On the Art of Argument

Professor Karl N. Llewellyn introduced Chief Justice Walter V. Schaefer '28 and Mr. James A. Dooley as their discussion "On the Art of Argument" before The Law School students and faculty. Mr. Llewellyn reminded the audience that the conscious study of the art of argument once had high development among the Greeks and again in medieval times. He welcomed our speakers as reintroducing into American thinking a study which had been too long neglected.

THE APPELLATE COURT

CHIEF JUSTICE WALTER V. SCHAEFER
Illinois Supreme Court

I am largely but not entirely at a loss. I am not a prophet. I am not a great scholar. I am not a great teacher. My role here was described and anticipated some years ago by a very great lawyer, John W. Davis. He was giving an address on appellate advocacy, and he peppered his remarks with something like this: "I must apologize for being here before you to speak upon the subject, for who would listen to the weary discourse of the fisherman on the relative attractiveness of various types of flies, if the fish could be induced to talk?" Taking my role from this story, I am the fish, and I am to indicate the relative effectiveness of various types of lures. As I understand it, I am to talk upon the subject of appellate presentation, including both the brief and the oral argument.

So far as the literature on the subject of briefs is concerned, I would refer you to two articles by two Illinois lawyers, Paul Ware and Owen Rall, and they are as good as anything I have seen anywhere on the subject. The articles are in the spring, 1952, issue of the Illinois Law Forum. These articles will refer you to the rest of the literature, including the essays by Wiener, Jackson, Davis, Wilkins, Carr, and all the rest. Actually, you can cover the literature in the field in a fairly satisfactory fashion in two hours. It is a rather fascinating little select body of literature. I do not think the literature generally is perhaps too profound, but it is interesting, and it is fun reading.

Now, just a word as to the brief, and this word is equally applicable to oral arguments. Keep in mind your purpose and keep in mind the person or persons to whom your argument is addressed. I think this is of the

THE TRIAL COURT

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This meeting to me represents the realization of a proposition for which I have always stood; namely, that the law schools should teach the law students something about litigation. No lawyer can be a lawyer in the true sense of the term unless he knows the problem of litigation. And I mean the problem of litigation in the trial court, the problem of litigation in the appellate court, and in Chief Justice Schaefer's court. How can a lawyer even advise a client unless that lawyer appreciates the problems which go with litigation? If you are to be lawyers in the true sense of the word, learn as much as possible about this problem.

A medical student does not go into the world and perform an operation on someone merely from the knowledge he obtained on surgery out of the textbooks. He has worked in the laboratory; he has assisted and has participated in operations. This is where he gets his working knowledge. And there is a laboratory for all of us students of the law, and we must remain students as long as we practice—that laboratory is the courtroom. And I think it characteristic of the progressive nature of the University of Chicago in seeking to bring the laboratory of the law to the law school. It is much like meeting the mountain, since the mountain cannot be brought here.

Now, of course, we are back in the trial court. The case has been reversed and remanded for trial by the Chief Justice.

The most important phase in the trial of any case is the preparation phase, and that facet is accomplished without the confines of the courtroom. Ninety per cent of all cases tried, in my opinion, are won or lost outside the court.
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utmost importance. We find some briefs in our courts by lawyers who, presumably, are well compensated for the job that start off something like this: "The trial court erred in refusing to give full effect to the previous decree of the court of Maconobby. It is well established that a decree rendered by a court having jurisdiction over the person in the subject matter is entitled to..." And then cases are cited. Our Court does not have from this the faintest notion of what the case is about. I have literally read as much as ten pages of a brief without being told what the case was about. In fact, our Court has read entire briefs and in at least one instance heard an oral argument without being told what the lawyer's point was—and this after some effort to abstract a clarifying statement by questions from the bench. So keep in mind that your main objective is clarity. You are trying to get the court to understand.

There are some subsidiary aspects to the problem of clarity—of getting the court to understand. The court is approaching the matter from an entirely objective point of view. In real life, as a lawyer before the appellate court, you will be approaching the argument with the heat of the trial court still about you. The tendency to carry over some of that heat will be hard to avoid. But you should avoid it scrupulously. The heat of the trial battle will not help the reviewing court at all. It will not help your case.

Both in the oral argument and in the written brief be wary of how you use the court's own language. A man does not sit very long on an appellate court before he becomes extremely cautious as to the meaning of what some judge, including himself, has said in some earlier case. Your naiveté about that when you are a judge lasts just until the first time somebody quotes back at you something you have written yourself. After that experience, your guard is eternally up. Having seen how what you wrote with a particular situation in mind and confined to that really—and perhaps you were a little careless, even though you tried not to be—can be quoted as applicable in quite different circumstances, you are going to be cautious about taking the words at their sheer face value, whether it be your language or some other judge's. Moreover, opinions do not all have the same value. Even your own opinions are not all of equal persuasiveness to you; they are not all of equal effect. That is because of what your job is and because of the characteristic of the business. The universal characteristic that every case shares in common with every other case is that it has to be decided, and in a reviewing court typically it has to be decided by written opinion. You convince yourself as Cardozo once said, 51 per cent, and then you write an opinion that indicates you are convinced 99 per cent. Your colleagues may go along with the opinion convinced in varying degrees from somewhere in the 40 per cent area up to somewhere in the 70 per cent range. The opinion that emerges is the opinion of the court, but it is actually a very close decision, not to be stretched, not to be expanded, and not to be distorted.

If you are asking the court to overrule a case, you should do so frankly. If your brief fails to mention a case which governs or has governed the kind of situation involved, the judge may read your brief with an uneasy feeling that something has been left out. The judge is likely to say to himself, "Now something has been said on this question; I'm not absolutely sure what it is, but where is it set forth in here?" and he will keep mentally looking for the case. Then, when the controlling case is set forth in your opponent's reply brief, your failure to have dealt with it is, of course, emphasized. Do not run that risk. Be entirely frank. If you are running into a case that is against you, or if there is an aspect of the facts that is against you, bring it out yourself. Do not leave it to the other man to bring it out and to exploit your discomfort.

Now as to the oral argument, I suppose the first question in our Court is whether or not you should ask for oral argument at all. That is a question in a good many other appellate courts where oral argument is not required or indicated by the court itself in specific cases. I think oral argument is extremely valuable. Someone has described it in this way: "It's the one opportunity the lawyer has to make sure that the essentials of his argument have passed at least once through the minds of the judges who decide the case." I think oral argument is actually entitled to a much stronger footing than that. In my judgment you ought to argue any case that is worth asking the court to decide. We do not have that many oral arguments now, but I suppose that in the next five or ten years that may come to be so.

So far as the technique of oral argument is concerned, and these are largely generalizations, you should keep in mind your objective. You are talking to a group of men by way of exposition and persuasion. They will know your case in varying degrees. In our Court it may be that about half of them will have read the briefs. You always ought to try to find out, before you make your argument, what the practice of the reviewing court is with respect to reading the briefs in advance of argument. The answer to this will make a difference in the way in which you present your case. In our Court you cannot be sure. In some cases all of the judges will have read the briefs; in a very rare case, where we are in a terrific jam, it may be that no judge has read them. That would be a rare situation with us today, although it once was the rule. You ought to keep in mind that, to at least some of the judges, your problem is likely not to be at all familiar. You should state your facts, without heat, and then go into your argument.

When you go into your argument, argue without reading. Our rule prohibits reading from the briefs. No court likes reading from the briefs. There is a story told about the Supreme Judicial Court of Massachusetts, in which a
man was standing there reading insistently and persistently from his brief, and one judge—so the story goes—wrote a note and passed it to his colleague. The note said, "A brief-reader is the lowest form of animal." The colleague looked at the note for a moment, took his pen, wrote something on the paper, and passed it back, and it read, "He is a vegetable." In our courts there is a curious practice indulged in—prompted, I suppose, by the rules prohibiting reading from the briefs. The curious practice is that the lawyer writes out his oral argument and then reads it to the court. The only appreciable difference between reading the argument or reading the brief that I can see is that, if a man is reading from his brief, the judge, by looking at his own copy, can gauge the lawyer's progress and can form some rather accurate notion as to when the lawyer is going to finish. Both methods are effective in drawing a curtain between the listener and the speaker. Do not read. It is all right to have some notes to tie yourself to, but you should know your case well enough so that you do not need to read.

Do not try to make the oral argument carry more than it can. In the average argument it does you no good, for example, to cite a case by the full citation, including the page reference and copious quotations. Of course, you want to place the case cited in point of time, and you can do that usually by naming a volume or the approximate year of the decision. Of course, there are unusual situations where you will want to do more than that. But all the oral argument can do is to leave an impression. You cannot expect a court to keep in mind precise facts—the very dramatic facts, yes; the details, no. Yet the impact of oral argument is very strong. We hear oral arguments in a term, and normally we have perhaps as many as forty or fifty in a term. The surprising thing is that, when the judge comes to work on the case, it slips into focus. It is incredible how this happens. I have a poor memory, and it should not work with me, but it does. I have checked with my colleagues, and it works with them. The judge will pick up the case; the title will be unfamiliar; the name of the lawyer may not mean a thing, and then all of a sudden there is some fact that is familiar, and the whole oral argument comes back into focus. I can pretty well see the man argue, and I can pretty well remember what he said, even if I have been so interested in the argument that I have failed to take notes.

Brevity is most important. The tendency of many a lawyer is to think that, because he has half an hour within which to argue his case, he has to take the full time. This does not follow at all. Some of the most effective arguments are made in fifteen or twelve minutes, and, when the argument is over, there is nothing more that needs to be said. When you are representing the appellee, the temptation to take up time by restating the facts will be terribly strong. I think that this is one of the most fatal mistakes that you can make. When the lawyer for the appellant has finished his argument, the points he has made and the echoes of his argument are still in the courtroom. Now the attorney for the appellee rises to respond, and that is one of the most dramatic moments I think in our whole judicial procedure. The appellant has controlled the show up to that point; now the court is looking to that man who rises to answer, and what does he do? Ever and ever so often he starts over again and restates the facts. You listen for the first minute or so quite attentively; you are waiting for that difference—that significant difference—in his portrayal of the facts to see what is going to affect the outcome of the case. It does not come in the first minute; it does not come in the second; and it does not come in the third. You can just look out of the corner of your eye up and down the bench, and you know he has lost the court. Whether he ever makes up for this lost opportunity is anybody's gamble, but he has not taken advantage of a decisive moment. Do not be afraid to leave the case on your opponent's statements, unless it is critically damaging. Then, you will hold the court's interest when you point out the different bearing of the facts or emphasize the omitted facts. An interesting technique sometimes used by the appellee is to begin by referring not to the facts but to the general background in its legal framework of the case at hand. When successfully done for a brief period, this can take the court away from the details and give a general background. The lawyer cannot do this forever, of course, because we sit there waiting for him to come back to the case. He has got to come down to earth. But this gives him an opportunity to come back with precision on the facts he wants to emphasize, and he has dissipated the atmosphere that existed at the time he began to speak and perhaps substituted some general premises to which the court reacts favorably.

I think the best thing that has ever been said with respect to questions asked by the court is "Rejoice when the court asks you questions," and I think you should. On a minimal basis, as it has been said, at least it is fairly clear proof that the particular judge is not asleep. Starting from that minimal basis, it seems to me that there is nothing harder than arguing a case to a mute court, to a court that sits there silent, and you do not know how close to the mark your shots are going. You have no notion as to whether you are meeting the problem that is in the court's mind. You have no notion even whether or not the court has a mind. Indeed, the court may be reading the briefs of the next case. You know the court bench is never as open to scrutiny from the other side as are the law-school benches. The court bench slants upward, and that gives the court an advantage which it has always considered itself fully entitled to have.

I think most courts today will permit the use of expository devices by way of charts, maps, and that sort of thing, which can be extremely helpful. This technique can be helpful even on such matters as the construction of a statute, where there may be a full column taken up by the statute but where only about twenty-five words
are important. Putting those twenty-five words on a chart will keep them before the court. But, if you are going to use charts, make them big enough. Among the other deficiencies of judges, they tend to be nearsighted. Most of us do not confess to a weakness like that publicly, but, if you watch us lean forward squinting in an effort to follow where counsel says we should look in the brief, you will know it is true. Another point, I believe, relates to the danger of referring to a photostat in your brief rather than reproducing a big chart. When the reference is to the photostat in the brief, I have never seen it fail but that, when the lawyer thinks he is through with the diagram or map and wants to go ahead with his arguments, he will find that the court will keep right on looking at the page of the abstract. The court will keep looking at it for the balance of the argument. On the other hand, if you have the chart yourself, when you walk away from it, you can carry the court’s eyes with you.

There is one basic point I would impress upon you. Keep in mind that the court is objective and that it is approaching the case as a new matter. Keep in mind also that, in deciding the case, the court, if it is worth its salt, is going to be interested in fitting this case into the existing body of decisions within the state. Therefore, in your argument, put your case at the outset into the existing structure of decisions of your particular jurisdiction. Put it into that existing structure and show the pressures of precedent which would push the decision one way and indicate also any counter pressures of precedent which might lead to an opposite conclusion. Do not argue your case, as is too often done, in terms of rules. The law actually does not live in the statement of the rule, including past statements of the rule by the court, any more than it lives in the black letter of the hornbook. The law lives and cases are decided—and advocates become great advocates because they know this—in that area of policy and in the considerations out of which the black-letter rules evolve. Keep your written argument and your oral argument pitched to take account of these considerations—not ostentatiously, I am sure I do not have to tell you that—but do not put your argument solely in terms of a bare absolute rule which the court may have announced in a particular case. You see, the judge may have written the opinion in that particular case, and he will not be impressed a bit when you tell him that the law of Illinois is inflexible because of his opinion. The judge will want to know why the rule has evolved and why it is important that the rule either be extended or cut short of your particular case. He will want to know the policy factors that govern the particular case. Your statement of these factors in the light of the structure of decided cases will be most helpful to the court, and happily you will be most helpful to yourself and to your clients if you pitch your argument this way, because this is the level on which cases are actually won.

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room. All cases are factual situations, and unless we the lawyers have a comprehension of the facts and an understanding of what the facts represent, we cannot truly represent the cause. How do you get the facts? The most fruitful way, in my opinion, at the cost of reiteration, is through interviews with and signed statements from any person who might be a witness whether that person is favorable or adverse to your cause, or whether he or she professes to know nothing about it. Obtain a statement of what they know, or a statement to the effect that they do not know anything of the matter in question. The negative statement will save you the embarrassment of being confronted in court with a person full of knowledge concerning factual matters when you were led to believe that in an out-of-court interview that person had no knowledge whatsoever concerning that about which he or she testifies. A signed statement is the circumscript of a witness’ ability to testify in court. It is an insurance policy that a given witness cannot violate the contents of the statement without running the risk of being plagued by it.

Of course, you students are familiar with discovery devices. I am not going to spend any time discussing this. Never, however, lose sight of the proposition that the facts in any case are the most important part of that case. Indeed, I am sure the Chief Justice will agree with me on that statement.

After you have completed your factual survey, it is usually well to confer with your client. Your investigation might have revealed things which apparently contradict what he has previously told you. In an interview with him, you can ask him about these apparently contradictory matters. Frequently, he will have a valid explanation, yet, if you were to go to court with that explanation, you would be in no position to explain the apparent contradiction for others. “Facts do not always interpret themselves,” and a trial is a classical interpretation of facts.

Your preparation should also concern your own knowledge. In almost every lawsuit there is some scientific or commercial matter involved. Thus, if it is an accounting situation, or a medical case, or litigation involving dynamite, do some work on it. Go to the textbooks and the appropriate journals. Then when in conference with an expert, upon whose knowledge you wish to draw, tell him your understanding of the problem and ask him if it is correct. With that fundamental knowledge which you have already obtained by your own work, you will find that your concept of the problem is readily made clearer. This is very important. Shall we call it "self-preparation on the meaning of the facts in a given case"?

Know, too, the law of the case. Know what you have to prove in order to make out the case. If you represent the defendant, know what the plaintiff has to prove in