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# Counsel on Appeal. Arthur A. Charpentier ed.

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COUNSEL ON APPEAL. (Arthur A. Charpentier ed.) New York: McGraw-Hill. 1968. x + 223 pages. $7.95.

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One of these authors tells us that Chief Judge Lumbard of the Federal Court of Appeals, Second Circuit, has estimated that not one out of ten appeals in his court is well argued. Many another experienced appellate judge has, without reducing experience to percentages, delivered himself of a similar sour summary of the performances of counsel on appeal. Groups of law students, escorted by this reviewer to an appellate court, and expecting to hear cogent presentations by articulate and well prepared counsel have come away disappointed and disillusioned. So it is not only the nostalgic oldster and *laudator temporis acti* who laments that appellate advocacy has deteriorated. Why the decline? And can anything be done about it?

Some efforts are under way. A few law schools are acting on the assumption that appellate advocacy—at least in its basic elements—can be taught to students and practiced by students right in the schools. Organizations like the American Trial Lawyers Association are setting up seminars and workshops for their members. And some valuable books on the subject are available, such as Weiner, *Briefing and Arguing Federal Appeals,* and Justice Pittoni's *Brief Writing and Argumentation.* Now we have *Counsel on Appeal,* which puts together a series of lectures on appellate advocacy sponsored by the Association of the Bar of the City of New York and presented at meetings of its members at the Association's New York City quarters.

What a sprightly, readable book it is, crammed with well thought-out, sound ideas! And what an all-star cast! This reviewer is grateful for the assignment to write about these lecturers, all good friends and several of whom have served as guest speakers in our law school seminars on appellate advocacy. Each of them has been a truly brilliant appellate practitioner: Harris Steinberg, whose recent death ended a glittering career, especially in criminal causes, a barrister in the best sense and a gallant gentleman; Milton Pollack, equally at home and equally impressive and successful before a jury or in an appellate court, now a Federal judge; Whitman Knapp, sometime prosecutor in whom courtroom incandescence combines with insight into the basic processes of appellate work; Samuel Gates, witty, urbane trial and appellate lawyer, international lawyer, Wall Street lawyer; Thurgood Marshall, of world fame for his work in historic civil rights causes, now Justice of the United States Supreme Court; Simon Rifkind, who, reversing his field, went from the Federal bench back to forensic successes in American courts from coast to coast; and, finally, the chairman and moderator, Judge Charles Breitel of the New York Court of Appeals, who has added twenty years of judicial study and experience to earlier governmental

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work and law practice and who integrated these lectures into a smooth, coherent series.

What do these pros tell us? For one thing, they are unanimous and emphatic in the opinion that oral argument is important, indeed essential, to "engage the court," to get the judges into a discussion with the lawyers, hoping to enlist one or more judges on one's side to carry the cause into the subsequent conference of the judges. Simon Rifkind writes that there is no substitute for an oral argument as an opportunity to narrate the events and outline the law in a way that will move the hearts and minds of the judges.

Many lawyers—and laymen—see little utility in oral presentation. Recently a respected journal of opinion[1] sent one of its editors to the United States Supreme Court to hear the arguments in an important constitutional law case. The editor reported that "neither the justices nor the lawyers distinguished themselves; the argument sounded more like a perfunctory college debate than a hard-fought constitutional confrontation." Well, he may have picked a poor day for his visit to our highest tribunal. Maybe all concerned had an off day. But everyone who has really studied the appellate process and seen and felt it in action over a period of time agrees that a good oral argument can win or lose an appeal. How to make a good one? Again citing former Judge Rifkind—"appellate advocacy is a personal and idiosyncratic art in which individuality plays a major role." In other words, you cannot really imitate a forensic star any more than you can successfully imitate any other kind of star performer. But you can learn the basics and then take every opportunity to practice their use.

What are those basics? These authors are surprisingly in agreement. They all tell us that in every court the facts are all important, even where the tribunal (like the New York Court of Appeals) has no power to revise lower court fact findings. The facts, our lecturers insist, are the most sophisticated tools of the advocate. The facts must of course be woven in with the applicable law for a complete presentation, but it is facts that move men's hearts and minds, and work on the universal human instinct for justice. These experts all warn us that a dry-bones speech on the law can never be effective.

There are many other useful reminders in this book. There is, we are told, a real difference between the handling of a civil and a criminal appeal. Especially in recent years, the convicted appellant's chances for reversal depend more on proving procedural defects in the prosecution than in the usually vain effort to show that the proof at trial was insufficient. In civil cases, on the other hand, there are relatively few reversals on appeal because of procedural or evidentiary errors, and the advocate must argue the substantive justice or injustice of the result reached below, and "the law as it ought to be."

Mr. Gates deals with the "hot bench" and the "cold bench" meaning the appellate court which reads the record and briefs before argument and the court which does not. Incidentally, this reviewer's research shows that most appellate

1. America, Dec. 6, 1969, at 550.

courts in modern times (not the New York Court of Appeals, however) examine the case to some extent before hearing the argument. There is endless discussion among judges and lawyers as to whether this is the sounder practice. "Hot bench" partisans say that, especially when argument time is limited by long calendars, pre-reading puts the court in better position to ask the right questions, to get right down to business without time-wasting preliminaries. On the other side, it is urged that a lawyer should be allowed to write on a clean slate, to argue his case rather than merely answer questions from the bench, and that it is impossible for appellate judges to read the record and briefs in advance without coming to some conclusions. Whichever be the better view, it is important that the appellate counsel knows before he gets up to talk whether the bench is "hot" or "cold." Some of the writers suggest a much more searching preliminary inquiry by counsel. The lawyer, they tell us, should learn as much as he can about the backgrounds, predilections and previous votings of the judges. He should note the trend of the particular court as to the branch of law involved in his case. Some of this is impossible in multi-judge courts, like the federal courts of appeal, which sit in varying and unpredictable panels. But the careful appellate lawyer will learn in advance as much as he can, and will tailor his arguments accordingly.

Each of these lectures exhibits the three same marks: first, the emphasis is on strategy, more than tactics; second, much more is said about oral argument than about written briefs; and third, almost everything is looked at from the standpoint of an appellant, rather than an appellee (or "respondent").

The top grade appellate lawyers who gave this series of talks have all probed deep into the appellate process, besides training themselves in its surface elements and skills. After all, the argument of an appeal is not an elocution contest nor is it a perfunctory debate ritualistically presented in obedience to old custom. As Judge Pollack reminds us, law is the only profession in which the chances of error are so high that an elaborate machinery is set up for correction. The law, enforcing the great rights and the great duties of men living in society, cannot be an exact science or reach results scientifically provable. The infinite varieties of human situations will forever make it possible for varying results to emerge. Appellate courts continually seek for the particular theory of law or line of decisions which best fits the case at hand or the particular rule of construction most reasonably applicable to the statute or contract at hand. Good lawyers can influence these choices—and the oldest and most effective route to the listener's heart and mind is from a voice and through an ear. Any lawyer who loves his profession and its accomplishments will be impressed by the care and study with which these great advocates approach their appellate tasks.

Why do they say so much more about oral argument than about written briefs? Probably it is a reaction to the erroneous attitude they see in other lawyers: that the oral argument is neither little noted nor long remembered, that it is the brief as the more thorough and permanent written argument that really

does the trick. The fallacy, of course, is in thinking of the spoken argument as a mere paraphrase or summary of the writing. The true professional in the field sees the two as quite separate endeavors with different impact. The good oral argument lights up the scene, highlights the big elements, stirs the interest of the judges, creates the indispensable first impression. The modern appellate judge may leaf through the brief (and the record) before argument but he does this as a mere introductory move, so that at oral argument he may get right down to the important questions.

As has been said, these lectures seem to be written for and about the lawyer who is taking the appeal, rather than the one who has won "below" and is responding. The reason is not hard to locate. Ordinarily, appellant's counsel has much the heavier burden, much the greater obstacles to overcome. Percentages vary from court to court but it is safe averaging to say that ordinarily only fifteen to twenty per cent of appeals in civil cases are successful. In criminal appeals the percentage is lower. And not only is the appellant's lawyer the underdog in the betting, he must also be the leadoff man. To change the metaphor, his job is to explain the case, to paint the picture, to make the contact with the judges, to interest them in the cause, to stir them into "awarding justice" (Professor Thayer's phrase). These are heavy burdens or thrilling opportunities, depending on how you look at the appellate function—and how you look at your profession.

Appeals are not just the last step in an already too-long process. They are essential to our method of using checks and balances to come as close to justice as is possible in this imperfect world. Taking the cynical view, Finley Peter Dunne's famous Mr. Dooley said that an appeal is where you ask one court to show its contempt for another. But the forensic giants have always taken higher ground than that. They keep in mind that theirs is an art that was old when the world was young, an art that reached near-perfection two thousand years ago with Cicero, advocate supreme. Cicero believed that an advocate must possess almost universal knowledge and so must be a perpetual student. Succinctly he defined the counsel's task: "to bring out everything of significance that the cause can furnish."