1956

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ON ADVOCACY *

ABRAHAM L. FREEDMAN †

I.
INTRODUCTORY.

It seems only natural that a discussion on advocacy should come from one who is himself an advocate. Indeed, it appears quite obvious that only an advocate can speak with knowledge of advocacy. Yet on analysis this is not so obvious a proposition as it seems on the surface. For advocacy partakes so much of the qualities of art that it may well be questioned whether advocates themselves are conscious of the attributes which underlie their success. Just as the writer and the artist generally fail to meet our expectations when they undertake to describe the sources of their power, so also is there a feeling of inadequacy when an advocate consciously seeks to describe the elements which make up his art. For in a sense the artist who succeeds has become a man of action. What has been hidden and unconscious has taken on an external form; and wise though he may be instinctively, he is not necessarily gifted with the capacity to understand the hidden mainsprings of his action or to explain how they break forth from intuitive comprehension into specific action. This is why most of the descriptions which the advocate gives of his own conduct are no more than ex post facto probings toward an explanation which will match what he has already instinctively done.

Thus it is that when an advocate has finished speaking on advocacy what remains—after the first enthusiasm of his audience at surcease has subsided—is the gathering up of a few more or less obvious rules of conduct, and if his address has been sparkling and entertaining, a sprinkling of some interesting personal anecdotes either from his own experience or which, with hasty erudition, he has summoned from the past.

I point out these deficiencies which are common to every attempt such as this, not to engage you in the hope of something better

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on this occasion, but rather to plant your expectations on realizable ground.

I hasten to add, however, that my theme is not to demonstrate that there is nothing to be said on advocacy. The very difficulty of penetrating the mystery of advocacy makes the tantalizing theme ever attractive—worthy of continuing exploration.

II.

THE ROLE OF THE ADVOCATE.

The work of the advocate has always had a fascinating attraction. The high drama which surrounds his activity and the human material with which he usually deals are sufficient to excite the deepest interest. When we recall that the arbitrament of disputes through the means of advocacy is the substitution of persuasion for force, we approach an even deeper basis for our interest in advocacy.

The courts are the instrumentalities by which organized society puts down the controversies which rise up for solution. The advocate determines and shapes the materials which call forth the courts' decisions.

As the law comes to deal more and more with economic and social factors and as government itself spreads its activity more openly into these realms, the advocate in presenting individual cases to the courts deals with the effect of these factors; he holds them up to public scrutiny and consideration in circumstances where they collide with currents which have their impulse from other individuals, other groups, or the State itself. Advocacy, therefore, is the window through which there is presented on public display the conflicting social currents in society and the debates regarding the choices to be made.

It is therefore inevitable that the advocate so often assumes the role of libertarian. For out of the complex activity of men in organized society it is he who finds through the channel of litigation the means of presenting for open debate and individual determination the choice of policy to be made between competing interests. Thus he stands as the representative of the individual in his claim of individual right against other individuals, personal or corporate, no matter how powerful they may be. Thus he stands also as the representative of individual right as against the power of organized groups. Indeed, thus he also stands as the representative of organized groups which seek protection against the superior power of the State itself.

And thus, by a remarkable device, the advocate, representing individual parties and maintaining their individual interest, spreads into view abstract questions of the utmost breadth.
The advocate, then, serves a dual function. He represents the individual litigant whose interests are merely in the decision of his own case. Yet at the same time, in fashioning the material for decision, he summons up for presentation in the public forum of the court a living segment of society in action and with it the clashing claims of competing social needs. Then, in the courtroom this material is surveyed, and in the light of its evaluation the court's decision is made. Much of the merit of judicial decision depends on the capacity of the bar to produce the relevant material.

So a living, organized society goes about its immediate affairs intent upon its activity and little inclined to indulge in speculation regarding the nature of the processes which it sets in motion. But when disturbances reach the point of litigation they are brought to the bar of justice where the skill of the advocate can summon up for conscious consideration and examination the very forces which otherwise would operate without conscious consideration. In the courts the judgment must be made between competing policies and competing rights which in competitive society had been determined more or less entirely on the basis of power.

This dual function of the advocate, in which he represents the individual litigant and yet at the same time helps in the airing and ultimate clarification of great social problems, is constantly illustrated.

The Gold Clause Cases\(^1\) were just lawsuits. Yet much of the financial foundation of a society, on whose health sound public finance depends, was there determined. Political and social issues of the highest order were entwined in the effort to liberalize and yet stabilize the currency. Some thought the effort revolutionary and were certain that it marked the path to the destruction of the nation's solvency and its financial integrity. Others thought it was but an effort at experimentation in a realm too long thought sacrosanct. Yet the will of a popular President, supporting a great popular cause which had its impetus in the terrors of depression and the ominous shadow of danger to the existing structure of society, could not rest on its own fiat. With the same form of respectful submission as every private litigant, the government itself had to justify in terms of law rather than of its will or even of the national advantage, the program it had espoused. What a harnessing of power in submission to law.

The great school segregation cases\(^2\) were decisions involving the rights of a few individual litigants. Yet within the confines of a legal

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proceeding the deepest currents of conflict within our society were exposed to the rational processes of argument and judicial decision. What a ventilation of social conflict. What a dramatic exhibition of the draining off into the forum of reasoning debate, of deep and violent passions.

In the steel seizure case, again the channel was a legal proceeding. But in it followed to an ultimate judicial decision a debate of the highest policy considerations dealing with the authority of the State against the individual.

The blue eagle of NRA, designed to change and regulate the methods and philosophy of American business, was brought to earth by the legal blow struck by a neighborhood chicken dealer.

Reaching conclusions in matters of this kind by judicial decision is an enormously powerful safeguard for the security of the social structure. It proclaims that the strongest and most passionate views must ultimately be put to the test of reason and find solution through the processes of law rather than force. The judicial processes are the great safety valves through which may be let off the ferments of change and the explosions of conflicting interests. The advocate is the engineer in charge of these valves.

Above all, it is the essence of the advocate's work that in the civilized atmosphere of courts of justice he urges the claim which he represents and no matter how fierce may have been the contest, he ultimately submits in peace to the decision of the courts.

III.

The Scene in Which the Advocate Is Cast.

Advocates, to whom the courtroom is so familiar, tend to become unaware of the uniqueness of the scene in which the advocate is cast, a uniqueness which a fresh impression would at once convey. It is only by making the effort to see the scene with eyes uninfluenced by familiar impressions that we realize how much the courtroom itself can teach us about the advocate.

In the courtroom perhaps the most consistent element in the various qualities which the advocate reveals is his ability to center all attention upon himself. It is this which makes him appear to have a commanding appearance, a penetrating eye, or a hypnotic power. It is this which makes him appear to dominate all others in the court-

room and thus to appear stronger and more powerful than they. This willingness to assume complete responsibility, to take over the risks of his client, to confront his adversaries, to deflect upon himself the sharpest dangers to his client, is what ultimately creates the impression of the masterful.

Yet a courtroom means a judge, whether an individual judge or a judge and jury. And it is before the judge and jury that the advocate performs his work. The understanding of the role of the advocate becomes easier when we turn from him for a brief glimpse at the role of the judge. The parental figure represented by the judge clarifies our understanding of the advocate. The advocate represents a confrontation of authority in the mask of humility. This masterful man must work within a framework of subordination. He may unleash against the witness all the weapons in his armory but—aside from the restraint of his own integrity—the only check upon his sarcasm, scorn and even brutality to the witness is the ever present test whether he is pleasing or offending the judge or the jury. If there is one point upon which all trial lawyers would agree, it is that the advocate must never offend the judge or the jury. For all his efforts are directed to the single issue of their decision. It is their decision which will swallow up all the doubts, the turmoils, and the uncertainties of the struggle.

Accordingly, within the framework of the constraint put upon him by the judge and the jury, the advocate must dominate the scene. The client turns helplessly to him for care and protection. Men successful in their own affairs, when they come into his hands are childlike in their faith and in their helplessness. His role is nothing less than parental. Yet in this very process of dominating his clients and seeking to dominate the witnesses and masterfully engaging in combat with opposing counsel, he is the subordinate and indeed the child of the judge. Even the nomenclature of the courtroom is loaded with echoes of subservience and the effort at placation. “May it please Your Honor”, “With submission to Your Honor”, are phrases so well-worn on the tongue of the advocate that it must be surprising to contemplate what it would mean to hear them said in any other walk of life.

Accordingly, aside from specific capabilities and talents, the advocate must have the psychological qualities which render it possible for him to express his aggressiveness while at the same time maintaining unbroken the paradoxical role of humility before the judge and jury.

The stage on which the advocate acts is so fascinating, among other reasons, because it is a microcosm with all the exaggeration which
the compression of life into a stylized, dramatic form creates. The advocate is the chief actor in the play, and yet remote and above him participating and yet outside the play itself and holding the ultimate power of judgment, is the judge. How profoundly similar is the advocate's role to the lot of every actor on the stage of life.

IV.

THE QUALITIES OF THE ADVOCATE.

The role which the advocate plays, the scene in which he is cast, all make demands upon him. What are the qualities which best fit a man to play the part of an advocate?

1. Physical appearance. Reference is often made to the physical appearance of the advocate. He is described as having a commanding presence or majestic or sonorous voice or a penetrating eye. In many cases these descriptions are accurate; but one can easily recall masters of advocacy apparently lacking in grace or charm. These qualities, of course, are desirable, and blessed are those whose physical appearance gives them either an attractiveness to their fellow men or a quality of commanding presence. It is clear, however, that the basic element here sometimes confused by external appearances, is the ability of the advocate to center attention upon himself and to create the impression of the masterful.

2. Curiosity. A ceaseless, restless striving in an endless sea of facts and circumstances is one of the outstanding qualities of the advocate. Such a lawyer will break down the incomprehensible resistance of his client to the discovery of the facts, even those which are helpful to his case. He will not accept his client's assurances that there are no relevant documents, but will himself ransack the files. In the course of preparation, he will lead and even force his client and his witnesses through every path and byway in the search for facts. When an advocate laments that his client has disappointed him on the witness stand in the revelation of some fact hitherto unknown to him, he reveals only the lack of thoroughness in his own preparation. For in reality, strange to say, the client with all his protestations of the justice of his own position, nevertheless erects a barrier between himself and the advocate in ascertaining all the facts. He will be sure that certain facts are irrelevant and not bother to speak of them. He will be sure that certain witnesses know nothing that would be of

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value and not bother to give the advocate the clue to the discovery of what they know. He will not bother with seemingly irrelevant documents or leads which point the way to evidence of the greatest value. Like the archeologist digging in the wastes of time the advocate must struggle against the accumulated assurances of his client that all the facts have been revealed in order to find what facts truly are available.

3. Clarity of mind. Clarity of mind is an essential quality of an advocate. It is, of course, an essential ingredient in many other activities,—such, for example, as lecturing. In law it is a quality desirable also for the office lawyer. But with the advocate it is of the essence. For court and jury, who are the objects of his efforts at persuasion, are all of them human beings with difficulties of their own which tend to draw them away from concentration. What the advocate seeks to convey must be crystal clear if it is to win their interest and ultimately their admiration and approval.

4. Imagination. The quality of imagination will make it possible for the lawyer to establish hypotheses which will aid him in the search for facts and ultimately even in the reduction of the mass of facts into some unified whole. Imagination will put him in the place of the participants; will make him feel and understand the motivations of their actions and the form in which men of such a nature would act. It will lead him to search for facts of which as yet he knows nothing but which he will already be able to imagine must have existed. His imagination will create positions on which to take his stand, tentatively to be sure, but secure enough to justify the search for the facts which they presuppose. That same imagination will give him a comprehension of the effect of the evidence as it is presented to the court. It will give him an ever-present awareness of the luminous whole; and from it he will detect why a witness's story seems but a fragment of what he knows and when an opponent's case is glaringly lacking in some element which would already have been made known if it were true.

Imagination will help him in the great work of synthesis of the raw material thrown up in the course of preparation and ultimately in the synthesis of the contradictory evidence of both sides. In his own mind the facts and impressions he has absorbed regarding the case will fall into some luminous picture which has form and pattern. New impressions, new circumstances, new facts developing at the trial, will all be incorporated into an ever-changing but always vivid image which the advocate will always have present in his mind.
This imagination coupled with clarity of mind will make the advocate able ultimately to make the contrast between the evidence of one witness and another and finally between the plaintiff's case and the defendant's case. It will make possible the description of the details of an automobile accident case in a simple graphic form. It will make possible the escape from the technicalities of medical language and the conversion into human terms of the forms of illness and of human suffering. It will make possible the presentation on appeal of the panoramic picture of what may require hundreds or thousands of pages of printed record. These qualities of clarity of mind, imagination and capacity for synthesis, are essentially the capacity to see clearly through a maze of details and, dealing with large ideas, to give even the petty and the detailed its broad human scope. With these qualities the advocate will have, in Mr. Justice Holmes' phrase, an eye microscopic in its intensity and panoramic in its scope. With them the advocate will not only satisfy the interest of the court and jury; he will do more, he will engage their gratitude as fellow human beings who have discovered points of mutual interest, who feel a reward is due to one who has done what in essence is a sublime thing: created order out of chaos.

5. Capacity for expression. The clear, constructive image in the advocate's mind would be imprisoned there did he not also have the capacity for its oral or written expression. It is not a smooth tongue or the easily tripping phrases, that I have in mind. It is the ability to describe the image which already is clearly in the advocate's mind, to depict it in such a way that it emerges with clarity equal to that which the advocate already has in his own mind and with the added element of vividness of imagery and expression; the capacity so to illuminate the image that it finds a brightness in the hearer's mind. It is this brightness which creates the heightened emotional effect and gives to the hearer the sense of the dramatic and thus adds conviction to logic.

Much has been written about style of speech from earliest times. Customs in these matters of course change and a Roman orator of Cicero's day would be thought a caricature of an orator today. But the essential elements upon which the advocate plays are immutable. It is still the human mind and the human heart which the advocate seeks to move and persuade. Words are the means, the instruments, which he must use. Yet their power is not lightly to be weighed. They are the symbols by which human beings have learned to convey
their thoughts and the style of the speaker is the means he employs in the use of this mighty weapon of words.

6. Quick and intuitive mind. Quickness and readiness of mind are essential to the advocate. His work in a courtroom permits him little time for contemplation. Unlike the office draftsman, he has no time for revision or correction. What comes to his mind spontaneously must serve as the finished product. He must deal with a swiftly changing scene, yet deal with it with assurance and imperturbability. This is impossible to the mind which although capable even of profound effort, moves slowly and spirals from change to change to its ultimately evolved conclusion.

The distinguishing hallmark of the advocate is the capacity to improvise and above all to act spontaneously and intuitively in the heat of the battle. This spontaneous and intuitive quality draws on sources deeper than the intellectual abilities of the advocate. It draws upon unconscious sources and is fed by the wellsprings of emotion. It is this quality which defies analysis and is even difficult to depict. It is known, however, from the unvarying skill with which the true advocate makes his spontaneous choice from all other possibilities open to him.

7. Humor. A courtroom is a place of serious business. All its surroundings emphasize the grave nature of the judicial proceeding. The heavy engagement of the participants in the proceedings and the strangeness of the surroundings to the lay witnesses and parties, have often been adverted to as causes for uneasiness in a place where above all it should be possible to be at ease. In appellate tribunals the element of strangeness is lacking, for the actors are the professionals who are presumably familiar with the scene. Nonetheless the limit of time imposed upon arguments in appellate courts with the consequent necessity of concentration of so much in so little time, and the drama of argument, create an atmosphere of tension similar in effect to that which prevails in the trial courts among the litigants themselves.

In the trial court and on appeal, the careful and restrained use of humor, spontaneous and appropriate to the occasion, brings relief and gratitude to the parties, their witnesses and to the court and jury. If the humor is such that it illustrates the advocate's point, then all the greater is its effect. Above all, humor sparingly indulged in reveals the objectivity of the advocate. It makes it impossible to think of him as a chained lion in whom the lust to destroy his adversary has swallowed up all other considerations. It shows him instead as
civilized, mindful that there are other things in the world than the success of his client's case, able to appreciate the views of his opponent and to concede whatever merit it may have.

8. Sincerity. Sincerity is a quality which perhaps more than all others has been artificially copied; yet it is most highly to be prized when it is genuine.

The role of the advocate is often misunderstood and in no area is misunderstanding more widespread than in the problem of his commitment to a cause which has an adversary equally committed to the other side. How then can both advocates be sincere?

Some would explain that the successful advocate is able to persuade himself of the justice of his client's cause and to forget conveniently the merits of the other side. These elements indeed exist. But they are far from the complete explanation. For we must not forget the complexities and the conflicting currents which exist in reality. They are magnified by the ever-present and troublesome disparity between law and justice. So it will often happen that an advocate can sincerely press his view because it is supported by the existing law, and conversely his opponent may with equal sincerity present his own view in an effort to persuade the court to overthrow an established rule of law because justice requires it. This may well be due to the fact that the hypothesis of our legal system is that justice will be better served in the long run if rules of law are followed in every case than if they are made to yield in each case where individual justice would seem to require it. This is the old problem behind the growth of equity jurisprudence, which, in Blackstone's words developed to correct injustice where "the law, by reason of its universality, is deficient." And now the problem is that the rules of equity have crystallized and hardened with the years.

Nor must we fail to notice that even in apparently unjust cases a litigant may be exposed to a specific act of injustice which may excite the utmost earnestness of the advocate. What better illustration can there be than a confessed criminal whose lawyer knows that he is guilty but feels a burning resentment at the use of the third degree methods on his client.

The popular question, how can a lawyer maintain a view which he knows from his client is without justification, poses a problem that is rarely encountered in real life. It seems so simple to ask how a lawyer can honorably represent a confessed murderer. But there are questions of degree of wrong; questions of sentence as well as guilt. And when one comes to grips with the problems of another human
being there inevitably arise currents of involvement and association which pull upon the human sympathies of the advocate and create in him a longing to alleviate or to help. There is no criminal whose life story will not furnish some reason for sympathy and pity.

When one considers the backwardness of some rules of law it is easy to understand how much room there is for a sincere advocate who is willing to dash himself against the apparently irrefragable obstacles of settled principles. Indeed it is often such an advocate, who is less learned and less respectful of precedent, who may create a breach in an apparently unbreakable rule of law.

Even in the more prosaic domain of civil law there are few controversies in which one side is black and the other white, and there are sufficient areas of human justification or sympathy on each side to involve each advocate in a commitment to his client.

Again, a jury's verdict may have justly decided the facts, yet the advocate may feel an abiding sense of injustice because of the trial judge's actions toward the parties or their witnesses.

9. Objectivity and fairness. The advocate must combine the passionate conviction of the justice of his case with an unbreakable objectivity. This objectivity will save him from demagoguery, from blind partisanship, and from the inability to see the merits of his opponent's case. It will be possible for him to be free from distortion in his statement of the facts; to include what harms as well as what helps his case, and to be free from despair every time the course of the trial or argument takes an adverse turn.

Perhaps the most powerful form of oral argument is one which presents the facts objectively, fairly reveals the arguments that can be made on both sides and then, marshalling the factors which weight the scales to one side, emerges with the true conclusion. Such a conclusion seems almost unanswerable. The best form of advocacy, therefore, as well as the fairest, is that which brings the advocate most closely to the form which the opinion of the court will ultimately express. There, too, in its fairest form will be found an objective and accurate recital of the facts, a recognition of the arguments that may be made from them on each side and the ultimate choice of the conclusion resulting from the weight leading in that direction.

The objectivity of the advocate reflects itself in many aspects of his work. It will save him from the perils of overtenacity. We all know the advocate who insists on answering every point the other side has made and who cannot let any point, even the most trivial, go unanswered. He burdens the court or the jury with his laborious ef-
forts and obscures the merits of his case in a jungle of details. A lack of objectivity leads downward to the petty. It trades for the passion for justice, a passion for success.

The objectivity of the advocate is, however, a different objectivity from that of the judge. With the advocate, objectivity must be ever present and yet, existing side by side with it, paradoxically, must be a deep emotional involvement with his side of the case. It is the ability to convey this strong feeling, while at the same time being able to survey what his strong emotions bring forth and channelize and pattern them in acceptable standards of rational argument, which characterize the difficulty and the uniqueness of the advocate's role.

10. Character. Much of the advocate's success depends upon his character. Inevitably, from the nature of his role, the advocate moves into the foreground and by his presence obscures the litigants themselves. In this prominent position the jury comes ultimately to judge the merits of his client's case by its judgment of him. In the trial courts many a jury's verdict has been the product of its regard or dislike for one of the counsel in the case. In the appellate courts, although the play of the advocate's character is more subtle, it is always an important element. The indignation of an advocate esteemed for his moderation and integrity is profoundly moving, whereas the artificial indignation of an advocate is a shameful exhibition. The axiom that when a witness takes the stand he puts his character in issue may well be turned to a maxim of advocacy that when an advocate seats himself at the counsel table the issue becomes his character. It is of course true that the qualities of character are often sought to be imitated. At times the artificial product passes for genuine currency. Yet when the test is greatest the hollow ring can most readily be detected.

One cannot here undertake to assay what constitutes character. But as reflected in the advocate's conduct in the courtroom, character is the impression that he creates as a man who seeks justice, who loves truth, and who plays fair, who is generous to the hard pressed and strong enough to be bold with the overbearing. It reflects itself in the trivia of daily conduct in the courtroom, His manner at the counsel table to his associates; his courtesy—not ingratiatingness—to his opponents; his devotion to the task at hand; his unwillingness to squeeze the last drop of advantage from a point which goes his way; his manly concession of the merits of his opponent's case.

This is not an impossible picture. There are advocates who try cases in this way and they are particularly successful because the
jury and the court come to trust them. Such an advocate's summation to the jury is not the wild exaggeration of the perfection of his client's case and the complete wickedness of his opponent's position. It is rather—and here again clarity of mind has its reward—a narration of the opposing views with a commentary of their merits and the ultimate presentation of the one as outweighing the other.

I know that there are advocates who would smile at this description. They would consider it impossible to try a case without berating their opponents; they would consider it dangerous to concede the slightest imperfection in their side of the case; they hold in low esteem the jury, and firmly believe that the din of the courtroom brings a far greater reward than adherence to the truth.

Nor would I deny that such advocates do at times have success. It must be conceded that success often attends the contemptuous. So also does force at times conquer truth. But we have staked our ultimate hope on the belief that in the long run truth prevails. And in the long run our admiration for skill and integrity will outweigh the wild and shameful applause for the demagogue who thunders at a jury.

V.

THE TECHNIQUES OF THE ADVOCATE.

We may begin with the last step of the work of the advocate: the oral argument.

1. Importance of Oral Argument.

There are some who minimize the significance of oral argument. When one considers that the advocate in an argument on appeal presents his views to judges whose minds have not yet been touched by the case and who are open and receptive to every fresh impression, it seems to me impossible to overestimate the importance of the oral argument. This is especially true in states like Pennsylvania, where appeals are as of course and the court has not already acquired a knowledge of the case on application for certiorari.

Given the importance of the oral argument, let us turn to the advocate himself.

2. Conduct and Demeanor.

There are a number of obvious matters governing the conduct and demeanor of the advocate.
(a) Dress.

The advocate's dress should be inconspicuous and pleasant in appearance. While we have come a long way from the formal attire once required in some appellate courts, the concentration on form still lingers in various ways. One court very recently required by a notice posted at the rostrum that the advocate keep his coat buttoned if he wore no vest. Whatever one may think of these trivialities about appearance, since they represent the will of the court they should be cheerfully obeyed by the advocate. But beyond these details, his dress is only the outward form which should reveal a man of dignity, fairly well adjusted to his surroundings. If this be so then his dress will not be bizarre nor his appearance jarring to the members of the court.

(b) Manner of Address.

It is well for the advocate to stay physically close to the rostrum. The peripatetic advocate who strides back and forth across the courtroom distracts attention from what he says and indicates, even if unjustifiably, confusion in his own mind about his case. He should stand erect on both feet. Nothing but distraction is the result of watching the gymnastic exploits of an advocate, who moves from one kind of embrace of the rail to another; and whose one foot climbs up the other leg and back again.

(c) Voice.

The voice of the advocate should be easy to hear but not too difficult to bear. It is remarkable how a low but audible voice will draw a concentration of attention while a shouting, noisy advocate will close the ears of the court to what he says. "An over-speaking judge," says Lord Bacon, "is no well-tuned cymbal," and an over-shouting advocate who beats too loudly at the ears of the court drowns out much of the merit of what he says. What a sign of inadequacy it is for an advocate to be told by the court to raise—or worse, to lower—his voice. These are, of course, obvious matters. They should hardly be spoken. Yet the fact is that violation of these simple requirements of deportment goes on every day.

3. Order of Speaking.

Sometimes the advocate has the choice whether he or other counsel should speak first. Where the order is fixed and appellant necessarily speaks first and the appellee follows, it is still an interesting theoretical question who has the advantage. There is no absolute answer to the
question. The advantage comes to him who has the greatest skill in using the opportunities which his particular position affords, whether he be appellant or appellee, and whether he be first or last of counsel on his side.

Thus, if the appellant's argument is disjointed and the facts are presented in fragmentary or obscure form, whatever advantage he might have had in going first has been lost. If in such a situation the appellee presents to a confused and frustrated court a clear and readily understood narrative of the facts, the gratitude of the court for receiving the information in this form is often apparent. Authority then attaches to the appellee, for the court inevitably looks with confidence to him for a statement of the issues involved and the doctrines which govern them.

By and large, it would seem clear that everything else being equal, the appellant, who has the first opportunity to present the problem involved to the court, has something of an advantage. But such abstract view must yield to the particular circumstances. If, for example, the court absorbs an argument slowly, it often happens that when the appellee's turn comes he is afforded the opportunity to correct the disjointed and mistaken impressions in the mind of the court, a situation for which the appellant may in no way be responsible.

The situation on appeal is a good deal different from what it is in a jury trial. In a jury trial the forces at work are less intellectual and much more emotional. There it is of supreme advantage to have the last speech. Many a defense counsel, having but a fragment of evidence to present, has cast it aside and presented no testimony, in order, under our practice, to have the last speech to the jury. I speak here of advocates who do not distort the facts and who do not take unfair advantage of the last speech and of the inability of their opponent to reply. In every case it is indubitable that the last impression on the jury, if it be a good one, will have the deepest effect, and especially is this true where the last address can be availed of to present not only one's own view but also one's answer to all that one's opponent has just said.

4. **Know the Court.**

The advocate must know the court before which he appears. He must know the human condition of the judges who comprise the court. From the reading of their opinions and from listening to their comments at oral arguments it should be clear to him what manner of men they are, what their views are generally and how they are likely to react in particular situations. It is plain negligence for a lawyer...
to say in a case involving a will contest that the testator was obviously of unsound mind because of his age, when one or more of the justices listening to his argument have already passed that age. It would be sheer blindness to appear before the Supreme Court of the United States in a case involving an administrative order or a civil liberties issue or a tax question without learning from their opinions where the various justices have stood in the past on these questions.

It may sometimes unfortunately occur that as a result of knowing the court to be prejudiced against his case, how closed he may think the objectivity of some of its members. How then shall he approach them? What is involved here is respect for the judicial process and for the courts which are its instruments. Clearly the only answer to the question must be that no matter how much the advocate may feel the court to be prejudiced against his case, how closed he may think its mind will be, his only course is to throw all this aside when he enters the courtroom and to present his argument in the deep conviction that somehow, in some way, it will be possible for him to break through the wall of prejudice. If, in the course of argument, he is beset with heated questions from the bench which betray more partisanship than judicial objectivity, his course is equally clear. Manfully yet respectfully he should maintain his position and in the extreme case, if need be, reveal that he will not be driven off the high ground of fairness in argument even under the lash of a partisan judge. For this course there is no alternative. But it may be comforting to add that a court—especially an appellate court—has more than one member and that such conduct of an advocate under such provocation will hardly fail to find understanding and sympathy from other members of the court.

5. Know the Facts.

It is not enough merely to know the court. Obviously, the advocate must know the facts of his own case. The facts should flow readily from him, not because of any special fluency, but because they are so familiar to him. The court should not wait impatiently while he searches—at times with the audible assistance of a colleague—for some fact lost in the pages of the record, or among his papers and notes.

In appellate cases, the main force of the argument normally must be directed to the facts. The courts usually have a fair idea of the law, however much individual judges may differ in learning and ability. But what they know nothing of is the facts in the individual case before them. Most of the problems of decision are not so much the determination of some new doctrine of law as they are the choice of the
legal principle which is applicable to the particular facts. Hence, the narration of the facts of the case is, perhaps, the greatest test of the advocate's skill and merits much more attention and emphasis than it usually finds in appellate argument. When the facts are clearly unfolded and the justice of one side thereby stands revealed, it often follows almost inevitably that there is little difficulty regarding the applicable legal principle. Moreover, the concentration on the facts easily wins the attention and interest of the court. Except for novel problems, a discussion of the law tends to become a review of particular decisions. The facts, however, because of the human interest which is always involved in them and because of their novelty and uniqueness in each case, excite attention.

6. Know the Law.

The advocate, should know the law applicable to his case. The wider and deeper his knowledge of the law, the more readily will he be able to present it with brevity and clarity. Where particular precedents are of significance, he will, of course, refer to them, even by name. He may even read a line or two of a particularly apt quotation, which will hammer into the mind of the court in unforgettable phrases the essence of what he has to say. But he will carefully refrain from burdening the court with the evidence of the law, which it is the function of his brief to establish. It is often possible to observe the obvious pleasure of the court when an advocate clearly and briefly expresses his view of the law which applies to the case and then graciously announces his determination to forbear from discussing the authorities because they are all fully set out in his brief.

To say that the advocate should know the law applicable to his case is not to speak of this or that decision in this or that volume of the reports. It is not enough to know a precedent or a group of precedents. The unceasing question the advocate must ask himself is, "Does this decision accord with what seems right and sensible?" Just as it is not enough to find a quotation from an opinion and treat it as decisive even though it may be dictum, so, similarly, is it not enough for an advocate to deal with decisions as isolated phenomena. The decisions in his brief should be mere evidence at which he points in confirmation of a larger, more general rule which is the reflection of a just system of law.

We all know the advocate who deals with decisions as if they were paper dolls. Scissors are his weapon. Let there be a phrase which seems pat for him, and out it will come from the opinion, torn from its context without any regard for its surroundings. The quotation
from the opinion he thinks of as an admission which bars the judge from any other view, regardless of the differences in circumstances. Not ratio decidendi, but estoppel, is what he searches for in the decisions.

It is dangerous business to rely so strongly on a precedent that the advocate tenders it in the face of every consideration of justice or common sense. It is even more dangerous to challenge a court to overrule its earlier decision. An interesting illustration of this arose some years ago. Our Constitution provides that "appointed officers may be removed at the pleasure of the power by which they shall have been appointed." The Supreme Court had decided that where the officers of an agency were appointed by different officials, each officer was beyond removal by the individual official who appointed him, and could only be removed by the aggregate of all the appointing powers. Ten years later the same question arose again. Counsel who had lost the first case in the Supreme Court appeared again, this time on the other side. When his opponent had finished, he began his argument by saying that ten years ago he had stood where his opponent now stood and had argued what his opponent had just now argued, and the court had told him ten years ago that he was wrong. He was now arguing the other side—the side which the court ten years ago told him was right. Then he exclaimed, "If I was wrong then, I must be right now. Your Honors can't say that when I argued ten years ago I was wrong and now when I am saying what you told me was right that I am wrong again." Yet this is exactly what the court did.

7. Questions by the Court.

Many lawyers fear questions by the court. The dread of the unknown hovers over them. They fear that some unforeseen aspect of the case will be revealed by the judge's question, an aspect which will inevitably shut the door on their argument. In a more everyday way, many lawyers are fearful of questions from the bench because they cannot quite credit the notion that questions are only for enlightenment and do not reveal the viewpoint of the judge. Every question, therefore, is to them an expression of opinion. And this is so even though the judge may surround the question with words of reassurance that he is only thinking aloud and seeking enlightenment from the advocate. Both these fears are, of course, at times justified. More often than one would like, the so-called questions from the bench are rather emphatic statements of position than inquiries for information.

More often too than the advocate would like, the greater perspective which the judge enjoys, the fact that his mind is unencumbered by too close an involvement in the case and oftentimes because of the superior ability of the judge, his comment from the bench may reveal a new aspect of the case completely disconcerting to the advocate.

All these are the risks which an advocate must be prepared to face. Notwithstanding these burdens it is overwhelmingly clear that the advocate should welcome questions from the court. What a magnificent opportunity it affords to see into the working of the mind of the judge whom he is seeking to persuade. The questions reveal what part of his argument is having the greatest difficulty in winning acceptance. It may even reveal where the mind of the judge has failed to comprehend what the advocate has been striving to convey. What would a trial lawyer not give for the opportunity to have a jury ask him questions in the course of a trial or in the course of his summation and then to be permitted to answer the juror's doubts or confusion.

So fearsome is the judge's question for many lawyers that even where it affords a springboard for nailing down a point, lawyers frequently shy away from facing up to an answer. They promise to answer the question later or give assurance that it will be discussed as their argument unfolds. This is poor advocacy. Its effects are sometimes even visible as the judge sinks back in his chair with an air of frustration or weariness.

Questions from the bench should be answered at once. And they should be answered directly and without equivocation. Where a question requires an answer harmful to the advocate's contention, he should courageously give the answer and acknowledge its effect. Where he does not know the answer, he should graciously and frankly say so.

Nothing is more dramatic than an advocate's immediate and effective reply to a question from the bench. The advantage derived from such an answer is so great that it is bound to outweigh the minor disadvantage of changing the course of the planned argument. Moreover, duty requires the advocate, regardless of his own plan, to give all the aid he can to the court; and there is no greater aid than the immediate and responsive answer to the court's question.

The great value of questions from the bench can perhaps best be described by recalling the opposite situation: Where an advocate makes his entire argument uninterrupted by a single question from the bench he leaves the courtroom without knowing whether his argument has been understood, whether it has taken hold, whether the silence of the court was a complete acceptance of his view or rather an indica-
tion that his view was deemed so far-fetched that it was useless to bother about it. Much better is it for the advocate to learn on the spot the doubts of the court and to have the opportunity to answer them.

It is in answering questions from the bench that the clarity and quickness of mind of the advocate, his capacity for dramatizing what he has to say, his ability to act spontaneously, have their greatest reward.

8. Know When to Stop.

It is remarkable how under the pressure of necessity the most important brief can be confined within a fixed number of pages and the most elaborate oral argument can be restricted to the time limit set by the court.

The more inexperienced the lawyer, the longer will be his brief. The more inexperienced the advocate, the longer will be his argument. Where the rules require that the brief be limited to a fixed number of pages, it is interesting to observe how a first draft, which exceeds the allotted length, can be reduced. Much heartache ensues. Well beloved phrases, quotations which seemed the very words which would persuade the court, all these fall before the inexorable and ruthless revision. Then strangely enough when the brief is reread it is found far more effective because of this heroically achieved compactness.

In oral argument there seems to be a psychological fear of coming to grips with the main point. The tendency is to avoid the ultimate issue and instead to approach the problem on its periphery instead of its center. The better the advocate, the more quickly does he come to the heart of the problem. The less able the advocate, the more does he rotate on the circumference of the problem; and if he is ultimately forced to the real issue it is only by degrees that he approaches from the circumference to the center. It is at basis a fear of facing up to the danger and risk of decision. It is this quality which is responsible for so much of the unnecessary protraction of legal arguments.

Another element with some advocates is the apparent need to repeat their contention in a seeming effort to coerce a favorable decision from the court then and there and an unwillingness to end the argument until they have learned the ultimate decision.

The best form of advocacy is the vivid and concise description of the facts and issues and the suggested conclusions and then with confidence that the case has now been adequately explained and that the burden of decision now rests with the court, to sit down.