A Slide Lecture
on
The Symbiotic Professions
and
The Appellate Process

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The American College of Trial Lawyers,
Northeastern Region
Black Point Inn, Scarborough, Maine
June 15, 2002

(Editors' note: Reference is made in this speech to slides of drawings that appear in two of Judge Coffin's books, "On Appeal" and "Lexicon of Oral Advocacy.")

Almost a quarter of a century ago, on January 27, 1978, we met on a similar occasion. I was your speaker, having predictably yielded to the advocacy of Ralph Lancaster, as I have tonight to that of Chuck Harvey. Ralph and I dolled up in our tuxedos and, in broad daylight drove to Brookline. My subject had to do with jurisprudence and cybernetics.

I reported on an article written by then Northwestern University Law Professor Anthony D'Amato, entitled "Can/Should Computers Replace Judges?" He wrote about how many of the troublesome issues we face, such as jurisdiction, procedure, standing, venue, choice of law lent themselves to ready solution. For example, to solve a choice of law question, a lawyer would type in all the relevant facts, such as place of injury, domicile of the parties, place of the conduct causing the injury. The computer would then quickly spit out the answer.

The result of this would be, D'Amato wrote, "fewer judges, fewer courts, fewer attorneys."

Since the past quarter century has not produced visibly fewer judges, courts, and attorneys, I have given up on theory and speculation. Tonight I present a down to earth behavioral study of our two professions, based on painstaking observation and analysis. I have written a book largely about lawyers, entitled "A Lexicon of Oral Advocacy," and another book, "On Appeal," about appellate judging. My son Douglas illustrated those books with clinically accurate drawings. I think of him as the Audubon of Appellate Advocacy. Thanks to Chuck Harvey and his talent for making slides, I am now able to juxtapose these remarkable likenesses in what may well be a ground-breaking study of human symbiosis.

For the title of this lecture is "The Symbiotic Professions and the Appellate Process." "Symbiosis," for those of you who don't know, is defined as "the relationship of two or more different organisms in a close association that may be but is not necessarily of benefit to each other."

Setting the Scene.

Let us begin where appeals begin - in the trial court. **[OA 82 - Magnifying glass and witness stand]** The three people at the right are the only ones visible to the casual onlooker: the judge, the examining attorney, and the witness. But the three characters hovering over the

magnifying glass are there in spirit. For the whole idea is that if you give three to nine judges several months to study the transcript, research the case law, and conduct exhaustive discussions, they can eventually decide whether a ruling made by a solitary trial judge after no more than ten seconds of reflection is an error of law or abuse of discretion. As an appellate judge, I have always been grateful that the playing field has not been exactly level.

Where appeals reach their apogee of public exposure is the appellate courtroom. **[OA 2 - Courtroom.]** This is fairly typical. Portraits of judges, deceased or nearly so, serve to inspire lawyers who are awaiting their turn to argue. Of course it's a federal appeals panel, with only three judges. The judge at the far right may be nodding off. But no matter, the three bright young law clerks by the window are awake.

I should pause here and say that although most of the illustrations you will see are of three judge federal panels, we are definitely not the only game in town. This will give you an idea of our relative significance to the whole litigation picture. **[OA 43 - State/Fed. Figures]** The feds are the little shrimp at the right. At the trial level, the state courts do about 99 percent of the nation's business; at the appellate level, they do from 85 to 90 percent. As Alexander Hamilton wrote in The Federalist, No. 82, our state and national judicial systems "are to be regarded as ONE WHOLE." And he wrote those last two words in capital letters.

Our Antecedents.

Before we lose ourselves in the present, it's a good idea to look over our shoulder and remember where we came from. Like almost all living creatures, we have gone through an evolutionary process. Our legal anthropologist gives us this picture. **[OA 326 - Fish, turtle, etc.]** The little fish at the left is obviously a law firm's newest recruit. The plodding, downtrodden, briefcase-carrying character is a typical cynical associate. And the one monkeying around, with tail held proudly high and broad, bland smile, is, of course, a senior partner. The judge, bemused, can hardly believe she came from such a paleoanthropic background.

All of us, judges and lawyers, are part of a uniquely American tradition, which inherits heavily from two much more venerable ones. **[OA 14 - three figures, French, U.S., British]** We are the character in the middle, looking a bit confused. This is because we mainly descend from the bewigged character at the right, English Common Law, but are occasionally yanked hither and yon by the character at the left, Civil Law, looking back to Justinian and peaking at the Code Napoleon. One current major civil law intrusion is the sentencing guidelines which command federal judges to decide how many years in prison a convicted defendant should serve by adding up points: so many for a defendant's criminal history, so many for the nature of the offense, so many for playing a leadership or supportive role, so many for recidivism, and so on.

So much for background.

Briefs.

Now we come to the first stage after the appeal is filed. After months of filing interrogatories and taking depositions, years of motions, conferences, and negotiations, and weeks of trial, a briefing deadline is looming. Somehow everything significant has to be put into a comprehensive, punchy document, not to exceed 50 pages, which we humorously call a "brief."

We'll now see how a top-of-the-line law firm mobilizes for this challenge. The tasks are highly specialized. Each associate has his assignment. We begin with legal research. **[6a - "Cases Not in Point"]** Now, more often than not, cases on appeal are pretty evenly balanced, or else they wouldn't be here. This means that cases in point are hard to find. So you go to this chap, who has a gift for finding cases that are not quite relevant. Now keep an eye on the ribbon leading off to the right. His research is bolstered by this young lady. **[6b -"String Cites"]** She

harvests string cites, or lists of cases bereft of any description. Of course no one ever reads them, but they make a most impressive table of contents.

As you know, a brief should involve not only legal analysis but persuasive writing. So a senior associate puts on the finishing touches. **[6c - "Pejorative Words"]** Well trained, he has a gift for words, naughty words. He salts the brief with sly words about the opposition. He would never stoop to calling the adversary a liar - only "disingenuous," which of course is the same thing. It remains for each associate to do what secretaries used to do, put words on paper. **[6d - row of computers]** You can see all the ribbons being assembled.

The culmination of the process, the golden moment, occurs when the brief reaches the hands of the partner who will make the oral argument. Here the partner does not have to rely on his native ingenuity and experience. **[6e - puppet strings]** Unlike poor Daniel Webster, this advocate has all the advantages of modern technology. He is really "wired."

What happens when the brief reaches the consumer? Let's take a peek at a judge's chambers as the briefs come in. **[OA 106 - assembly line of briefs]** While the lawyers are trying to reduce an epic to a short story, the judge is on the receiving end of briefs from two or more parties in 18 to 20 cases. The judge faces an incoming tide of some 2000 pages.

Oral Argument.

We now come to the moment of high drama in the appellate process - the oral argument. It is a misperception to think of this exercise as one in which the active party is the lawyer and the passive listeners are the judges. Both sides of the bench have their agendas. **[OA 126 - judges and lawyer with fish poles]** The real object of this sport is to see who will catch whom. At this point, antibiosis is a more appropriate word than symbiosis. Antibiosis is defined as "An association between two or more organisms that is injurious to one of them."

Borrowing a technique from Plutarch's Lives, I shall present several pairs of advocates to show contrasting demeanor, attitudes, techniques, and vulnerabilities. The first pair consists of the Thespian and the Terpsichorean. Here is the former. **[L 17 - Actor]** This fellow has forgotten that he is no longer addressing a jury. And, as I have learned, it does little good to remind him of this. His partner is no less active. **[L 50 - Dancer]** His argument may be very pedestrian but his body English is eloquent. So eloquent that his arm waving, finger pointing, hand wringing, and foot shifting so occupy the judges' attention that they completely miss the argument.

A more restrained kind of demeanor characterizes our second duo. The first is the advocate who loses himself in his reading. **[L 85 - Reading]** Now there's nothing against referring to notes and even occasionally reading from them. But this chap uses his manuscript as a shield between him and the bench. Indeed, he has managed to put the bench behind him rather than before him. The opposite kind of advocate wants desperately to communicate. He is a firm believer in visual aids and will stop at almost nothing to explain complexities to the court. **[L 53 - lawyer and Rube Goldberg machinery]** Occasionally appellate judges are helped by charts, pictures, or cut-away models. But nothing is more pathetic than a lawyer who has not quite mastered his demonstration.

We've been talking about counsel in the midst of their arguments. You might wonder what opposing counsel have been doing back at the counsel table while the actor, the dancer, the reader, and Rube Goldberg were doing their thing. Well, there are techniques for those who play the waiting game. The first player is the lawyer I call the scribbler. **[L 97 - Scribbler]** The scribbler seems to be trying to convey the idea to the judges that his adversary is making a fatal error with every word uttered and that he is putting together a masterful rebuttal. Of course, we

seldom hear anything approaching this, if indeed he makes any rebuttal at all. This activity, though feckless, is relatively harmless. Not so, however, is the character I call the backbencher. He sees himself as a very active participant even when his adversary is talking. He erupts when a judge's question or comment seems to favor his side. **[L 23 - Backbencher]** Backbenchers in the British House of Commons enjoy the tolerance of tradition. But in court the judges have the quaint idea that there should be only one bench.

My next pair exhibit attitudes, not conduct. **[L 21 - Arrogance]** This chap, happily not very common, reeks of arrogance. He brings his pedestal with him. He is obviously a person of superior intellect. Judges should be grateful when he condescends to explain a point, perhaps prefacing his remarks with, "Let me repeat…As I said before…." His opposite is the obverse of distant or diffident. He is all too proximate and imminent and involved. **[L 57 - Overeager]** His problem is that he is so close to his client or his cause that he is prone to erupt in anger, shaking with indignant rage. When he tries to tell an anecdote showing what a fine person his client is, he resents being told that he must confine himself to the record and to the issues.

He, however, is not the only one to be overeager or overinvolved. Let me illustrate the Number One hazard for attorneys. Counsel has prepared an excellent brief, refreshed himself with the trial transcript, moot courted with colleagues, and exhaustively planned to extract from the 50 page brief, which was in itself a condensation of years of litigation, an effective 15 minute argument. His case is called. He goes to the podium and says "May it please the court," when Zowie! **[L 70 - Overeager Judge]** It's great to have an attentive court, but this is ridiculous. This judge is obviously loaded for bear. The advocate who can handle this deserves the most handsome fee. Of course, he may be helped by the ultra-vocal judge's two colleagues, who may not be amused.

Perhaps reacting to such a judge are two advocates who are obviously in a fix. The first is the lawyer who has not mastered the art of listening. A judge's question passes through her head without stopping. **[L 77 - Listening]** The judge may have asked a friendly question, putting an easy hypothetical that would further strengthen her argument. But she suspects the worst and tries to find a hostile motive. Chuck Harvey reminds me that Geoffrey Hazard describes this character as someone who just won't take "Yes" for an answer.

Another unhappy scene is where a seemingly compelling case begins to fall apart with a simple question. **[L 93 - Raveling]** I have seen confident, commanding counsel visibly wilt when asked the basis for the court's jurisdiction, why the case wasn't moot, or whether the issue had been preserved in the trial court. When such a question is asked, and has not been anticipated, a process occurs which I call raveling. This is what is happening to counsel's left trouser leg.

Now, after coming down hard on these hapless advocates, I want to recognize the advocate who has somehow mastered the art of responding respectfully to questions from the bench while gracefully resisting going down dead end streets. In short, the advocate who, despite importunate, irrelevant, and time-consuming questions from the bench, can keep a modicum of control over his precious argument time. I have no idea how he manages. But here he is. **[L 41 - Control]**

Behind the Curtain.

Everything up to now has been public. Now, when the last advocate has made his last plea, and the judges have filed out of the courtroom, the curtain falls. We are going to lift a corner of that curtain.

The first scene takes place almost immediately following the end of the lawyers' presentations. In our court at least, the judges assemble in the robing room and discuss the five

or six cases they have just heard argued. You can be sure that the conversation is one of the most urbane, intellectual, and civilized. **[OA 148 - trio of judges]** You can tell that the case being discussed here was argued well by both counsel. Here cases are sometimes finally decided, sometimes only tentatively, and the senior active judge makes the assignments.

We now go to the chambers of the judge assigned to write the opinion. Here is the chambers family. **[OA 66 - judge and clerks]** Sometimes it's difficult these days to identify the judge. You might think it's the man in black, but it could well be the young lady sitting to the left at the desk. After conferring with her clerks about the results of the judges' conference, she is off to work. **[OA 170 - judge and books]** At the beginning, the judge is looking for the right solution. She is always listening for the whisper that will unlock it. Sometimes, however, it's a good idea to leave the books behind and seek light elsewhere. **[OA 230]** But all too often such lonely strolls lead nowhere. And the judge reluctantly comes to the conclusion that he is in uncharted waters and somehow must resort to celestial navigation. **[OA 274 - judge and sextant]** But of one thing the American public can be sure. At bottom the process is a deeply rational intellectual exercise. **[OA 3 00 - crystal ball]**

Now I could leave my story at this point, but I think it only fair to reveal how a judge works with his law clerks. Because of the huge increase in the volume of cases, most judges have had to surrender the luxury of writing every word of every opinion. This has led some misguided critics to charge judges with abandoning their responsibilities. Nothing could be farther from the truth. Here is how it works. **[OA 192]** You can see what a tight rein we keep on our clerks. We are one happy family.

But we live and work and have our being within a larger family. For we appellate judges don't do anything as individuals. We always act as a body. We are the essence of collegiality. Here, for example, is a typical scene of the active and senior judges of our court relaxing after a demanding day at work. **[OA 212]**

Our evening would not be complete without showing you a typical argument by a Fellow of the American College. Here he is, winding up another triumph. **[29a - time almost up]** Observe the ho-hum self assurance in his offering back some of his time. What chutzpah! Now observe the reaction of the court. **[29b -"already?" "No" etc.]** As might be predicted, the Fellow's performance has contributed greatly to the collegial harmony of the judges. **[29c - For He's a ...]**

This is symbiosis of bench and bar at its happiest. On these notes, Douglas and I leave you.