Address by Honorable Frank M. Coffin, U.S. Circuit Judge,
U.S. Court of Appeals for the First Circuit,
to the Judicial Conference of the Second Circuit,
Hartford, Connecticut, September 13, 1984

Our Appellate Advocacy -- A Unique And Wonderful Institution

Each nation, sooner or later, indulges its idiosyncrasies and produces a custom, sport, game, or art form that is absolutely unique and the wonder of the rest of the world, which, however, has no intention to emulate it. Noel Coward immortalized the shared proclivity of deranged canines and Englishmen to expose themselves to the noonday sun. In Scotland a sporting event consists of tossing immense sections of a telephone pole called a caber, end over end, high into the air. In Finland, taking a sauna is highly ritualized, being accompanied by the vigorous flailing of oneself with branches of birch leaves. Japan has a welter of unmatchable ritual -- whether we consider the intricacies of the tea ceremony, the immensity of colliding avoirdupois in Sumo wrestling, or the unfathomable masked subtlety of Kabuki Theatre.

We are, by comparison, a youthful civilization. But, as this Conference demonstrates, we have perfected our own unique and minutely disciplined art form -- appellate advocacy. The ingredients are the following: a quiet room with, at one end, a bench on a raised platform -- a subtle artificial device to suggest, if not substitute for, intellectual superiority; behind the bench, three or more judges who are not only clad in their sanctifying robes but are forearmed with a knowledge of everything the advocate has said in his written brief as well as wicked bench memoranda concocted by fiendishly clever law clerks; in front of the bench a beady-eyed clerk, a clock, a console of ominous orange and red lights, a lectern, and the advocate.

Historically, the appellate advocate has had certain advantages. The record was closed; nothing new could be added. If issues had not been raised earlier, it was too late now. He had all the time he wished to prepare. There was no witness to give embarrassing answers. His adversary was not likely to explode with objections. He had the complete attention of a small and legally sophisticated audience trained to listen patiently. And, time was when the court would give hours or even days for the leisurely building of an argument of architectonic splendor. So, arguing an appeal was a far more comfortable task than the trial of a case to a jury.

In recent years the art form has undergone, some would say suffered, basic changes. The advocate must often do in fifteen minutes what once took hours. But, worse, the fifteen minutes are not really his or hers. Those robed figures behind the bench increasingly want their piece of the action. As precious minutes are taken up by judicial "Trivial Pursuits", the advocate bemoans his shrinking chance to make an impression that will survive a judge's reading some thousand to two thousand pages of briefs and listening to fifty or sixty lawyers' arguments in the 25 to 30 cases heard in the same week. He envies his British brother who merely supplies the bench with a short list of pertinent cases and proceeds to argue languidly, resting intermittently while Milord sends the bailiff to the library for a reported case and ponders it.

How is one to practice the profession in this souped-up, time-foreshortened, judicially inquisitorial arena? My own intuition, after some years of advocacy as a lawyer and 19 years of listening, is that while there are no sure-fire prescriptions for success, there are many well paved roads to disaster.

For example, how to begin an argument? The only positive advice I have is not very important. Just say, "May it please the court." Don't waste any time thinking that pleasing the

court is not at all what either you or the court want. Just say it. I think I can also say that if you are addressing a bench of federal judges, calling them "Justices" will not give you points. Nor is it today a very impressive ploy to use several minutes saying "Your Honors. May I first call your attention to a regrettable error on line 17 of page 35 of our brief. The case should be U.S. v. Brawn, awn, not Brown." If you do this, Judge Rip Van Winkle will belatedly begin turning pages of the wrong brief and frantically ask you to repeat. At the end you will have used five minutes and your reputation for meticulous honesty will not have been enhanced one whit.

Other similarly doomed beginnings are: "Your Honors, although I have practiced for 15 years, this is the first time I have been in an appellate court; I hope you will bear with me"; "Your Honors, I represent a victim of an unconscionable contract, who is sitting in the first row with his loyal wife and fine family"; "Your Honors, I want to make it clear that I did not try this case in the lower court; I am court appointed."

Other self-inflicted wounds, usually fired in response to questions from the court are: "To be perfectly honest with the Court . . . ."; the clear implication being that most of the time you are being either imperfectly honest or perfectly dishonest or, if a judge happens to be slow on the uptake, an obviously irritated glance at one's watch and "As I've tried to make clear, let me repeat . . . ." After such ripostes one doesn't really save the day by being a Uriah Heep and saying: "Your Honor put it so much better than I."

Once the presentation is well launched and under way, there is an impressive array of role models to eschew, models reminiscent of the Edsel. I shall share with you some of the esoteric scholarship about these models that forms the heart of a little volume of mine called "A Lexicon of Oral Advocacy", soon to be inflicted on an unsuspecting world by the National Institute for Trial Advocacy.

One model is that of the Actor. He is the advocate who is seized of such kinetic energy that he paces back and forth, gesticulates unceasingly with the most exquisite hand motions, using fist, forefinger, extended fingers, upraised palm. He may tear his hair, even turn to the audience behind him and beseech its support. A variant is the Boxer or Dancer who prances on the balls of his feet. Another is the veteran jury lawyer with fog horn voice addressing a bench presumably a long mile away. My problem with all of these is that I am so taken with the gestures, the pacing, and the noise that I don't have the foggiest notion what is being said.

Another model is the Backbencher. He's the fellow, or she the lass, who thinks one's best points are made while one's adversary is at the lectern. So -- one looks bored, nods vigorously when a judge asks a tough question, yawns. Or one looks surprised, shocked, indignant. Sometimes one's opponent says such outrageous things that one cannot, in good conscience, refrain from going into a catatonic trance. At other times, one's adversary is so clearly off base that one must be forgiven for his "home free" look. A variant of the Backbencher is the assiduous Scribbler. As counsel for the appellant, he writes furiously during his adversary's argument, shaking his head, going from page to page as if to say "Every word's a lie and I'll prove it conclusively." Then, on rebuttal, he merely corrects a citation and sits down.

The Cheshire Cat is the flatulent incompetent who thinks that only the judges and he understand the case. More's the pity, he thinks that he and the judges are in such rapport that he doesn't need to say anything. So he merely smiles, and though mortally wounded by his opponent, says, "I see no need to add anything to my brief, Your Honors." At the opposite end of the spectrum is the Demonstrater. He wants to dot every i and cross every t with a visual aid. This might mean a chart, so like a hideously complex Rube Goldberg contraption that the judges never recover from their confusion. Or -- what one lawyer from a prestigious firm once proposed

to help us follow oral argument -- a 25 page summary of a 50 page brief. Or -- the ultimate in my book -- the lawyer in a patent case who, wishing to make the point that significant, therefore patentable, ideas can be quite simple, saw fit to repeat the legend of Columbus going to Isabella and demonstrating how he could make an egg stand on end, by cracking one end slightly so that there was enough of a surface to stand on. Our imaginative advocate approached the clerk's desk, egg in brown paper bag, and tapped it. The egg remained intact and continued to roll irresponsibly; the lawyer tried again -- and again. Finally he administered such a coup de gras -- or coup d'ouef -- that the entire egg exploded out of the bag into the clerk's face. The argument was not a complete success.

A pair of models that cancels each other out is the Dishrag and the Gascon. The Dishrag is the advocate who thinks he has tested fate quite enough by rising to his feet to speak. The sooner he can end the ordeal the better. He will then answer any question from the bench in a manner designed to minimize controversy. A judge will ask, trying to be of help, "How is your case different from this." Then he lobs a hypothetical, easily distinguished. But old Dishrag merely says, "Well, I guess it isn't." The Gascon, however, has more blood -- indeed, an excess. His best argument is a very narrow one, that his opponent never objected at trial. But no, this is not his style. That would be too easy. He discards the procedural point and argues on principle. Even though five other circuits have taken the opposite position, he unsheathes his sword, waves it in the air and dares the court to create new law -- where neither he nor the court needs it to decide the case.

Two all too familiar models are Big Fish Out of Water and Fading Foliage. Big Fish is the lawyer who has made a name for himself with the media. He visits the provinces on a case involving considerable technical detail. Somehow, a supposedly sophisticated corporation has chosen this advocate solely because of name recognition. Word of his participation precedes him. A score of young lawyers and students gather to hear the master. The performance is pathetic. The judges are embarrassed to press their points. Fading Foliage is the senior partner who has lingered too long. One such bored the bench to death, steadfastly looking down at the lectern. I wondered why he read so badly. I looked at the lectern. There was nothing there ... or elsewhere. To compound the felony, he blandly ignored the red light which we had so long looked forward to.

Then there are the Hare and the Tortoise. The Hare is the lawyer who overestimates the ability of the bench to absorb all the trivia connected with his particular case. If it's a drug prosecution, he will proceed to say that Betty said to Joe that Harry had some stuff to sell, whereupon Gustave drove Joe to Albert's house where Ignatz called. Or he will presume an intimate knowledge of Supreme Court Justices' nuances of views and say, "In U.S. v. Opaque, Justice Powell wrote for three other Justices, with Chief Justice Burger concurring on the ground of mootness. Justice O'Connor dissented and would have taken a stronger stand while Justices Brennan and Marshall said there was no standing. Justice Stevens thought the case should not have been considered since the docket fee had not been paid. This meant that Justice Blackmun's stand was the significant one because he had earlier, in U.S. v. Ominous, argued the importance of the third amendment but didn't mention it at all here." At this point, if counsel is anywhere, it is clear the judges are not with him. The Tortoise, of course, is the opposite, plodding through facts the court well knows and issues in which it is not interested. The court will interrupt and say that each judge has read the briefs; the Tortoise will nod understandingly and proceed. "As I was saying . . ."

My models so far have been advocates. But they are not by any means the only actors.

There are the judges. Here, too, it is easier to identify ways in which judges derail argument than advance it. There is, for example, the unprepared or underprepared judge. After five minutes of argument in a civil rights appeal, during which time the judge has been riffling through his pile of briefs trying to find the right case, he will ask: "Counsel, is this a diversity case?" Then there is his opposite -- the overprepared judge, who has been so intrigued with the case that he has read the whole record and done independent research. His question is likely to be: "Counsel, I note that the invoices in Exhibits 71, 84, and 96 were each addressed to a different corporation. No mention of this is made by either party. Could you explain?" The advocate then shuffles through the appendix, finally quotes a stipulation that the several corporate names all identify the defendant. Not willing to let go too easily, our terrier judge proceeds to challenge the wisdom of the stipulation. All this has taken five minutes.

There is the overweeningly brilliant judge who poses a series of blinding hypothetical questions, probing the ramifications of the theory advanced by the advocate. Unless the advocate can say promptly with courteous conviction, "These, however, are not this case, your Honor", five more minutes are spent wandering down the Primrose Path. Of course we then have the obtuse judge -- not necessarily always obtuse but in this case he is having a bad day. He may feel that he is advancing the matter by asking the ultimate question, such as, "Counsel, don't you concede that the trial court acted within its discretion?" Well, of course not, but saying so takes time. Or he will ask a very penetrating question. That is, it would be penetrating if the parties were as he conceived them. But they are not. He has mixed up plaintiff, defendant, and intervenor. Straightening him out takes three minutes.

Occasionally we have the biting judge who wouldn't have a good day without chewing out some member of the bar. If the dereliction is real and substantial, criticism is an unhappy duty of a judge. But the biting judge will often bare his fangs when the fault is either nonexistent or trivial.

Finally, there is the judge with his bias showing. He or she is obviously pro or anti-management, prosecution, warden, environment. Questions are likely to be framed in terms of general values. Valuable time is taken getting discussion down to this case.

There are foibles enough for lawyer and judge alike. But this catalogue of quixotica should not blind us to the frequent best we see on both sides of the bench. Let me end by sketching a profile of an effective oral argument.

Our advocate avoids the minefield we have briefly mapped. But his style can be infinitely varied. Of course it's nice if he can speak extemporaneously, smoothly, and eloquently. But these are secondary qualities. I know superb appellate counsel who read, who stammer, and who struggle for words. What they all have, however, before they go into court, is a capacity for analyzing the case and identifying the jugular -- the weakest part of their side as well as that of their adversary. In court, their sword and buckler are the three C's: control, candor, and confidence.

By control I mean the ability, with tact and firmness, to deal with active and maybe overactive judges in getting the train of argument back on track. This advocate will realize that he must make as much hay as he can with his first two or three minutes. He might announce in advance that he wishes to discuss x number of issues. Then he must yield gracefully to some questions, turning them, if irrelevant, into occasions for making a pertinent point. As time begins to run out he must announce his hope that he will be allowed to devote his remaining time to an issue about which nothing has been said.

By candor I mean the ability to give maximum assistance to the court without invading

any legitimate interest of the client. In my view candor toward the court is the product of candor toward one's own case. Only after one has come to see the full extent of procedural problems, factual weaknesses, questionable policy implications, and adverse precedents confronting him can counsel place his presentation on the bedrock of candor.

Confidence -- or conviction -- is the natural product of hard analysis, preparation, control, and candor. Yet manner of presentation has something to do with it. It is not enough to be confident; one must radiate it. Unfortunately, I have no formula to prescribe. Like Justice Stewart on pornography, I know it when I see it. The advocate can be young or old, elegant or inarticulate; if he says, "Your Honors, if the cases as you read them permit the prosecutor to argue as he did below, then I submit they are, wrong" . . . if he says this and if then the court is acutely uncomfortable, the advocate has possessed that ineffable quality of radiating conviction.

As for the other side of the bench, the effective argument will see judges who have read the briefs and a few critical parts of the record; who have one or two very pertinent questions addressed to facts, law, or policy; who ask them and then let counsel proceed; who may obtain concessions from counsel narrowing the issues; whose questioning informs the other judges that the case is not so simple as it first appeared ... or perhaps that it is more simple.

When both sides of the bench live up to their full potential, the appellate advocacy process has seen its finest half hour. Preconceptions have been altered, perceptions deepened, and the groundwork for a sound, and wise collegial opinion of use to the bar has been laid. And one cause which has labored through our system of justice has ended on a high note -- one that can rarely be duplicated in any other country.

I should at this point add one other vital ingredient of effective advocacy. The advocate, whether or not he has been successful in controlling his time, must learn to stop. Even if he is in the middle of a sentence, when time is up, he -------.