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EPILOGUE

THE ART OF ADVOCACY IN A CHANGING WORLD

E. OSBORNE AYSCUE, JR.*

The bedrock of the common law system of justice we inherited from our English forebears is an adversary system in which opposing parties are represented at trial by competent advocates whose duty it is to present their clients' case in its most favorable light within the limits of applicable law and the rules of professional conduct. Indeed, this is more than simply a common-law tradition. The rights to due process, to trial by a jury, and to assistance of counsel are enshrined in the Constitution of the United States. We envision this to be the approach most likely to produce a just result.

The *sine qua non* of this system is the competent advocate.

Most literature on the art of advocacy is written in the context of trial by jury and appeal to a panel of appellate judges with written briefs and oral argument. But advocacy in the contemporary legal world takes many other forms. Indeed, the most crucial advocacy on a client's behalf may consist of persuading a prosecutor not to pursue charges. Or it may consist of convincing a judge that a civil case should be dismissed on motion before the client is put to the trouble and expense of responding to discovery or being subjected to a trial. It may consist of presentation of a case to arbitrators who are not bound by traditional procedural and evidentiary rules. Or it may consist of a presentation to an administrative agency from which one's client seeks a favorable ruling or seeks to avoid threatened administrative action. In the mediation of a civil action, it may consist of a presentation of one's client's position so effective that it persuades the opposing party, hearing the other side of the case for the first time, to settle, rather than go to trial.

In a world in which the law has become the first arbiter in regulating our lives, instead of the last resort for disputes that cannot be otherwise resolved, advocacy has many faces. The articles that precede this one illustrate some of the many contexts that call for advocacy. The basic principles of advocacy and the process by which one becomes a skilled advocate are a constant. They remain the same regardless of the forum.

The art of advocacy is exactly that, an art. It cannot be learned *without* books, but it cannot be learned *from* books. In England, from whence we inherited our adversary system, the academic education of a would-be advocate is followed by a period of virtual apprenticeship to a practicing barrister. In

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this country, in the days before there were law schools, a would-be lawyer read law under a practicing lawyer, carried his briefcase, and learned vicariously by watching him and others try cases. As his own practice grew, he learned by talking through his projected strategies in his cases, either with those with whom he shared office space or, in many smaller towns, in mid-morning sessions in the local coffee shop. He became a part of a mutually supportive fraternity. The law was a profession with a shared pride in the art of advocacy.

Except for isolated smaller communities, that nurturing world is gone forever. The young lawyer today emerges from law school armed by her academic training with every tactical weapon known. She may have had some mock trial experience in law school. If she is fortunate, she will have had a summer clerkship with a lawyer or law firm which may have afforded some opportunity to observe what lawyers do. As law firms have grown larger, the enlightened ones that depend on a succession of competent advocates have created formal mentoring programs or internal trial advocacy programs to train younger lawyers. In other firms the incentive to teach younger lawyers may not be as strong. For those not in larger law firms (most lawyers still practice in offices of five lawyers or less), the surplus of lawyers, the resulting intense competition among lawyers, and the erosion of collegiality are simply not conducive to the kind of mentoring that was once a tradition of the profession.

This personal mentoring has been supplanted by an avalanche of how-to books. Through the first half of this century, there was abundant literature on substantive law and civil and criminal procedure. Reading the advance sheets to keep up with changes in the law was an accepted part of a lawyer's compulsory routine. On the other hand, there was very little literature on the art of trial advocacy.

During my professional lifetime, the literature has changed enormously. It is now virtually impossible to keep abreast of the changes in all facets of substantive law. A trial lawyer has a choice between becoming a specialist in some area of trial practice or, if he remains a generalist, of having to reeducate himself about the state of the substantive law relevant to each new case he undertakes.

Equally dramatic has been the explosion of literature on the art of trial advocacy. Like every other aspect of modern life, the art of persuasion has been dissected under a microscope. The rapid development of the social sciences, particularly psychology, and their application to the art of advocacy has already produced more literature than one could reasonably read and digest in a lifetime.

What once had to be learned by trial and error, either through one's own experience or through watching others in action, is now analyzed to death in the literature. Furthermore, modern science, particularly the developments of the electronic age, has given us far better tools for analysis and presentation of evidence. Indeed, it has given us the capacity to *create* evidence.

Perhaps not totally unrelated, we have become a nation of spectators. The

art of advocacy is not, however, a spectator sport. The use of analogy is always risky, because too many analogies can be turned around by a clever opponent and employed to destroy the user's argument. Nevertheless, the analogy between trial advocacy and operating an automobile appears to have some validity. One can learn how to start an automobile, steer it, accelerate it, slow it down, and stop it without really understanding how it works. One can learn the rules of the road so as to be able to share the highway with others without catastrophe. This is as far as the training of the ordinary driver goes. One can go further by studying the operator's manual and learning how to work all the peripheral features of the vehicle. One can purchase a shop manual and digest the instructions for dismantling, assembling, and repairing the automobile; one can go into a shop and actually dismantle an automobile and put it back together.

All of these activities put together will teach the prospective driver only a fraction of what she needs to become a competent driver. The rest must come from experience. There is no substitute for having available in one's memory instant recall of what has worked and what has not worked in the past when one's car went into a skid or started to mire up in a snowdrift. No amount of reading can impart a sense of the distance it will take to bring a particular car to a full stop from a particular speed on a particular surface under particular weather conditions. Such experiences become a part of the inventory of one's memory bank, available almost as a matter of reflex to inform the driver's judgment when the need arises. The contents of this memory bank will continue to grow until the driver's faculties, powers of observation, and intellectual capacity begin to diminish with age. In the early years, a driver will depend upon her reflexes. With increasing experience she will depend less upon her natural physical ability and more upon judgment tempered by experience. A driver who continues to rely solely on her physical ability, and who does not learn, is an overconfident wreck looking for a place to happen.

Likewise, the trial lawyer can be exposed to the basics of advocacy through books, published articles, lectures, and aural or visual electronic presentations, but he can learn how to use this information effectively only through experience. He begins his career depending principally upon his book learning and whatever may be programmed into his genes, including instinct, intuition, and the ability to observe what is going on around him, process it and act on it. With experience and the passage of time, however, he increasingly relies more on judgment tempered by experience and less on inherited talent. Whatever natural brilliance he may have exhibited early in his career is progressively enhanced by the patina of experience. Out of reason, experience, and reflection, he develops a set of reflexes that eventually becomes almost second nature to him. He learns to adapt and grow.

Here the analogy begins to fail. As one becomes more experienced, the professional literature becomes more meaningful. Furthermore, unlike the automobile, improvements to which are progressive and incremental, in this

world of ever-accelerating change, old wisdom about trial tactics is constantly being discarded and replaced or rediscovered. Growth as an advocate, thus, requires continued study and continued practical experience.

Reinforcing this necessity is the element of constant change. When I started practicing law, almost forty years ago, the newest conventional wisdom in trial advocacy was best expressed in the maxim that “a picture is worth a thousand words.” Classic courtroom oratory was passé. Demonstrative evidence was the rage. Demonstrative evidence that was transparently manipulative, however, tended to blow up in the user’s face. One rarely tried a personal injury case in a courtroom that did not have a model skeleton suspended ominously opposite the jury box. I have a vivid recollection of seeing an attorney representing a plaintiff who was complaining of low back injury dramatically passing to the jury the orthopedic corset his client testified she had been forced to wear on account of her injury. The jury, however, awarded no damages after one of the women on the jury, having fingered the material in the corset, perceptively observed that it still contained its original sizing, evidencing the fact that the corset had not been worn often enough to have required laundering! I can recall a plaintiff, asked to show the jury how the home neck traction apparatus that had been prescribed for her whiplash worked, failing miserably in her attempt to assemble it.

The line between demonstrative evidence that assisted the jury in understanding the facts and demonstrative evidence that was transparently manipulative was a delicate one. The price for stepping across it was to risk having one’s case blow up in one’s face.

Furthermore, too often the picture turned into a thousand pictures to replace a thousand words, leaving the jury in a sea of confusion. More recently, the onset of the information age—copying machines, data banks, computers, faxes, and the like—has littered the legal landscape with an avalanche of trivia.

The audience to which one’s advocacy is directed has also changed. Forty years ago one who read the local newspaper and kept one’s ears open developed a generally reliable understanding of the world from which judge and juror came. Today jurors are exposed to a much wider world. The instant access of CNN has replaced the morning and evening papers. Every juror can be assumed to know about the aberrational outcome of lawsuits in remote parts of the country. Contemporary moral and ethical issues are aired on Oprah and Geraldo, rather than in home, school, or church. There is no longer a reliable, identifiable moral consensus on many issues. In this information age, the advocate who does not have her finger on the pulse of that wider world in which her judge and jury live wanders in a wilderness.

The way in which many people learn has also changed. Today, rather than dealing with jurors who have led sheltered, insular existences, one deals with jurors who have grown up with television and, for many, modern electronic devices, most notably the computer. A critical document, blown up and exhibited on a monitor, with the important passages highlighted on the screen,

may be an extremely effective way of communicating with a modern jury—much more effective, for instance, than handing each juror a copy of the document to read. On the other hand, a manufactured illustrative exhibit, designed to send a nonevidentiary message, as opposed to actual evidence displayed on the screen, can come across as too slick. It takes only one juror who is intelligent enough to recognize the manipulation implicit in the former to turn its presentation into a high-tech disaster. Low-tech or high-tech, if the medium—the slide projector that jams, the overhead projector that projects an unreadable image, the VCR that will not function—rather than the content, becomes the focus, the message is lost.

The fundamentals of the art of advocacy, nevertheless, transcend changing times and remain valid in any forum.

Primary among these fundamentals is that effective advocacy must always begin with a thorough grasp of the facts. Inscribed in bold handwritten letters on the flyleaf of the civil procedure manual that the writer's mother gave to his father upon his graduation from law school in 1930 are the words, "GET THE FACTS," a lesson that the author of the book, who had taught my father courses in civil procedure and trial practice, had drummed into his students. When I graduated from law school in 1960, thirty years later, the first chapter of the book on courtroom strategies my father gave to *me* was devoted to the importance of gathering of facts as the first step in the handling of any lawsuit. In the sea of contemporary literature about every device and strategy known for influencing judge and jury, we sometimes tend to forget this basic principle.

Adequate gathering of facts requires hard, persistent effort and ingenuity. It cannot be done from an office desk. It requires getting out and talking to everyone who has some knowledge of the subject matter of your client's problem. It requires understanding how the subject of your advocacy works. Whether it be the operation of a freight elevator or a brake system or the operation of a hedge fund, you must acquire a working knowledge of the subject of your suit.

The remaining overarching principles of the simple, yet complex, art of effective fact-based advocacy are familiar:

Preparation: The *Sine Qua Non* of Success

1. Decide what your goal is and develop and master the theory that will get you there. Think strategically. Develop a game plan for reaching your goal.
2. Get organized. Do not assume that you can try even the simplest case off the top of your head. Never wing it. Choose the witnesses and evidence you need to tell your client's story. Select your exhibits carefully. Prepare your witnesses to testify. Map out your direct examination. Know what questions to ask to enable your witnesses to tell their story. Know what questions *not* to ask them. Do what you

can to increase their comfort level while they are on the witness stand. Prepare them so that they encounter no surprises on cross-examination. If each of your witnesses comes off the stand having told his story cogently and having encountered no surprises, you will have done your job.

3. Your opening and closing should be a part of your trial preparation. They are the glue that holds your story together. Your opening should predict in outline form your closing, your summing up of your case. The opening should be attention-getting, but spare.
4. Forecast the sticky issues and try to deal with them in advance. Anticipate the problems you will face at trial and decide how to deal with them. Know what “Plan B” will be if you are not successful in getting around your problem. Take nothing for granted.
5. Know the playing field. Master the rules that govern the forum in which you will appear.
6. Know your audience and prepare your presentation to persuade that audience.

At Trial or Hearing

1. Keep it simple. Focus on what is important. Do not overcomplicate; do not get mired up in trivial detail. Every move should have a purpose. Have a reason for every question. Do nothing by rote. Know why you are doing everything you do.
2. Shape your presentation to fit the audience. Do not underestimate your audience, but take nothing for granted. Tell your audience what it does not know but needs to know to make a decision. Educate it.
3. Be yourself. Study what works for others, but do not imitate it artificially. Do what works for you. Use your own judgment. Your client is paying for your judgment, not someone else’s. Do not be afraid to follow your own intuition.
4. Be a storyteller. Pick the right story and tell it in your own style, the way it works best for you.
5. Do not ignore your audience. Learn to read body language. Listen, observe reactions, and be responsive to your audience.
6. Get your message out early. Do not make promises you cannot keep. Instead, plan to produce more than you promise. Ask for what you want. Explain how the evidence leads to facts and how the facts compel the result you want.
7. Do not talk over the heads of judge or jury. Speak in plain English. Avoid legalese.
8. Assume that your audience has a limited attention span and level of interest. Make every word count. Be crisp. Do not waste time. Avoid repetition. Develop an instinct for the relevant.

9. State the facts honestly. Do not duck the hard questions, but deal forthrightly with them. Deal forthrightly with the warts on your client's case.
10. Be flexible, not rigid. Do not try the case from a script. Develop the ability to adapt to the response you observe in your audience. Listen to the witness's answers and the court's questions and respond to them.
11. Keep your perspective. Know when to leave well enough alone and have the confidence to do it.
12. Surprise is inevitable. Handle it with confidence. Never look worried. Never let a judge or jury see you flinch or sweat. Develop the ability to take a blow to the solar plexus without letting the expression on your face change while you stand there and decide where you go next.
13. Remember that you are always on stage. Always appear to be confident of your case, securely confident, not arrogantly cocky. Maintain control of yourself, your witnesses, the environment. Project a sincere belief in your case.
14. Be courteous, civil, fair, and sincere with witnesses, opposing parties, and court personnel.
15. Your dress and your demeanor speak volumes about how you regard yourself. Be conscious of your appearance, the tone of your voice, your timing, and your eye contact.
16. Do not be obstructive. Object only when it matters.
17. Keep your sense of humor—natural, not forced humor. You are there to win, not to entertain. The humor that works best is a natural, spontaneous, tension-breaking reaction to something that happens in the course of the proceeding.
18. Listen to the judge; the jury does. He is a symbol of authority. If you do not appear to respect his authority, you lose your own authority.
19. It is your client's case. Never act as if it were yours. Make your client a visible part of the proceedings, including her in even routine decision-making.
20. Always remember that you are interposing your credibility between your client and the decision maker. If you lose your own credibility, you are worse than worthless to your client.

Your Growth As an Advocate

1. Remember that great advocates are not born; they are made.
2. Constantly hone your people skills. There is no "right" or "wrong" style. Find out what works best for you.
3. Keep up with the literature. The frontier of our knowledge about human behavior expands with time. Become a student of human behavior.

4. Know the rules that govern procedure in every forum in which you appear. Keep up with the changes. Refresh your recollection regularly.
5. There are fewer and fewer opportunities to acquire first-hand experience. Seize every opportunity to observe others. Watch good lawyers try cases. Read about trials. Listen to the war stories of veterans of the courtroom. Seize every opportunity to be an advocate yourself. Seek feedback about your performance from your seniors and your peers.
6. Remember that becoming and remaining a superb advocate requires a lifetime of learning and growth. Become a lifelong student of the art of advocacy.

In conclusion, success as an advocate is not measured by how many cases you win and how many cases you lose. Any lawyer can pad his record by settling all his potential losers. The true measure of the worth of an advocate is whether at the end of the day he knows that his client's case has been presented for adjudication in its most favorable light. The satisfaction of knowing that you have done that is the ultimate reward, the only one that matters.