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Conference on Supreme Court Advocacy

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CONFERENCE ON SUPREME COURT ADVOCACY*

Chief Justice Warren E. Burger

For nearly two decades I have pressed for improved advocacy in federal courts, including the Supreme Court of the United States. And I have cooperated with state judges and the Bar to improve advocacy in all courts. With some exceptions, state and local governments have not provided experienced and qualified personnel skilled in arguing cases before the Supreme Court. My experience is that many who represent the states and local communities in the Supreme Court of the United States fail to appreciate fully the crucial importance of well-organized and carefully researched briefs, especially when confronted with a thirty minute limit on argument in the Supreme Court. Oral arguments which help the Justices get quickly to the core—the jugular—of the legal issues call for a high degree of skill and careful preparation. The Supreme Court is no place for inexperienced or ill-prepared advocates; such advocates provide little help to the Court; they do a disservice to their clients—and to themselves.

I congratulate the sponsors of the Conference on Supreme Court Advocacy for the materials they have developed and the Catholic University Law Review for making these materials available to a wider audience. Attorney General William French Smith deserves special mention for his consistent support and for providing Douglas Ross to the National Association of Attorneys General. That Association has provided much support for this program and has worked with many state advocates who have appeared before the Supreme Court. Both the Association and The Academy of State and Local Governments are to be commended for their contribution in making this Conference possible.

This Conference is a matter of some satisfaction to me personally because it is carrying out an objective that I have long advocated concerning the need for improved performance, particularly on the part of state and municipal governments in their litigation before the Supreme Court.

I have been “monitoring” the performance of Supreme Court advocates for fifteen years. At meetings of the Attorneys General of the states and at

* Opening remarks at the Conference on Supreme Court Advocacy held at Georgetown University on October 17, 1983.

Governor's Conferences, I have stated that the Office of the Solicitor General of the United States and leading members of the Supreme Court Bar consistently rank highest in the quality of advocacy. Unfortunately, the representatives of state and local governments consistently rank far below. There are exceptions, of course. A number of state Attorneys General have performed on a level with the ablest advocates.

I am also able to report that the quality of representation of state and local communities in the Court has improved significantly. This is due in part to the work of organizations like the National Association of Attorneys General and the Academy of State and Local Governments. It is due also to conferences and seminars such as this one and the seminar at Georgetown University last fall. State and local communities are also beginning to realize that often superior advocacy can tip the scales in close cases.

I know if I were an Attorney General, or an Assistant Attorney General of a state, one of the things I would look forward to would be an opportunity to argue a case in the Supreme Court of the United States. Unfortunately, many in such positions have taken advantage of this opportunity without giving much thought to their ability to do a credible job. When this happens, it is the client who suffers. I recall one case involving many millions of dollars. I will not go beyond that in identifying it. The case was miserably argued on behalf of the state. The state prevailed, but it was not due to the quality of the advocacy for the state. The lawyer clearly had had no experience in appellate advocacy. The state's attorney did not win the case—the other side lost it. The Court had to take charge because the representative for the state was of little or no help. The point is that state and local municipalities, as your clients, are entitled to the best representation possible. If that means hiring someone outside the state government who is skilled in appellate advocacy, then that step should be taken. If it means sending attorneys to seminars and conferences such as this, then do so. The bottom line is to do what has to be done to ensure that only the best attorneys are coming forward to represent the interests of the people of your state and local communities.

During your program you are going to be given tips from a number of distinguished speakers on how best to argue cases before the Supreme Court. I am not going to intrude on their domain, but I will mention three things for you to consider when arguing before the Supreme Court.

First, the Court does not favor divided arguments. There is great reluctance on the part of the Justices to grant motions for divided argument, unless the time is divided with the Office of the Solicitor General of the

United States whose presentations are consistently superior. You will be pressured by staff members to let them argue, even if for only ten minutes. My advice is to resist such appeals and not allow divided argument unless there is a compelling reason to do so. Thirty minutes is a short time and dividing it up among advocates is dubious business. It should never be divided among three.

Second, I recommend that you not rely on a prepared argument, because the Court is not going to let you present it. If you come to the Court with a set argument and if you are permitted to present it, chances are you have either won the case before you got there or you have lost. When I was sitting in the Court of Appeals about fifteen years ago, we had a very important case coming out of the southwest on natural gas. I do not recall the exact details, but the lawyer started his argument by opening his book and began reading it in a formal way. He said that it was a great honor to appear before such an important court—something we can do without. He then started his argument and a short way into it, the late Judge Wilbur Miller, one of the finest judges in the federal system and who at the time was not in very good health, said sharply, "Counsel, are you reading that argument?" The fellow looked up and said, "Yes, Your Honor." "Well don't!" was the reply. It threw the lawyer off and he looked stunned. I then said: "Counsel, what we mean is that we know you know more about this case than anyone in the world, except perhaps your friend on the other side of the lectern, and we want you to just tell us about the case in your own words." He closed his book and went on to make a very superior argument. Those talking with you at this conference will make this point.

The third and last point concerns the length of argument. Someone is sure to tell you during your conference that if you can cover your case in twelve minutes, do so and sit down. I am always pleasantly surprised when this happens. Justice Jackson once told me that subconsciously, the Court cannot help but conclude that the advocate must think he has a pretty strong case if he only argues twelve minutes and sits down. When the advocate gets up later, if he is on the top side, and says "I have no rebuttal unless the Court has questions," the Court is impressed. Such strategy will not win a losing case, but it does convey a subtle message.

In conclusion, I repeat that I think this conference is extremely important and I am delighted to see so many Attorneys General present. And I hope the result is better trained attorneys and a higher level of advocacy on the part of the states and cities that appear before the Court.

