendered an opinion against us. What in the world do we do? What in the world do we say to the client, and more important for these purposes, what do we say to the court?

I have been very much in favor of greatly extending the time within which to file Motions for Rehearing. I still insist that temperatures do not return to normal within the short space allotted by our rules!

After we have explained the stupidity of the court to our client, and after we have told every other lawyer within the sound of our voices what we think of the court and the judge who wrote the opinion in particular, and how we are certain that he never read the brief and he must have been looking out of the window when we made the oral argument, and besides that, we never thought he liked us anyhow, and all of the other alibis that disappointment can engender, we are still confronted with the practical situation of whether or not we should file a Motion for Rehearing. After all, by filing a Motion for Rehearing, we can at least get ten minutes of oral argument in which we have the rare privilege of telling the Court exactly what we think about them. This is a privilege not easily foregone by one who is still quivering under the sting of defeat.

My advice, which I confess is hard to take myself, is that we had better take a careful second look at the situation. There is always a possibility, you know, that the seven judges on our Court might be more nearly right than we who have been hypnotizing ourselves for months in advance with the idea that our position was unassailable. I would suggest, first, that some of our associates or our friends at the Bar be asked to carefully read the opinion, and if not in fear of their lives, to tell us what they honestly think of it. Second, we should ourselves return, painful though it is, to the scene of the slaughter and most carefully analyze why we lost the lawsuit. My guess is that if those two simple rules were followed, the number of motions for rehearing might materially decrease.

I can imagine no more senseless conduct in the world than for a lawyer to write a motion and brief for rehearing in which he abuses the Court and the original opinion. One would think that enlightened self-interest, if nothing else, would prevent that sort of thing. After all, we might have another case some day! Do we hope to win friends and influence people by abusing them or being sarcastically critical of an opinion which has represented hours of effort on the writer's part? Surely, common sense should tell us that a motion for rehearing should never be filed unless there is, for instance, a divided Court, indicating some possibility that the advocate has another advocate inside the conference room, or the court has misunderstood the facts, which not infrequently happens (and which, by the way, is usually the fault of counsel), or unless the court has been led into a misstatement of a legal proposition.

Under those circumstances a carefully restrained Motion for Rehearing, an argument bearing more a tone of regret and disappointment than abuse and cocksureness, does occasionally, as we know, result in a rehearing and sometimes in a withdrawn opinion.

I think sometimes we miss the boat in complicated litigation when we file blanket motions for rehearing and attack the entire proceeding, when we might gain at least a part of our objective by asking reconsideration of some portion of the opinion that is really vulnerable and which may have an effect on the ultimate disposition of the case.

If I may personalize a little, many years ago I had one matter in our own court in which I filed four successive motions for modification of opinion, each of them attacking particular language which would inevitably have an effect when the cause was remanded, as it had been. Each of those four motions was sustained in part, and by the time the process was complete, we had removed from the opinion language which might have resulted in an instructed verdict against us on the second trial below.

Human nature being what it is, I am reasonably confident we would not have progressed to that point if we had started the motions for rehearing by telling the court, in more or less refined language, that they were all wrong and didn't know what they were talking about.

Certainly the vast majority of the cases decided by our own court, to me as an outsider in reading them, indicate that a motion for rehearing is actually a waste of time. The box score on the allowance of such motions indicates that at least the Court feels similarly.

On the other hand, we must recognize that courts are human, are subject to errors; that they make mistakes like the rest of us; that they have certain pride of opinion; that they are earnestly seeking to render justice between the parties as best they can, and that if a true error can be pointed out, embarrassing as it may be and reluctant as

the court may be, they will correct that error. Certainly, to have a motion for rehearing allowed, one must shoot with a rifle and not with a shotgun. The complaint must be pin-pointed, must be accurate, it must be forceful, it must not be insulting. If it is not all these, I think we have learned that the little postcard, "Motion overruled" is very apt to follow after the next conference of the Court.