

SELECTED REMARKS TO THE
AMERICAN INN OF COURT
SEPTEMBER 13, 1995

Frequently, lawyers will ask me for my observations about the presentation of appeals. I will be glad to give you, for what they are worth, a few thoughts that occur to me about appellate work:

First, the question arises whether one should request oral argument. My comment would be that if you are the appellant, I would strongly consider asking for oral argument and would do so unless there is some strong reason to the contrary. In representing the losing party below, on appeal you have the laboring oar and forceful oral argument can do much to accomplish your objective—make the court want to rule for your client. A solid brief can often win without oral argument, but you can emphasize the issues you are pushing by argument. In particular, you can obtain a sense of what is troubling the judges and respond, and you can answer most effectively any errors in your opponent's statements about the record or the cases.

Second, as a related point, I suggest that as an appellant, you think seriously before you waive your right to file a reply brief. In numerous cases, I have had a real problem with sorting out the appellant's position after a strong brief by the appellee. If there is a dispute about what the record shows, an effective reply brief with accurate record citations can save the day.

Third, I urge that where your office, or your company legal department, maintains brief banks, please be sure that you don't pull out an old string of citations and throw it into your current brief without careful checking. We have had several instances where counsel have relied on our old rule that the views of a federal district judge in diversity cases on the law of his state should be given deference and not reversed unless clearly in error. That old rule was reversed four years ago in the strong opinion of Justice Blackmun in *Salve Regina College v. Russell*, 499 U.S. 225 (1991). It shakes my confidence in a brief to see the old rule cited and the Supreme Court's authoritative decision unmentioned.