11-1-1979

The Oral Component of Appellate Work

T. W. Wakeling

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I. Introduction

A. Anyone who haunts the courtrooms of North America will find advocates of uneven quality.1 There are master craftsmen but alongside them labour colleagues blessed with skills which escape the observer's scrutiny. Unfortunately, the latter category has been the subject of considerable attention lately with the result there is the impression about that poor advocates have cornered a disproportionate share of the market.2 Even Canadian and American judges have felt it necessary to question the competence of some practitioners.3

Chief Justice Burger directed his serious charges at the trial lawyers but the appellate bar, the subject of this study, has been the target of the odd judicial barb. Judge Wilkins sums up this disenchantment with his complaint that the bar's oral abilities are

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1 See Rall, Effective Oral Argument, [1952] U. Ill. L.F. 114. Other discoveries will be more startling, for if Fry v. Lebold (1939), 31 N.E. 2d 257 (Ohio Ct. App.) is a guide, most anything can happen. Counsel serenaded the jury and the spectators, and of one lawyer, the reviewing court noted, "Mr. Walter Ruff played many parts. He bewailed his fate in tragic manner not unworthy of King Lear." Id. at 258. Of course, counsel need not be the center of attention. See Regina v. Bevacqua (1970), 11 C.R.N.S. 76 (Ont. C.A.) for the remarks of a provincial court judge, characterized by the Ontario Court of Appeal as "simply beyond comprehension". Id. at 78


3 Id. Mr. Justice Stratton of the New Brunswick Supreme Court has complained about the quality of today's advocates. The Canadian Bar Association, 5 National, Sept.-Oct. 1978, at 12. Chief Justice Burger of the United States Supreme Court has voiced criticism as well. Newsweek, Dec. 11, 1978, at 98-100. In the same vein Chief Justice Wilkins observed, "Appellate argument resembles great literature. Almost anyone has some critical competence, but only the few achieve a standard of performance which the many sense." Id. Mr. Medina, of the New York bar makes the point this way: "An appellant should always argue .... The fact that a large number of oral arguments are futile and a mere waste of time is beside the point." (1934), 20 A.B.A.J. 139 at 140. Mr. Rall attributes the advent of timed oral presentations in the United States, in part, to the Bar's inability to usefully employ oral argument. Rall, supra, note 1. Mr. Davis might not agree with this explanation for modern economies as he considers increased work loads the primary factor. Davis, The Argument of an Appeal, (1940), 26 A.B.A.J. 895; see Wilkins, supra, note 2 at 115-16

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their "least qualitative accomplishments".\(^4\) Given the prominent place these skills assume in the appellate chambers this is a stinging indictment.

However, this plaintive cry does not mean that each community is without its luminaries but rather should be interpreted as a lamentation that there are not more of them.\(^5\) It is the adoption of this emphasis which explains the emergence of appellate advocacy courses in North American law schools and encourages students of the art of advocacy. Underlying such enterprises is the assumption that industrious lawyers can develop the pleader's talents, for in the words of Professor Weiner, "there is nothing mysterious or esoteric about the business of making an effective oral presentation."\(^6\)

Prominent academics, judges, and lawyers must share this belief for what other explanation is there for the fact that leading counsel have throughout the ages recorded their views on the topic.\(^7\)

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4. Supra, note 2

5. Weiner, Oral Advocacy (1948), 62 Harv. L. Rev. 56

6. Id. at 57. Mr. Maloney, Q.C. would probably agree for he regards his conversations with acknowledged experts as an important part of his education. He must believe that they had something concrete to pass on. Advocacy (1978), 12 L. Soc'y Upper Can. Gazette 114. But see O'Driscoll, The Presentation of an Appeal to the Court of Appeal and to the Supreme Court of Canada in a Criminal Case, [1969] Special Lectures of the Law Society of Upper Canada 203

B. Because there is not a perfect identity between ability and experience, the model on this essay is the outstanding counsellor, as opposed to the weathered veteran. Senior lawyers have delivered many memorable arguments but the explanation for the indelible impression is not always the expertise displayed. Sometimes, it is the total lack thereof which is breathtaking. Experience is undoubtedly a great teacher yet it may be counterproductive if what has been cultivated and refined are bad habits. The point is that excellence is the product of the diligent study and application of sound principles, not simply the accumulation of time logged in appellate courts. Accordingly, the accomplished artisan, whether senior or not, is the norm.

Now it is probably true, as Mr. O'Driscoll, Q.C. asserts, that "[t]here are . . . as many ways of presenting an appeal as there are advocates", but this cannot mean that all modes are equally desirable or meritorious. Golfers strike the ball with a bewildering variety of styles yet most would concede that Arnold Palmer or Jack Nicklaus have the most effective format. As in golf, there are, in appellate advocacy, clear bases for preferring some approaches over others, and consequently, questionable practices must be identified as such, just as a lighthouse warns seafaring types that danger lurks, even if it is not apparent on the surface.

This article studies the oral presentation component of appellate advocacy but on occasion the interdependence of the oral and written element will emerge, and observations applicable to one will govern both forms of communication. But regardless of the medium utilized, the communicator’s message will be lost if the receiver’s interest is not aroused. In the rarefied atmosphere of the court of errors this means that everything which the advocate does should be designed to galvanize the judges, the piscatorial figures in Mr. Davis’ apt analogy of the angler and the fish. This directive determines what arguments will be selected and the order in which

8. But see Anderson id.; Maloney, supra, note 6. Senior members are not the only practitioners who have received the approbation of appellate courts. For example, Mr. Justice Arnup described Mr. Gold’s argument as a powerful one “attractively presented” in Regina v. Shand (1976), 30 C.C.C. 2d 23 at 35 (Ont. C.A.)
9. O’Driscoll, supra, note 6. Judge Loughran confirms the existence of certain intangibles such as looks or manners which are certainly unique to the individual. Supra, note 7 at 7
10. Wilkins, supra, note 2 at 119. Lord Macmillan said that “[t]o be interesting is almost as important as to be logical.” Supra, note 7 at 29
11. Supra, note 3
they will appear as well as the body movements and words which will best articulate the chosen concepts.

C. A narrow forensic focus reflects a conscious decision to study a discernible skill of considerable importance to the judicial process but it does not suggest that the attorney’s persuasive powers are the profession’s exclusively or that the courtroom and the social arenas share no common traits. Neither of those propositions are true. Since an advocate is any person “who speaks or writes in support of something” it is apparent that the lawyers do not monopolize the traits. Clearly the art of persuasion is a characteristic displayed by many disgruntled spouses, hopeful salespersons and capable teachers. Because all advocates are not attorneys the lawyer has much to learn from the perceptive layman.

At the same time, certain features of the lawyer-advocate’s experience are unique for the forum he appears in is presided over by an impartial decision maker appointed by the state with the authority to decide very significant issues. Other differences also exist which justify a special interest in the appellate process. An advocate, whether lawyer or layman, shares a common interest in that they desire the recognition of their position, but with the lawyer that end is a judicial conclusion which will advance the client’s interest. There is another aspect of a lawyer’s work which distinguishes it from non legal efforts, which is the professional responsibility owed to the state and court, as well as to the client. For example, counsel is expected to act as an informal screening process, and refrain from filing unmeritorious appeals. Thus, although a barrister fervently hopes that the judges will side with his client, a principled practitioner always has a higher goal in sight, which is to participate in a rational process that will culminate in a just and fair decision which reinforces the values of the rule of

13. Barry, supra, note 7 at 168; Macmillan, supra, note 7; Weiner, supra, note 5 at 57
14. Mr. S. Kujawa, Q.C. frequently regales his listeners with the wisdom of his poker partners and how they have contributed to the odd appellate victory. Judge Re believes “[h]elpful suggestions can be obtained from any intelligent person who is willing to listen.” Supra, note 7 at 187
15. Davis, supra, note 3; Freedman, supra, note 7 at 294; Macmillan, supra, note 7
16. See Canadian Bar Association, Code of Professional Conduct (1974); Appleman, supra, note 7 at 48; Kaufman, supra, note 7 at 166
17. Wilkins, supra, note 2 at 120; see Macmillan, supra, note 7
law.\textsuperscript{18}

Judges and lawyers alike, as a unit, struggle for the best solution. Those on both sides of the bench make their contribution and without this co-operation the legal system will not attain its full problem solving potential.\textsuperscript{19} Unless all the complexities of a proposition are unravelled and the merits of both sides ventilated, a judge will entertain some reservations about the ultimate determination. A judge is certainly more confident if all the relevant considerations are before him.\textsuperscript{20} Furthermore, animated debate saves the judge from undue identification with one side, which is a danger if the judge must act as the surrogate advocate. \textsuperscript{21} Appellate judges have the final say in the legal drama but the advocates are certainly a supporting cast, without whom, the show would not be the same.

The advocate's job then is to forcefully state his client's interest. How crucial this role is becomes apparent from the following passage which chronicles the conduct of Mr. Ivan C. Rand, in his days as commission counsel for the Canadian National Railways:

[Rand] confessed that on occasion, in the course of an application to the Railway Transport Board for leave to discontinue some local rail facility which had, insofar as the Railway was concerned, become redundant, it appeared to him that the local interest was not being adequately represented. In those circumstances, Rand felt obligated to say what could be said on the other side of the issue and, it is reported, he sometimes presented the case so vigorously that the ultimate decision of the Board went against the Railway.\textsuperscript{22}

An outstanding advocate will understand the fundamental importance of his role and let that govern the quality of the work

\textsuperscript{18} See Barry, \textit{supra}, note 7 at 167. As an officer of the court the advocate is obliged to play a role in the law making process. Appleman, \textit{supra}, note 7 at 48. See also Freedman, \textit{supra}, note 7 at 292; Jackson, \textit{supra}, note 7 at 863
\textsuperscript{19} Kaufman, \textit{supra}, note 7 at 165. Sometimes counsel's factum and the courts opinion share similar features. Cooper, \textit{supra}, note 7 at 37. Mr. O'Driscoll, Q.C. opined, "I suppose one of the nicest compliments that a counsel can receive from a court is when the reasons for judgment bear a strong resemblance to the wording of the factum." \textit{Supra}, note 6 at 204
\textsuperscript{20} Davis, \textit{supra}, note 3 at 896; c.f. Jackson, \textit{supra}, note 7 at 863. Even full argument does not rid the court of doubts. Mr. Justice Laskin said of second doubts that "they are endemic in judicial office." \textit{Spataro v. The Queen} (1972), 7 C.C.C. 2d 1 at 14 (S.C.C.). See Jackson, \textit{supra}, note 7 at 863
\textsuperscript{21} Kaufman, \textit{supra}, note 7 at 165-66
\textsuperscript{22} Pollock, \textit{Mr. Justice Rand; A Triumph of Principle} (1975), 53 Can.B.Rev. 519 at 520
product.\textsuperscript{23} To Mr. Justice Jackson's mind the exceptional lawyer accepts the function of a cathedral builder and eschews the notion that the task is akin to a stone mason's.\textsuperscript{24}

The courts, the workplace of judges and advocates, are there to fashion remedies the protagonists themselves are unable to discover. But the opinion will have ramifications which affect more than the disputants, for specific facts introduce abstract principles which affect interests beyond those of the immediate parties.\textsuperscript{25} Most cases will not arouse the national interest as \textit{Morgentaler v. Regina}\textsuperscript{26} did in Canada, or \textit{Brown v. Board of Education}\textsuperscript{27} did in the United States, but even those carrying a lower level of public interest display the trait mentioned above. For this reason, an advocate must be cognizant of this high duty, for its breach damages not only the client, but those in comparable positions as well, and society as a whole labors under a deficient regime if the errors are of signal importance.\textsuperscript{28}

In summary then, the decision maker and the advocate have mutually constructive roles to play. Together, through interchange of opinion, oral and written, the participants strive for a fair and sensible solution to the matter at hand.\textsuperscript{29} The leading feature of this colloquy is active intellectual participation.\textsuperscript{30} Both counsel and the

\textsuperscript{23} Those without this appreciation will hopefully be motivated by the fact that appellate work is an infrequent occurrence for them. Appleman, \textit{supra}, note 7 at 48. The fear of facing the unsuccessful client might affect others. See Jackson, \textit{supra}, note 7 at 802

\textsuperscript{24} \textit{Supra}, note 7 at 864


\textsuperscript{26} (1975), 20 C.C.C. 2d 449 (S.C.C.)

\textsuperscript{27} (1954), 347 U.S. 483

\textsuperscript{28} Unskilled advocates tax the system, and it is questionable whether incompetent judges or counsel provide the greatest handicaps. If advocates must educate the judges, then arguably deficient counsel represents the greatest hazard. See Loughran, \textit{supra}, note 7 at 7. A superb judge will survive a bout with the flatulence of inferior counsel, but must decide the issue without the valuable insights a proponent of one side may have. Excellent counsel may lead a judge of questionable talent but there is always the danger the court will not properly identify the side with the expertise.

\textsuperscript{29} Gordon, \textit{supra}, note 7 at 446

\textsuperscript{30} An effective argument assumes both parties have knowledge of the matter discussed. That is why it is improper to discuss cases opposing counsel has no reason to suspect will be called in aid. There are, of course, exceptions, such as a recent decision not previously available, or the other side's indication the case might be of some assistance in argument. Rombauer, \textit{supra}, note 7 at 180
court must adopt an inquisitive stance and advance meritorious propositions for consideration.\textsuperscript{31} That Mr. Justice Frankfurter favored a charged environment is apparent from this tribute to a former law clerk of his: "He respected the traditions of the Supreme Court as a tribunal not designed as a dozing audience for the reading of soliloquies but as a questioning body, utilizing all arguments as a means for exposing the difficulties of the case with a view to meeting them."\textsuperscript{32} It follows then that although the judges' views carry the day, counsel must consider himself the intellectual equal of the bench, for without this orientation, counsel, awestruck by the surroundings and the eminence of the judges, will not adequately fulfill the advocate's role.\textsuperscript{33} If counsel has "a litter of intellectual kittens" the process is short circuited.\textsuperscript{34} That probably explains Chief Judge Pound's statement to a nervous tyro, "Don't forget that you are talking to seven ordinary men like yourself."\textsuperscript{35} Thus, an advocate should be instructive without being condescending, respectful without being obsequious, and forceful without being obnoxious.\textsuperscript{36}

II. Orientation

An advocate who understands the importance of the rule of law and the crucial functions performed by judges and lawyers will recognize the need for all participants to be courteous and respectful.\textsuperscript{37} Disagreements are expected but animosity has no place in a setting which thrives on rationality. Personal slights never pass for sound argument.

Neither counsel nor the judges should display anything but a gentlemanly manner.\textsuperscript{38} Chief Justice Duff was ever the gentleman and on his retirement, the Canadian Bar Association complimented him on this attribute in these words: "No case has ever suffered through the inexperience of its pleader. No pleader has ever appeared here who has not been afforded full opportunity, indeed

\textsuperscript{31} Gordon, \textit{supra}, note 7 at 446

\textsuperscript{32} Frankfurter, \textit{Of Law and Men} 321 (1956) in Gordon, \textit{supra}, note 7

\textsuperscript{33} Weiner, \textit{supra}, note 5 at 72-73

\textsuperscript{34} Id. at 73

\textsuperscript{35} Loughran, \textit{supra}, note 7 at 7

\textsuperscript{36} Rall, \textit{supra}, note 1 at 131

\textsuperscript{37} Kaufman, \textit{supra}, note 7 at 172; Macmillan, \textit{supra}, note 7 at 30

\textsuperscript{38} Macmillan, \textit{supra}, note 7 at 30; Maloney, \textit{supra}, note 6 at 144; Rall, \textit{supra}, note 1 at 131. The judges of the Supreme Court of Canada have an excellent reputation in this regard. Robinette, \textit{supra}, note 7
who has not been patiently guided and helped, to make full
demonstration of his case.'" 39 But this precept has not always been
obeyed, and the embarrassment associated with personal attack is
evident. Lord Thurlow, the Lord Chancellor in the reign of George
III, had to decide if a death occurred, and in response to counsel's
observation that he had seen his client lying in his casket, retorted,
"Good Heavens, sir! Why did you not tell me that before? I should
not have doubted the fact one moment, for I think nothing can be
more likely to kill a man than to have you for an attorney." 40

Neither judges nor pleaders should engage in conduct this
discordant, and counsel certainly gains nothing from defaming
fellow advocates or belittling lower courts. 41 An appellate forum is
not the place to air personal disputes, for not only is it in poor
taste, 42 but it introduces an irrelevant consideration which is devoid
of persuasive value, 43 and annoys judges who do not, as a rule,
condone slights given their brethren. 44 Judge Anderson records the
disfavor an over zealous advocate risks: "Such attempts leave a bad
impression, and are never made by an astute lawyer." 45

Obviously, as a matter of tactics, counsel refrains from conduct
which will displease the court. 46 As judges are keenly aware of the
need to be impartial and to be so regarded, they do not enjoy
compliments. Such commendation may well be a sincere expression
of respect but it can place judges in an awkward position,

40. L.J. Bigelow, Bench and Bar: A Complete Digest of The Wit, Humor, Asperities and Amenities of the Law (Reprint New York: Harper, 1970) at 37; see also S. Jackson, Laughter at Law (1970) at 76. Equally offensive is this judicial remark prompted by the attorney of record's absence, and the prosecutor's explanation that defence counsel was delayed because of a murder trial in a higher court: "No doubt his own."
41. See Weiner, supra, note 5 at 63
42. Anderson, supra, note 7 at 704
43. Davis, supra, note 3 at 898
44. Id.
45. Supra, note 5 at 704-05. Counsel who opened in this form, "My lords, this is an appeal from the judgment of Mr. Justice Kekewich but I hasten to add that this is not my only ground of appeal.", may have scored well under the heading of "Interest Arousal" but probably escaped unscathed only because none of the likeable justice's friends heard the appeal. S. Jackson, supra, note 40 at 83-84. Ridicule is a prohibited weapon. Levitan, supra, note 7 at 66
46. A judge who is troubled might not give his full attention to the arguments. Counsel's attire then should not divert the court from the contentious issue and should mirror the importance of the process. See Jackson, supra, note 7 at 862
jeopardizing in the eyes of some observers their indifference in the cause. Therefore, consummate tacticians never compliment a justice for such accolades often embarrass the recipient and irritate his brethren. If the opinion of a sitting judge is useful, counsel discusses it, but in a manner suitable for any other work.

Judges undoubtedly wish to be held in high esteem by members of the bar, but the appellate oral presentation is not the time to deliver plaudits.

While hearings are formal occasions, serious because of the interests at stake, they need not be sterile and solemn. Normal persons labor under physical limitations and periods of intense concentration necessitate relief. Thus felicitous humor is welcome, although some dissenting voices can be heard. It is Lord Macmillan’s opinion that humor “has a curious and almost incalculable psychological effect” and Lord Chief Justice Erle affirms that “[t]he court is very much obliged to any learned gentleman who beguiles the tedium of legal argument with a little honest hilarity.”

The benefits of a humorous assertion or response are identifiable.

47. This sensitivity no doubt explains some vitriolic reactions prompted by rather innocuous compliments which touched judicial nerves. Remember Lord Hewart’s words in The King v. Sussex Judges, ex p. McCarthy, [1924] 1 K.B. 256 at 259 that it “is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”
48. Rall, supra, note 1 at 131. Judicial modesty is by no means uniform but the general rule is a good one.
49. Jackson, supra, note 7 at 804
50. See Rall, supra, note 1 at 131
51. Freedman, supra, note 7 at 298. Expert advocates realize though that there can be too much of a good thing.
52. As a critic Dean Prosser looks with some disfavor on legal levity: “Judicial humor is a dreadful thing. In the first place, the jokes are usually bad, I have seldom heard a judge utter a good one. . . . In the second place, the bench is not an appropriate place for unseemly levity. The litigant has vital interests at stake.” Preface to The Judicial Humorist at vii (Prosser ed. 1952). The first observation is a matter of personal opinion but the Dean’s remarks assume the lighter moments are without value unless terribly funny. That would be valid from an entertainment perspective but that is not the approach to consider. The proper question is, does legal humor contribute to a full hearing of the question. For the reasons asserted in the text an affirmative answer is justifiable. The caution of Sir Gervais Rentoul, K.C. is well taken: “Humour must be sparingly used even if at times it serves a useful purpose; facetiousness is not to be encouraged, because the issues are generally too serious a matter for the parties.” The Art of Advocacy, supra, note 7
53. Macmillan, supra, note 7 at 27
54. L. J. Bigelow, supra, note 40 at 373
Lord Macmillan believes it dissolves tension. A point humorously made will not quickly be forgotten. Erskine possessed this flair for one writer commented that "he was perpetually winning men's opinions by tickling their sense of humour." A clever remark will certainly give one the court's attention for the upcoming argument. No appellate court could ignore an opening like this: "My lords, this is an appeal from the judgment of Mr. Justice Kekewich but I hasten to add that this is not my only ground of appeal." Humor is suspect though when used in a personal way. Personal affronts are disruptive of the process and the same is true whether humorous or not. The following jibe, uttered by Serjeant Davy while in the west country, runs afoul of this directive: "The farther I journeyed toward the West, the more convinced I was that the wise men came from the East."

A timely barb can undo a specious argument. As well, laughter can sometimes give counsel time to fashion the proper response which will answer a judicial question or defuse a potentially dangerous situation. It is effective then as a disguised plea for time. Furthermore, a humorous incident shared by counsel and the court symbolizes the common purpose and origin of the participants. This identity was apparent to those who observed Professor Norman's argument in *Harelkin v. University of Regina*, a case involving a discharged student in the school of social work. The appellant encountered judicial turbulence at the outset and Mr. Justice Spence finally leaned forward and asked Professor Norman, counsel for the appellant, if it was his position

55. *Supra*, note 7 at 27
56. See Freedman, *supra*, note 7 at 298
57. L.J. Bigelow, *supra*, note 40 at 52
58. S. Jackson, *supra*, note 40 at 83-84
60. L.J. Bigelow, *supra*, note 40 at 99
61. Some judges tend to capitulize the advocate's position and by doing so, trap unwary counsel should agreement be expressed with the court's restatement. Placed in such a quandary Edinborough's onetime Dean of the Faculty of Advocates responded, "My Lord, while fully appreciating the benevolence which has prompted your Lordship to come to my assistance, may I be permitted, for reasons which your Lordship will understand, to state my case in my own way." Macmillan, *supra*, note 7 at 28. Mr. O'Driscoll, Q.C. cautions counsel against an inconsidered concurrence. *Supra*, note 6 at 211
62. (S.C.C. March 30, 1979) (unreported)
that one had to be neurotic to be a social worker. A slight smile accompanied the delightful response, "My lord, I do not think I have to make that point to carry the day."\(^{63}\) Levity may also stamp the advocate as an objective participant, able, with some detachment, to see the lighter side of the controversy.\(^{64}\)

A humorous sally is often spontaneous or even inadvertent but there is nothing objectionable about preconceived efforts. In fact, the court's best known wit, Lord Darling, was at his best after careful consideration of the appropriate line.\(^{65}\)

Again, the formal nature of the surroundings will dictate the forms of expression employed, but counsel should not forego colloquialisms when the context makes it the most attractive mode of communication. Counsel who stated "My opponent is spitting into a rather strong wind" has memorably reminded the court that precedents favor the speaker's position.\(^{66}\) Communication is of course advanced when the participants have a large vocabulary to draw on, but an appellate hearing is not an invitation to parade one's learning. Rather, an advocate uses words to transmit concepts which advance his client's position, not his own standing.

Unless counsel is relaxed, satisfied with the preparatory work, useful energy will be tapped by nervous needs.\(^{67}\) The best advocates have confidence in their abilities and this allows them to participate fully in the process. As they are comfortable in their surroundings, the likelihood they will be themselves increases, which in turn frees all their resources for the tasks at hand. The court senses this confidence and is attentive.\(^{68}\) Without this boldness, the advocate

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63. This is the writer's record of the exchange which Professor K. E. Norman has confirmed.
64. Freedman, supra, note 7 at 298-99
65. Mr. Jackson suspected "that his more literary quips were cooked over the midnight oil and served fresh and piping hot in Court the next morning." Supra, note 40 at 26
66. Gordon, supra, note 7 at 452
67. Counsel who worry about inadequate research efforts always wonder if something crucial has been omitted. Such doubts plague most advocates but undermines the confidence of those with genuine reservations. As a result counsel constantly anticipate the imminent destruction of their position, which impairs their effectiveness as forceful advocates. To combat disconcerting doubts a smart pleader will thoroughly research his problem.
68. Freedman, supra, note 7 at 295. The best advocates let their own characters stamp their work.
who is well read,\(^6\) imaginative,\(^7\) has "a catholicity of interest",\(^8\) and an excellent command of the English language will labor under a self imposed handicap, his full powers never unfettered.

III. **Value of Oral Presentation**

Counsel commit a grievous error if they underestimate the value of an effective oral presentation.\(^9\) Even in the United States where strict time limits are observed, judges and lawyers have regularly proclaimed the multiple virtues of oral argument.\(^10\) An American Supreme Court justice has acknowledged that the Court relies "heavily on oral presentation",\(^11\) and with reference to the Canadian court of last resort Mr. Robinette, Q.C. maintains that "[t]he court has always recognized the extreme importance of oral argument."\(^12\) Chief Justice Laskin has certainly revealed his preference for the "spoken word."\(^13\) Mr. Justice Jackson's

69. Lord Macmillan believes that outstanding pleaders have filled their minds "with the treasures of our great literary inheritance". *Supra*, note 7 at 28-29. See Jackson, *supra*, note 7 at 863. Mr. Justice Frankfurter must have had the same convictions for he advised a young man readying himself for the study of the law to read good books, view superb paintings and live life to the full. Letter reproduced in Maloney, *supra*, note 6 at 148

70. Imagination is an invaluable asset in all court work. Freedman, *supra*, note 7 at 296-97

71. Diverse interests lead to balanced judgments. Jackson, *supra*, note 7 at 863. "He will draw inspiration not alone from the literature of the law but from the classics, history, the essay, the drama and poetry as well." *Id.* Mr. Justice Jackson might well have had Chief Justice Duff in mind when composing that list. For a description of Chief Justice Duff's extensive interests see Campbell, *supra*, note 39 at 250-51

72. Ineffective pleaders though are a problem. An Illinois judge complains "that many lawyers merely read from their briefs and I consider oral arguments a waste of the court's time in most instances." Rall, *supra*, note 1 at 117 n.23


75. Robinette, *supra*, note 7

76. Seminar on Advocacy in the Supreme Court of Canada held in Saskatoon, Canada, February 17, 1978.
sentiments are unmistakable, for he urges the bar to "make its presentation for oral argument on the principle that it always is of the highest, and often of controlling importance." 77

The explanation for this enthusiasm is apparent. A skilled advocate will streamline a bulky record and place the issues in perspective. 78 Oral argument obliges counsel to stake their ground and summarize their position. 79 The verbosity which characterizes the written presentation is stripped away. 80 This aids the court's understanding and as it expedites the entire process the bench will listen. 81 The decision makers appreciate the opportunity to quiz counsel as it enables them to highlight what divides the parties and perhaps to view the case from an entirely new perspective. 82 Judge Loughran also believes that there is an intangible element present with the oral argument: "The printed word of the ablest advocate, to me at least, falls short of the same arguments when heard face to face through his living voice." 83 Others relish the seminar atmosphere and the excitement present when educated persons struggle for answers to complex problems. 84

Advocates also can justify Mr. Freedman's claim that it is "impossible to overestimate the importance of oral argument." 85 There is no better time to emphasize one's best arguments and construct a framework that will support a possible favourable decision. It is probably the single occasion counsel has the full court's attention 86 and it is undoubtedly counsel's best opportunity to discuss the case with the judges. This is because judicial questions enable counsel "to see into the workings of the mind of the judge." 87 After an expert sits down the court knows exactly what counsel's position is on all relevant points.

77. Supra, note 7
78. Weiner, supra, note 5 at 59; see Hiscock, supra, note 7 at 139
79. Gordon, supra, note 7 at 446
80. See Loughran, supra, note 7 at 6; Robinette, supra, note 7
81. Wilkins, supra, note 2 at 116
82. Gordon, supra, note 7 at 445-46; Kaufman, supra, note 7 at 171. It is Mr. Robinette's view that "[t]he real merit of oral argument is that in the cross fire of discussion the issues become crystallized and vivid." Supra, note 7. See also Weiner, supra, note 5 at 59
83. Supra, note 7 at 6. Chief Judge Kaufman puts it this way: "An oral argument is as different from a brief as a love song is from a novel." Supra, note 7 at 171
84. Id.; see also Hiscock, supra, note 7 at 139; Kaufman, supra, note 7 at 171
85. Supra, note 7 at 302
86. Rall, supra, note 1 at 118
87. Freedman, supra, note 7 at 308
Unfortunately though, judicial participation does unnerve some advocates, and those withering under a barrage of queries, might if they have an inadequate understanding of the process, resent this interruption of their carefully constructed arguments. Counsel are mistaken if judicial questions are considered evidence of unfriendly orientation for judicial queries are invariably a plea for enlightenment. A discerning advocate knows that an appellate court is "not designed as a dozing audience for the reading of soliloquies", accepts his responsibility to help judges create law and acknowledges that his major function is to answer questions. For these reasons, capable advocates welcome the opportunity to clarify matters the judges consider important but which are unclear to them. Is it not fair to suggest that counsel whose preference it is that judges keep their questions to themselves have little confidence in their persuasive abilities?

A good advocate does not evade the court's questions. If the judge's timing is unfortunate, he answers the question quickly and indicates a more complete answer will follow. Of course, many questions are unpredictable and the unknown is disconcerting. There are of course questions which must be asked and for these experienced counsel will have prepared answers. But is it not the unexpected interrogatory which makes the oral argument a thrilling experience? Judge Hiscock sympathizes with this position because it is his opinion that interruptions confuse inadequate advocates and endanger the logical presentation of intelligent counsel who will in all likelihood discuss the judge's point anyway, and better if left to his own devices.

88. Many questions are unpredictable and the unknown is disconcerting. There are of course questions which must be asked and for these experienced counsel will have prepared answers. But is it not the unexpected interrogatory which makes the oral argument a thrilling experience? Davis, supra, note 3 at 858
89. Gordon, supra, note 7 at 450. Judge Hiscock sympathizes with this position because it is his opinion that interruptions confuse inadequate advocates and endanger the logical presentation of intelligent counsel who will in all likelihood discuss the judge's point anyway, and better if left to his own devices. Supra, note 7 at 140
90. Jackson, supra, note 7 at 862; Wilkins, supra, note 2 at 121
91. Anderson, supra, note 7 at 703; Davis, supra, note 3 at 898; Freedman, supra, note 7 at 307; Gordon, supra, note 7 at 450; Wilkins, supra, note 2 at 122
92. Frankfurter, supra, note 32
93. Rombauer, supra, note 7 at 182
94. Freedman, supra, note 7 at 308; Gordon, supra, note 7 at 450; Wilkins, supra, note 2 at 122. An irrelevant question identifies for the advocate those who have misunderstood the argument. If a major proposition is involved then remedial measures are necessary. Anderson, supra, note 7 at 704
95. Rall, supra, note 1
96. O'Driscoll, supra, note 6 at 211; Rall, supra, note 1 at 129; Jackson, supra, note 7 at 862; Wilkins, supra, note 2 at 122
97. See Rall, supra, note 1 at 129; Wilkins, supra, note 2 at 122. Mr. Freedman urges a prompt complete answer because of the dramatic impact such produces. Supra, note 7 at 308. Lord Macmillan endorses this approach as it meets a legitimate need of the questioner. Supra, note 7 at 29. Mr. Medina sanctions dilatory responses if a later point would be more propitious. Supra, note 3 at 143. Mr. O'Driscoll, Q.C. thinks momentary delays are acceptable, otherwise counsel should answer immediately. Supra, note 6 at 211. Chief Justice Wilkins did not
questions of a rhetorical nature need no answer and if counsel is unsure whether a comment demands a reply he will ask, ‘Is that a question?’ But woe unto the person who postpones answers with the promise of a future response which never materializes.\textsuperscript{98} Lord Macmillan perjoratively describes such procrastinators as issuers of ‘promissory notes’.\textsuperscript{99}

As no position is impregnable counsel should expect damaging questions.\textsuperscript{100} An honest answer and the admission certain hurdles bar the way does not foreclose one from stressing the countervailing considerations which offset the admitted deficiencies.\textsuperscript{101} The court appreciates frankness and Lord Macmillan believes that concessions invoke the judges’ aid.\textsuperscript{102} He explains, ‘You will almost invariably find that the first instinct of the judge is to assist you by pointing out that the evidence is less damaging to you than you presented or that the precedent is on examination distinguishable.’\textsuperscript{103}

When an advocate is without an answer this should be disclosed.\textsuperscript{104} Provided that this is an infrequent response and the tolerate evasiveness but agreed time should be granted if an immediate answer ‘would require too long a digression.’ \textit{Supra}, note 2 at 122

\textsuperscript{98} Wilkins, \textit{supra}, note 2 at 122

\textsuperscript{99} \textit{Supra}, note 7

\textsuperscript{100} Questions will relate both to the facts and the law.

\textsuperscript{101} See Freedman, \textit{supra}, note 7 at 308

\textsuperscript{102} Macmillan, \textit{supra}, note 7 at 24

\textsuperscript{103} Id. In a multipartite court judges will often entertain different views and perhaps ask questions which will prompt answers satisfactorily meeting another judge’s objections. \textit{See Regina v. Cote} (1974), 21 C.C.C. 2d 474 (Sask. C.A.) for an example of judicial assistance.

\textsuperscript{104} Rombauer, \textit{supra}, note 7 at 182; Freedman, \textit{supra}, note 7 at 308. This is precisely what the Attorney General of Texas did while arguing the respondent’s side in a capital punishment case, \textit{Jurek v. Texas} (1976), 428 U.S. 262. The following transcript is reproduced in 90 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law (1977) 617 at 647-49:

THE COURT: Before you leave that — this is not involved in the present case, but you have brought it up. Is there a requirement under Texas Law that the defendant must have known that the victim was a police officer?

MR. HILL: No, that he is in the course of duty and that I —

THE COURT: Must he know that he is a police officer?

MR. HILL: I frankly don’t know.

THE COURT: Or has that been decided perhaps?

MR. HILL: I frankly —

THE COURT: Most of the Texas cases, they were in uniform, as I remember.

MR. HILL: I beg your pardon?

THE COURT: Most of the Texas cases, they were in uniform. Am I right?
question is not an obvious one counsel should have anticipated, the incident will do little harm. No one likes to acknowledge gaps in their preparation, but the alternative of dissimulation is far more dangerous. Ignorance is much easier to admit than to feign learning, and the advocate foolish enough to attempt the latter will soon be unmasked, with the consequence that the discovery will do far more damage than an original concession. As well, the good lawyer does not hesitate to reformulate a previous erroneous answer to avoid the pitfalls associated with forced and illogical justifications. And if counsel entertains any doubts about a question, the proper course is to seek a restatement, a request the court will honor, if the matter is significant. Should counsel’s response prove inadequate nothing is gained by giving the court time to reflect on the lawyer’s deficiencies. Dawdling is not advisable here and besides, counsel’s alacrity can be checked if the court wishes to probe with further questions.

MR. HILL: Yes, sir, but I think what Justice Stewart may be asking, Mr. Justice Marshall, is that someone is impersonating — or perhaps you just simply

THE COURT: A plain clothes officer.

MR. HILL: He is a plain clothes officer; you are not aware that he is in the course of duty.

THE COURT: That’s right. We dealt with that here in —

MR. HILL: I will check it for you and —

THE COURT: Well, it is not relevant to this case, but I just —

MR. HILL: My impression is that knowing would be involved.

THE COURT: Mr. Attorney General, just to save you the trouble of looking — I think I quote from your code — the person murdered was a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman. The defendant knew —

MR. HILL: I appreciate that very much, Mr. Justice Blackmun. I have tried to prepare very diligently for this matter, and I obviously didn’t do a hundred percent —

THE COURT: Well, I think it is an obvious answer. You don’t have a Feola problem.

105. Jackson, supra, note 7 at 862
106. Jackson, supra, note 7 at 862; Medina, supra, note 3 at 143
107. Rombauer, supra, note 7 at 182
108. This often gives counsel valuable time to prepare a response.
109. Nothing is gained by the agonizing period of silence which often follows poor answers. A slight pause emphasizes brilliant responses, but that is not the effect one seeks with dismal ones.
In spite of the foregoing, there exists two types of questions which counsel may politely decline to answer. No question should be answered which necessarily draws on facts outside the record.\textsuperscript{110} Nor should counsel deal with issues which are irrelevant, which may happen if the judge interjects facts which are not on the record.\textsuperscript{111} Care must be taken with this last group for judges seldom characterize their inquiries in this fashion. A persistent judge may draw an answer but such should include the qualification that the point is not in issue for the reasons given.\textsuperscript{112} An experienced counsel says escape is possible only if "the judge next to him will nudge him to shut up and let you go on with your argument."\textsuperscript{113}

This is not an ironclad rule and occasionally counsel must be prepared to discuss relevant hypothetical situations which will test the validity of propositions in border areas. Barristers have no reason to object to queries of this nature.

To summarize, if a judge considers a matter important enough to warrant a question, counsel should, as a matter of respect answer the question.\textsuperscript{114} Besides, the advocate who copes with incisive questions will strike the court as a reliable and creditable authority.\textsuperscript{115} Furthermore, the facts and the law may favor the other side and the last thing a good advocate wants to do is antagonize a judge by ignoring his queries.\textsuperscript{116} Counsel most certainly should never reveal their distaste for judicial participation. The lawyer who, after answering a question turned to the public gallery and exclaimed, "Is there anyone else present who would like to ask any questions?", is not a model to emulate.\textsuperscript{117} Judicial interrogatories are not an invitation to counsel to abandon the rules of common courtesy.

There is not a perfect correlation between a judge's impressions at the conclusion of oral argument and the final disposition, but the identity is strong enough to warrant the devotion of considerable

\textsuperscript{110} Denecke, \textit{supra}, note 7 at 361; Gordon, \textit{supra}, note 7 at 450; Wilkins, \textit{supra}, note 2 at 117. Even if counsel is aware of crucial facts these cannot be referred to when the record is silent.

\textsuperscript{111} Gordon, \textit{supra}, note 7 at 450; Jackson, \textit{supra}, note 7 at 862; O'Driscoll, \textit{supra}, note 6 at 211

\textsuperscript{112} Rail, \textit{supra}, note 1 at 130

\textsuperscript{113} \textit{Id.} An advocate turns to the full court for protection whenever a partisan judge's conduct jeopardizes a fair hearing. Freedman, \textit{supra}, note 7 at 305

\textsuperscript{114} Medina, \textit{supra}, note 3 at 143; Rail, \textit{supra}, note 1 at 129

\textsuperscript{115} See Freedman, \textit{supra}, note 7 at 308

\textsuperscript{116} Medina, \textit{supra}, note 3 at 143

\textsuperscript{117} Wilkins, \textit{supra}, note 2 at 121
energies to the preparation of a convincing oral presentation. Professor Weiner suspects that an advocate’s performance may be crucial in up to 50 percent of the cases.

IV. Preparation

Given the importance of oral argument, adequate preparation is indispensable. Disorganized, counsel will be ineffective and put in full retreat by a challenging court. One side has to lose but the explanation should never be counsel’s unpreparedness. This admonition is well taken: “And let the work be done, not for the mere gain, but as the artist works, for the satisfaction of making each piece of work as consummate a piece of craftsmanship as you can.” There is more than personal satisfaction at stake, for the lawyer does owe a duty to the state and court, and plays a crucial role in the legal process.

A successful advocate does everything that will free the mind of all distractions so that there is nothing to concentrate on but the merits of the case. This is why care has to be taken beforehand to clarify roles if counsel does not act alone. An interrupting associate persistently offering advice is counter-productive, shattering the advocate’s train of thought and probably the court’s too. Associates can be valuable but their contribution is usually restricted to the location of some document in the record and the comfort of another mind during recesses when the proceedings can

118. Currie, supra, note 7 at 562; Jackson, supra, note 7. Professor Weiner’s study sets the figure anywhere between 60 and 97 per cent. Supra, note 5 at 58 n.7
119. Advocacy makes the most difference in those cases “where no one would suppose ‘that civilization will come to an end whichever way this case is decided.’” Weiner, supra, note 5 at 58
120. Kaufman, supra, note 7 at 172; O’Driscoll, supra, note 6 at 206
121. Hilbery, Duty and Art in Advocacy (1946) in O’Driscoll, supra, note 6 at 206
122. See Canadian Bar Association, supra, note 16
123. Jackson, supra, note 7 at 861. If an advocate’s brown shoes bother him, and he is annoyed because he did not pack his black pair, he will purchase black ones. If his scuffed black shoes bother him they will be polished.
124. As a general rule lawyers avoid any division of presentation responsibilities, for judges do not respect such assignments as they tend to rob the proceedings of desirable flexibility. Mr. Justice Jackson would like a rule limiting one counsel to a side. Id. at 802. Rule 37 of the Rules of the Supreme Court of Canada state that “no more than two counsel for each party shall be heard on any appeal.” Mr. Rall, an experienced advocate, claims that the number of errors counsel makes rises exponentially when more than one argues a case. Supra, note 1 at 119
125. Jackson, supra, note 7 at 861; O’Driscoll, supra, note 6 at 208
be reviewed.\textsuperscript{126}

As the unknown can be disturbing, thinking novices who have never appeared in the court about to hear their case take time to observe its operations.\textsuperscript{127} These preliminary observations will settle any unarticulated doubts about general procedure and protocol and save vital nervous energy.\textsuperscript{128} Other advocates can be studied and their individual skills noted for future use. For example, an observer might discover that a timely pause silences a court trading comments amongst themselves,\textsuperscript{129} or that counsel argues minor points during this period.\textsuperscript{130}

Preliminary investigations may reveal useful information about a judge.\textsuperscript{131} It is true that reported opinions will be the primary source of helpful material, but other aids should not be neglected.\textsuperscript{132} For example, in \textit{Harelkin v. University of Regina},\textsuperscript{133} a due process case involving internal university procedures, counsel, aware of the extensive ties some members of the Court had with the academic community might decide to devote less time to an explanation of university procedures with which insiders would be conversant. Other information could save counsel from embarrassment. Mr. Freedman explains: "It is plain negligence for a lawyer to say in a case involving a will contest that the testator was of unsound mind

\textsuperscript{126} There is value in having someone comment on proposed courses of arguments.
\textsuperscript{127} Jackson, \textit{supra}, note 7 at 861
\textsuperscript{128} The tyro might wonder if the presiding judge introduces counsel, or will it be the appellant's task? Is opposing counsel referred to as "my friend" or "my learned friend"? Mr. S. T. Bigelow, Q.C. indicates the latter is correct. \textit{Supra}, note 7 at 33. These are admittedly easy matters to master but until this is done, doubts about them can absorb a disproportionate amount of energy. The foregoing applies to novices but even the veteran must check the correct pronunciation of words, the proper titles of judges in cases infrequently cited, and the names of the judges hearing his case. The polished advocate will not want to worry about these soluble problems.
\textsuperscript{129} Weiner, \textit{supra}, note 5 at 63. But others find this form of rebuke offensive and suggest that counsel continue the discussion with those listening. Medina, \textit{supra}, note 3 at 184. This is not the prevalent view though. Mr. O'Driscoll, Q.C. supports Professor Weiner's tactics. \textit{Supra}, note 6 at 212
\textsuperscript{130} See S. T. Bigelow, \textit{supra}, note 7 at 72; Rall, \textit{supra}, note 1 at 126
\textsuperscript{131} Judges are ordinary persons with life experiences they will bring to their judicial work.
\textsuperscript{132} Lord Macmillan consulted the "Who's Who". \textit{Supra}, note 7 at 23. Periodicals sometimes contain articles on prominent active judges. For example, Professor Gibson has written about Mr. Justice Dickson. \textit{Unobtrusive Justice} (1974), 12 Osgoode Hall L.J. 339
\textsuperscript{133} (S.C.C. March 30, 1979) (unreported)
because of his age, when one or more of the justices listening to his argument have already passed that age. "134

An outstanding lawyer is always well prepared, not only because oral argument is important, but because victory is never certain. Litigants seldom carry disputes to higher courts without considerable support for their cause — thus the need for eternal vigilance. 135 It matters not that the respondent was triumphant in the lower courts if the court of last resort is unsympathetic. 136 If the propositions that oral presentation is important and that triumph is never assured are accepted, then counsel without the time to prepare adequately should recognize the impropriety of their appearance. If hortatory is all a participant has to offer, such a person is a liability regardless of his standing.

Deficiencies which are apparent when one stands behind the podium were probably there when time for remedial measures existed. An advocate must be familiar with every case cited in the factum for its very presence therein identifies it as a valuable decisional aid. 137 This does not mean counsel can ignore relevant cases just because the factum makes no reference to them. The court may well seek counsel’s comments on how related areas of the law should affect the case at bar. 138 Besides, what appears as an important matter to a judge, might not strike counsel as such. Should this happen and the judges pose unexpected questions, only the advocate who is thoroughly schooled in his case will escape unscathed. Preparation introduces the dimension of flexibility which is essential in a socratic setting. Accordingly, superb counsel master not only the legal principles that directly govern the problem but related general principles as well. 139 An advocate who is equal to this task gains the court’s trust as a reliable source of information. The converse is also true — a judge who finds counsel’s responses inadequate will wonder if deficiencies exist elsewhere as well. 140

134. Supra, note 7 at 305. Lord Macmillan counsels that "[i]t is unwise to attack too violently the practices of landowners when that invaluable manual [Who’s Who] has informed you that a member of the Committee owns 30,000 acres . . . ." Supra, note 5 at 24
135. Denecke, supra, note 7 at 361
136. For example, in Canadian Indus. Gas & Oil Ltd. v. Saskatchewan (1977), 18 N.R. 107 the Supreme Court of Canada reversed the decision of the Saskatchewan Court of Appeal and the trial court which declared the impugned legislation valid.
137. This covers both the facts and the law.
138. Jackson, supra, note 7 at 861
139. Freedman, supra, note 7 at 306; Jackson, supra, note 7 at 861
140. Weiner, supra, note 5 at 11
Because judges draw these inferences lawyers follow simple precautions to eliminate any bases for untoward impressions.\textsuperscript{141} Careful proofreading of the factum will catch spelling errors and incorrect citations. If the factum is free of avoidable errors then counsel will not labor under initial handicaps, but, as Chief Justice Wilkins observes, ""[A]ny considerable number [of errors] tends to destroy confidence in the substance of the brief itself . . . ."",\textsuperscript{142} and counsel as well.\textsuperscript{143}

Obviously then, the factum a conscientious lawyer submits to the court is not a first draft, because it will be needlessly verbose, suspect in its organization, replete with inaccurate statements of the law either because of their generality or particularity, and imprecise in its expression of principle.\textsuperscript{144} For the same reasons an appellate court should not hear an oral presentation unexposed to thorough revision.\textsuperscript{145}

Careful attention to the oral presentation does not have as the goal memorization\textsuperscript{146} of any material.\textsuperscript{147} Instead, it is hoped that the familiarization process will prompt at a timely juncture questions and doubts which can be resolved.\textsuperscript{148} Sometimes vocalization creates a sensitivity to issues absent with sight alone.\textsuperscript{149} Practice makes it easier to anticipate judicial queries, which of course enables counsel to deliver planned responses. Vocalization emphasizes the presence of clumsy expressions\textsuperscript{150} and identifies those words the pronunciation of which counsel is unsure, or for

\begin{thebibliography}{150}
\item Currie, supra, note 7 at 561
\item Supra, note 2 at 119
\item Currie, supra, note 7 at 561
\item Denecke, supra, note 7 at 356
\item Jackson, supra, note 7 at 861; Weiner, supra, note 5 at 72. At the very least, Mr. Rall maintains, advocates should test their statement of facts. Supra, note 1 at 123
\item To overcome initial nervousness some counsel memorize their openings. Rall, supra, note 1 at 123. Nervousness tends to disappear with the commencement of the argument.
\item Gordon, supra, note 7 at 452; Medina, supra, note 3 at 140. I have seen counsel argue before the Seventh Circuit Court of Appeals in Chicago without notes but the presentation was invariably short and clearly not a recitation.
\item If counsel objectively evaluates the best aspects of both sides, potential judicial questions can be discovered and answered in the mind, well in advance of the oral presentation. Freedman, supra, note 7 at 300-301
\item This is certainly my experience as a law school instructor, one confirmed by several of my colleagues.
\item For example, Mr. O'Driscoll, Q.C. suggests that ""I submit"" is preferable to, ""I put it to you"", Supra, note 6 at 212. For a list of words and phrases to avoid see Cooper, supra, note 7 at 28-36
\end{thebibliography}
emotive reasons, are inappropriate, given the nature of the case. The removal of these rough edges fills counsel with confidence and impresses the court.

Mr. Justice Jackson urges advocates to "use every available anvil on which to hammer out your argument." 151 A discerning listener can help weed out unconscious speech patterns, such as the excessive use of "you know", "I mean", "okay", identify malapropisms, 152 and detect arguments, which are cogent only to a partisan, but would not survive objective scrutiny. 153 The complete counsel solicits the frank opinions of associates for an impartial impression points out not only arguments which must be eliminated as irrelevant, 154 but which need reinforcement. 155 In other words, a probing third party mind can reveal suspect areas in need of attention, with a powerful compact argument the result.

The good advocate appreciates what is at issue and presents to the court in a precise manner the merits of the side. Judges welcome such artists for they face a regular barrage of irrelevancies which jeopardize their concentration powers. And judges who labor long hours will not tolerate with good humor those who waste the court's time. 156 Lord Ellenborough, having endured a boring oration, in response to counsel's request as to when it would be the court's pleasure to hear the remainder of his argument said, "We are bound to hear you, and we will endeavor to give you our undivided attention on Friday next, but as for pleasure, that, sir, has been long

151. Supra, note 7 at 861. Mr. Maloney, Q.C. reports that senior accomplished barristers are not as a rule reluctant to share their thoughts with their more junior colleagues. Supra, note 6. Of course, the comments of any intelligent listener should be invited if the occasion presents itself.

152. A lawyer who argued in front of Mr. Justice Gordon of the Wisconsin Supreme Court referred to a decision as an "exhausting opinion". Gordon, supra, note 7 at 451

153. The moment a lawyer accepts a client's cause his objectivity diminishes. This is unavoidable but if counsel is aware of this phenomenon, realizes there is probably merit on both sides, the "perils of overtenacity" can be avoided. Freedman, supra, note 7 at 300

154. One of the "perils of overtenacity" is the loss of any ability to determine relevance.

155. Denecke, supra, note 7 at 358

156. Many judges devote their lives to their work. Mr. Justice Jackson reports that "Justices Brandeis and Cardozo were almost as retired as hermits and [that] Chief Justice Hughes withdrew from all social engagements . . . ." Supra, note 7 at 863. Chief Justice Duff's private secretary records the dedication of Sir Lyman. It was not unusual for the Chief Justice to work evenings and Sundays. Campbell, supra, note 39 at 249. That diligent judges are able to display any patience at all under trying circumstances the writer has witnessed, is most amazing.
Therefore, there is great merit in a screening process which produces a precise presentation, and preserves judicial patience.

Preparation is crucial, for the advocate stands alone behind the podium, dependent on his own resources to effectively forward the client's position and answer the court's questions. Admittedly, a lawyer can map the course of the argument but the nature and extent of the court's interest is not always predictable and major alterations, which this interest may prompt, will undo all but the masters of the art. An advocate does not have the luxury of contemplation once the proceedings commence yet a skilled performer will survive because of a quick mind and perfect knowledge of the fact pattern and the law. It is true, as Mr. Freedman maintains, that "the distinguishing hallmark of the advocate is the capacity to improvise and above all else to act spontaneously and intuitively in the heat of the battle" but what Mr. Nizer says of trial work is equally applicable to appellate endeavors: "Proper preparation is the be all and end all of trial success." Without prior study, even the most able lawyer, will not be in a position to derive maximum advantage from an oral presentation.

Accomplished speakers do not ignore any system which enhances their delivery, and Lord Macmillan specifically urges counsel not to "neglect the mechanical side of preparation." A judge thinks little of an advocate engaged in a frenetic search of the record and

157. L.J. Bigelow, supra, note 40 at 64
158. Mr. Freedman writes, "The more inexperienced the advocate, the longer will be his argument." Supra, note 7 at 309. Judge Anderson tells the story of the great evangelist who required a month's notice if his presentation was not to exceed twenty minutes, two weeks if the time was an hour but no notice if given unlimited time. Supra, note 7 at 701
159. Mr. Justice Wightman must have been a patient man. After counsel had repeated himself a number of times his Lordship sighed, "You've said that before." To counsel's reply "Have I, my lord? I'm very sorry. I quite forgot it." Mr. Justice Wightman bravely responded, "Don't apologize. I forgive you, for it was a very long time ago." S. Jackson, supra, note 4 at 20
160. To cover contingencies counsel prepares alternative "game plans" which are employed as the court's reaction is recorded. If opposition registers then the detailed argument is adopted and the outline form is abandoned. The latter is employed when judicial approval is met. See Weiner, supra, note 4 at 75
161. Supra, note 7 at 298. A lawyer whose preparation is deficient will not be in a position to improvise. Kaufman, supra, note 7 at 172
162. L. Nizer, My Life in Court (New York: Pyramid Books, 1963) at 10
163. Macmillan, supra, note 7 at 25
164. Davis, supra, note 3 at 893; Loughran, supra, note 7 at 5; Macmillan, supra,
counsel’s embarrassment may deleteriously affect the remainder of his presentation. 165

The sole measure of any aid is its utility and a number which follow have demonstrated their efficacy: (1) Lawyers have found that a tab system promotes mastery of the record, 166 however voluminous it may be. 167 These markers highlight the most important aspects, 168 and a short index typed on an accessible card covers the less significant. Any fact counsel plans to refer to is keyed to the record, lest the reference arouse the court’s curiosity. This artifice, of course, makes possible an automatic satisfactory answer. 169 A polished advocate does not waste the court’s time wading through the record, with the attendant risk that his and the court’s concentration, probably for good, will be lost. 170 (2) A sophisticated card system can assist counsel’s retrieval of legal information. 171 All case briefs are recorded on single cards and, overlapping, with just the case name at the bottom showing, attached at the top edge to counsel’s case file. Arranged properly a relevant case can be immediately spotted and the salient features taken in with a momentary glance. 172 Imaginative use of ink color codes will also add other dimensions to this system. 173 (3) An outline page on which the entire argument appears in headline form is also valuable. This serves as a ready reference sheet and gives counsel the flexibility needed in oral argument. 174 (4) Counsel who read from the reports carefully tab the appropriate pages and clearly delineate the quoted passage. Failure to observe these elementary

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165. See Rall, supra, note 1 at 123
166. Chief Justice Wilkins exhorts counsel to "Know the record!" Supra, note 2 at 116. Mr. Nizer could recite the record from memory but this is not what Chief Justice Wilkins had in mind. L. Nizer, supra, note 162. Professor Weiner maintains that lawyers who deny the necessity of mastering the record suffer from a hardening of the forensic arteries. Supra, note 5 at 69
167. Weiner, supra, note 5 at 70-71
168. A paper clip attached to a few important pages may prove useful.
169. Rall, supra, note 1 at 123. Counsel must have instant answers to questions involving the record. O’Driscoll, supra, note 6 at 213
170. Macmillan, supra, note 7 at 25
171. An advocate will be familiar with all the cases but this aid certainly increases one’s security, and hence, confidence in one’s ability.
172. This certainly is preferable to a comprehensive written statement which obliges the advocate to fix his attention on the statement rather than the court being addressed.
173. For example, all cases which support theory "X" might appear in red type.
174. Rall, supra, note 1 at 122-23
precautions force counsel to skim the page for what inevitably becomes an elusive passage. This frantic search can be eliminated if care is taken to highlight the borders of the quotation.\textsuperscript{175}

V. \textit{Manner of Presentation}

The concepts counsel argues are of fundamental importance, but not to be overlooked is the mode of presentation. Mr. Levitan explains it this way: "An unshaven, dirty-collared, baggy-suited salesman handicaps himself in selling, no matter how superior the merchandise."\textsuperscript{176} Obviously, how something is said does not change the content, but what the delivery does affect is the reception accorded the message, which is crucial in a court setting. A bad idea remains just that regardless of the technique used to explain it, but a good concept can be overlooked if it is not advanced correctly. The haberdashers make the same point when they maintain that a stylish suit will not put a buffoon into the boardroom, but that a poor appearance might keep a good prospect out.

An advocate will avoid conduct which diverts attention from his arguments, especially if it is objectionable. For this reason customary attire is advisable.\textsuperscript{177} A catalogue of disruptive conduct would also mention peripatetic advocates, of which it has been said, "nothing but distraction is the result of watching the gymnastic exploits of any advocate,"\textsuperscript{178} and other personal idiosyncracies such as pencil tapping, paper shuffling and change jingling.\textsuperscript{179} These problems are overcome though by the advocate who stands erect, resting his hands either by his side or on the podium.\textsuperscript{180} What is decried are movements which are incongruous with the speaker's topic. On the other hand, there is much to be said for the person who can effectively punctuate his speech with the appropriate gestures;

\textsuperscript{175.} Use a paper clip to find the page and a pencil mark in the margin and brackets to isolate the quotation. This works much better than the human memory.
\textsuperscript{176.} \textit{Supra}, note 7 at 61
\textsuperscript{177.} Mr. O'Driscoll, Q.C. describes proper apparel for the male advocate in his article on appellate advocacy. \textit{Supra}, note 6 at 207. The writer forwards no opinion on the desirability of this habit.
\textsuperscript{178.} Freedman, \textit{supra}, note 7 at 303
\textsuperscript{179.} How annoying this last pastime can be is illustrated by this tale. The judge, exasperated by counsel's incessant coin jingling, asked counsel how much change he had. To the reply of four quarters and a dime, the judge announced his citation of counsel for contempt of court with an accompanying one dollar fine, and concluded with this, "Now let us hear you rattle that damn dime, counsellor."
\textsuperscript{180.} Rombauer, \textit{supra}, note 7 at 182. Counsel must also be vigilant while seated for excessive note taking distracts some judges. Medina, \textit{supra}, note 3 at 140
the adept may express his bewilderment with a certain decision by scratching his head or raising his eyebrows.

Considerate lawyers speak loud enough to be comfortably heard.181 If the advocate is inaudible, which happens when the volume is no more than a whisper, the intention being the attraction of the bench’s attention, the value of even a brilliant argument is minimal.182 A good advocate will not strain his listener’s auditory powers.183 Equally objectionable is the lawyer who attempts to carry the day by the mere din of his voice.184 Mr. Freedman warns that such a speaker will “close the ears of the court to what he says”185 and Mr. Justice Jackson adds that “no judge likes to be shouted at as if he were an ox.”186 Excesses of this nature are concrete burdens, as is anything which detracts from the speaker’s theme.187

The size of appellate courts vary somewhat with the result that the volume necessary to make oneself heard in an intimate courtroom will not be the same as that needed in a cavernous chamber.188

Counsel will fare well if they abide by the fundamentals of good public speaking.189 Accomplished lawyers do not speak in a monotone, but like all good speakers, vary the emphasis to highlight important passages.190 This immediately signals the court something significant will be discussed. If this promise is not realized the court will subsequently ignore such signs, and counsel will lose a

181. Other suggestions: Mr. Medina advises one to “speak in a clear and distinct voice with as little harshness or discordancy as possible” and Mr. O’Driscoll favors “a loud clear voice”. Supra, note 3 at 140 and, supra, note 6 at 211, respectively
182. Medina, supra, note 3 at 139; Rall, supra, note 1 at 131
183. Davis, supra, note 3 at 896; Medina, supra, note 3
184. Medina, supra, note 3
185. Supra, note 7 at 303
186. Supra, note 7 at 861
187. Objectionable speech habits impair the advocates’ delivery and should be eliminated. A judge irritated by a profusion of “‘you know’, ‘aah’, ‘like’, ‘I mean’, will not appreciate any argument replete with these vexatious interjections.
188. The main courtroom of the Supreme Court of Canada is spacious and no doubt, partially in recognition of this fact, the Court now asks all advocates, whether Her Majesty’s Counsel or not, to speak from the inner bar. Mr. Justice Jackson described the acoustical properties of the American Supreme Court chamber as “‘wretched’ and suggested counsel adjust to the perceived signals from the bench. Supra, note 7 at 861
189. Weiner, supra, note 5 at 60
190. Medina, supra, note 3 at 140; Weiner, supra, note 5 at 61; Wilkins, supra, note 2 at 119-20
valuable aid. This is why Professor Weiner condemns the "ministerial cadence", which describes a regular pattern of emphasis with no apparent purpose. Of course, the precepts of public speaking rule out mumbling and Mr. O'Driscoll, Q.C. suggests that counsel "should speak slowly, but should not drag out his words."

A judge's adjudicative task is difficult enough as it is and they prefer not to suffer advocates with objectionable speech habits or voices which are either inaudible or thunderous. Nor does the boring advocate who reads his oral argument have any place in an appellate forum. Mr. Justice Jackson asserts that "if you have confidence to address the court only by reading to it, you should really not argue then." Besides, a reader forfeits the valuable opportunities offered by the spontaneous give-and-take with the bench.

Experts enthusiastically condemn readers197 and some courts do not stop at expressing their "disfavor" of the practice of reading. The Wisconsin Supreme Court rules specifically prohibited the reading of written argument. This distaste is deeply rooted as the following epithet used to describe a reader attests: "A brief reader is the lowest form of living animal." Readers are dismissed because they are boring and this conduct "places a needless barrier between a lawyer and his judicial audience." There are other compelling reasons why a capable advocate does not read his factum or prepared material. First, a judge can read the factum himself. An appellate judge acidly complained, "We may not be

191. Such practitioners are like the little shepherd who yelled "wolf" too often.
192. Weiner, supra, note 5 at 62
193. Id.
194. Supra, note 6 at 211
195. Davis, supra, note 3
196. Supra, note 7 at 861
197. Rombauer, supra, note 7 at 180; Davis, supra, note 3 at 896; Gordon, supra, note 7 at 448; Jackson, supra, note 7 at 861; O'Driscoll, supra, note 6 at 211; Weiner, supra, note 5 at 60; Wilkins, supra, note 2 at 122
198. Rule 44(1) of the Revised Rules of the Supreme Court of the United States provides: "Oral argument should be undertaken to emphasize and clarify the written argument appearing in the briefs theretofore filed. The court looks with disfavor on any oral argument that is read from a prepared text."
200. Wilkins, supra, note 2 at 122
201. Rail, supra, note 1 at 127
202. Gordon, supra, note 7 at 448; see Davis, supra, note 3 at 898
203. Rail, supra, note 1 at 121
able to think but we can certainly read." Second, the frequent interruptions of judges make the prepared text unsuitable for this form of dialogue. Third, the existence of written argument tempts counsel to adhere to it, a slavishness which is unwarranted given the function of the appellate hearing. Statutes or crucial written instruments such as indictments or contracts will be read, but other material only of necessity. Fourth, excessive attention to a written draft might cause an advocate to miss a telling judicial reaction. As well, some judges "like to meet the eye of the advocate", as this reinforces the co-operative nature of the venture. In short, the appellate hearing is not designed as an occasion for counsel lectures.

A good delivery enhances any argument and counsel would be remiss not to cultivate the good habits mentioned above. If a practice session with a keen and sympathetic listener improves the substance of the presentation, might it not also have similar benefits for the manner of the presentation?

VI. The Oral Presentation

Both sides will reap the rewards preparatory work provides but it is the appellant who has the first opportunity to use his erudition on his client's behalf. The appellant has the carriage of the case and the heavy responsibility of relating the fact pattern in an understandable and interesting format. Little is gained from a confused presentation yet the advantages of an artful effort are manifold. The interesting one stimulates the court, the dull one enervates it. As well, the court holds in high esteem counsel who open skilfully. The drawbacks of a poor portrayal are manifest. An inferior effort so confounds the court that the law can only be argued after judicial

204. Gordon, supra, note 7 at 448
205. Davis, supra, note 3 at 898; Rall, supra, note 1 at 126. Give the judge a reference to the record when anything therein is read, for the eye complements the ear. Davis, supra, note 3 at 898; Jackson, supra, note 7 at 804; Rall, supra, note 1 at 126. Never read pages of case opinions. The Wisconsin Supreme Court Rules stated, "Decisions relied upon may be stated in substance but not read." Supra, note 199. If something must be read "read to the court and not to the book or paper from which you are quoting." Rombauer, supra, note 7 at 182
206. Rombauer, supra, note 7 at 182
207. Jackson, supra, note 7 at 861
208. Weiner, supra, note 5 at 73; see also S. T. Bigelow, supra, note 7 at 30. Mr. Justice Frankfurter likened the hearing to a "socratic dialogue." Kaufman, supra, note 7 at 170
209. Medina, supra, note 3 at 140
intervention elicits the relevant facts and their chronology.\textsuperscript{210} To ensure an attentive court, prominent attorneys frame this question: "What would you like to hear about this case if you were the judge?"\textsuperscript{211} In other words, they ask what decisional aids the court needs and then govern their conduct accordingly. The "implements of decision" as Mr. Justice Homes described decisional aids\textsuperscript{212} cover both facts and the law.\textsuperscript{213}

The employment of this test should resolve many doubts advocates have about their presentation. It suggests that the introduction of the participants be the first matter attended to after the appeal is called, for in any discussion this is the polite and sensible arrangement. Because the appellant speaks first that side should identify counsel if the court does not take the initiative.\textsuperscript{214} Some writers would not have the appellant introduce opposing counsel, with the expectation the court would accord the respondent the same courtesy,\textsuperscript{215} but this cannot be the subject of hard and fast rules, and will depend on the practice of each court. However, these problems do not arise in the ultimate American, Canadian or Ontario courts as the presiding judge invariably undertakes this responsibility.\textsuperscript{216}

With introductions completed counsel can concentrate on the effective communication of the appellant’s case. But legal arguments must have some factual framework for the courts rarely

\textsuperscript{210} Inadequate counsel work explains the need for some judicial questions. See Anderson, supra, note 7 at 704. Mr. S. Jackson relates this admonition delivered by Mr. Justice Maule to a befuddled lawyer: "Mr. Barker, cannot you state your facts in some kind of order? Chronological is best but, if you can’t manage that, try some order. Why not alphabetical?" Supra, note 40 at 38. Lord Macmillan relates the same tale in his article. Supra, note 7 at 23
\textsuperscript{211} Davis, supra, note 3 at 896; Medina, supra, note 3 at 140; Rail, supra, note 1 at 124. Lord Macmillan puts a slightly different question: If you were the judge, how would you frame a judgment in your client’s favor? Supra, note 7 at 23
\textsuperscript{212} Davis, supra, note 3 at 896
\textsuperscript{213} Medina, supra, note 3 at 140
\textsuperscript{214} Gordon, supra, note 7 at 447. The introduction may take this form: "May it please your lordships [the Court], I am A.B., counsel for the appellant. Associated with me is my learned friend C.D. My learned friend, E.F., is counsel for the respondent." See S. T. Bigelow, supra, note 7 at 33; Rombauer, supra, note 7 at 181; O’Driscoll, supra, note 6 at 209
\textsuperscript{215} Rombauer, supra, note 7 at 181
\textsuperscript{216} O’Driscoll, supra, note 6 at 209. Chief Justice Burger generally announces the parties in the upcoming case and invites the appellant’s counsel by name to proceed whenever ready. When one speaker concludes his argument the court introduces the next by name as well.
decide abstract legal issues. Thus, care must be taken to prepare a receptive judicial mind which means the listener has to have enough preliminary information to determine and appreciate from the outset what is significant and relevant. This function the appellant commences by telling the court at the outset what area of law the appeal touches. Is it a defamation case, or a due process controversy? Then indicate the case history, outlining briefly the trial disposition and the appellate determination, if any. Some courts like to know whose work is under review and this information can be provided at this stage.

Mr. Davis would then state the facts but, with respect, to do so would be premature. The impact of the statement can be heightened if counsel explains the crucial issue before the court, as this introduces another relevance indicator. Counsel who fail to identify the issues before tackling the facts risk judicial confusion, a problem apparent from Mr. Justice Currie’s observation that “it is particularly annoying to a judge to have to listen to a long detailed statement of facts in complete ignorance of their significance until counsel, at his convenience, is ready to let the court in on the secret of what issues are being raised on appeal.” Only occasionally would a statement of the facts allow the court to correctly guess the reason for the inquiry. As well, deviation from this order does not release counsel from any obligation to pose the questions presented

217. Reference cases are the exceptions and many participants object to the abstract nature of these inquiries. See J. Lyon & R. Atkey, Canadian Constitutional Law in a Modern Perspective (Toronto: Univ. of Toronto Press, 1970) at 347-56
218. Accordingly, counsel must regulate the flow of information keeping in mind that the court’s familiarity with the case will not match his own. And even after the preliminary groundwork has been laid, one must not concede the court too much knowledge about the case. Rall, supra, note 1 at 124
219. Anderson, supra, note 7 at 702-3; Davis, supra, note 3 at 896; O’Driscoll, supra, note 6 at 209; Rall, supra, note 1 at 124; Wilkins, supra, note 2 at 120
220. Currie, supra, note 7 at 562-63; Rall, supra, note 1 at 124
221. Mr. Davis opines that “judges, like humbler men, judge each other as well as the law.” Supra, note 3 at 896. See the text associated with note 58 for the opening naming Mr. Justice Kekewich as the decision maker.
222. Supra, note 3 at 896
223. Weiner, supra, note 5 at 60
224. Currie, supra, note 7 at 563. Judge Anderson voices his displeasure this way: “[When counsel initially attempts something other than an outline of the questions to be argued] the court is very much in the position that an audience attending a joint debate would be in, if the discussion got under way without a statement of the subject being debated.” Supra, note 5 at 702
in "succinct and specific terms",\textsuperscript{225} it simply delays the inevitable and forces judges to interrupt and pry the information from intractable lawyers.\textsuperscript{226a} A sound opening will contain an initial statement of the questions presented by the appeal, but it may omit some of the other preliminary information, such as the case history and still retain its utility. Or, as some counsel prefer, the issues might precede other introductory material.\textsuperscript{226b}

A good statement of the questions presented has its rewards, a fact illustrated by Mr. Justice Frankfurter's testimonial that Chief Justice White merely had to state the question to disclose the answer.\textsuperscript{227} An opening which is free of confusing and irrelevant details and complex sentences no listener could understand, that incorporates prominent facts, gives the court some preliminary flavor, presents the appellant in his best light without violating the rules against bias, and fixes the court's attention, is effective.\textsuperscript{228}

The appellant enjoys a benefit that the respondent does not, for the former, unlike the latter, has the luxury of time in the formulation of the opening. On the bottomside counsel has to gauge the court's mood, evaluate the appellant's thrust, and in a comparatively short time digest all this and produce an attractive response. But, this flexibility can be a potent force in the hands of the adept. Obviously, the respondent's opening need not be extemporaneous if counsel has accurately anticipated the appellant's case and the court's response thereto.

\textsuperscript{225} Cooper, supra, note 7 at 68

\textsuperscript{226a} The following transcript reproduced in 83 Landmark Briefs and arguments of the Supreme Court of the United States: Constitutional Law 285, 287 (1977) contains the argument of the appellant in \textit{Michelin Tire Corp. v. Wages} (1976), 423 U.S. 276:

\begin{quote}
MR. MAY: Mr. Chief Justice, and may it please the Court:
This is a case which involves the import clause of the Federal Constitution and the proper interpretation and application of that clause to imported tires and tubes. The sole issue is whether tires imported without packaging and held for the sale by the importer in his warehouse in the original form in which imported are immune from local \textit{ad valorem} taxes by reason of the import clause.
The trial court upheld the importer's claim of immunity with respect to both tires and tubes. The Supreme Court of Georgia affirmed with respect to the tubes but reversed with respect to the tires, notwithstanding the fact that both the tires and the tubes are handled precisely in the same manner while in the importer's warehouse.
\end{quote}

\textsuperscript{226b} Currie, supra, note 7 at 563; O'Driscoll, supra, note 6 at 210

\textsuperscript{227} Cooper, supra, note 7 at 77

\textsuperscript{228} \textit{Id.} at 81-103; Weiner, supra, note 5 at 63-67. For examples of effective openings see Anderson, \textit{supra}, note 7 at 702 and Weiner, \textit{supra}, note 5 at 63-65.
After the questions presented have been addressed, those who excel set aside time for a lucid exposition of the facts, which are

The following meets the standards outlined in the text: "This case . . . involves the question of whether leaking water pipes can cause a constructive eviction; the case also involves the issue of whether a landlord's recovery against his tenant who vacates during the pendency of a valid lease should be reduced by the landlord's failure to mitigate damages. Otherwise stated, appellant seeks to establish that dripping water pipes, which irritate a commercial tenant's customers, interfere with the operation of the tenant's store and perhaps cause a loss of business, are a substantial interference with the tenant's enjoyment of the premises which can terminate a lease. If the court finds that there has been no constructive eviction, then appellant wishes that his landlord's recovery for unpaid rent should take into account the failure to get a new tenant for the remainder of the term." The next example deserves no accolades for its distinctive feature is total confusion. At issue in Runyon v. McCrary (1976), 427 U.S. 160 was the lawfulness of private discrimination. The following transcript is reproduced in 83 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law (1977) 859 at 861-62:

MR. CHIEF JUSTICE BERGER: We will next hear argument in No. 75-62, Runyon v. McCrary; No. 75-66, Fairfax-Brewster School v. Gonzales; No. 75-278, Southern Independent School Association v. McCrary; and No. 75-306, McCrary v. Runyon.

Mr. Koutoulakos, you may proceed whenever you are ready.

MR. KOUTOULAKOS: Mr. Chief Justice, Honorable Justices:
I represent the Bobbe's School, which is Mr. and Mrs. Runyon, who are operating it; and I will limit my argument to the narrow areas of what I consider the crucial issue in this case and, if necessary, will rebut on the point of the statute of limitations on the right of attorneys' fees.
Now, first let me touch on the facts a little bit as to the reason why we are here. The Bobbe's School is a small school in Arlington, Virginia — in Fairfax, Virginia; it is right on the line — that operates a private school. It has been stipulated in the facts that the school is not supported in any way by any Federal or state money and it depends entirely in its support upon the student enrollment.
Insofar as the Bobbe's School is concerned — now, this case was consolidated with the Brewster School — but insofar as the Bobbe's School is concerned, Mr. and Mrs. McCrary and Mr. and Mrs. Gonzales testified — and, of course, this is unrebutted — that, as a result of a telephone call — this is, by both parties, one in '69 and one in '71 or '72, as I recall — and no further contact and no formal application — as a result of a telephone call, it brought into play Section 1981 of the Civil Rights Act that we are now here under. And the court, upon hearing evidence — and there is a serious question in my mind as to whether or not — and the dissent was in agreement with what I am going to say: that there is a serious question of whether or not they made out a case. They certainly did not rebut the fact that there are selective standards of exclusion by our school. There is no evidence contrary to that. I think all the evidence is clear that no one would be admitted on the basis of a phone call. There has to be a formal application and certain admission policies that are necessary, such as a medical examination, a personal interview with a parent, and, based on that, then it is determined as to whether or not the person is to be admitted. Now, it
developed just like a story-teller would.\textsuperscript{229} This is part of a building block process which enables counsel to eventually meaningfully discuss the law.\textsuperscript{230} Without facts, legal principles are of negligible utility.

Experts anticipate questions the bench might have and relate the facts to meet them.\textsuperscript{231} But there is no guarantee that even an impeccable statement of the facts will exhaust the court's curiosity and one must be ready for all queries. Yet, without a doubt, a superb performance here will reduce the number of judicial interruptions, for most listeners will not be struggling with the facts, the explanation for many queries.\textsuperscript{232} A good tale not only minimizes the need for questions but advances the cause considerably, as Professor Llewellyn explains: "It is a question of making the facts talk. . . . The court is interested not in listening to any lawyer rant, but in seeing, or better, in discovering, from and in the facts, where sense and justice lie."\textsuperscript{233} Mr. Davis supports this view, which again underlines the importance of this phase of the argument, in these words: "[I]n many, probably in most, cases when the facts are clear, there is no great trouble about the law."\textsuperscript{234}

seems to me that the bedrock of what the plaintiffs relied upon to be here is the \textit{Jones} case. First, starting off with Section 1981 and just going briefly, it says that all persons within every state and territory to make and enforce contracts to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

Now, I will jump to the \textit{Jones} case, because as I say, that seems to be the foundation of private discrimination and, really, that is what I think we are here on. Now, first, at the outset, I want to make this observation: Being of Greek heritage, it is not a question of whether I agree or don't agree with restrictive policies. I am here, as Mr. Justice Marshall used to in the old days, to support individual rights in this battle to eliminate abuses. Well, I am here in support of an individual right of a citizen in this country or any person in this country: the right of privacy and the right to freely choose his associates.

\textsuperscript{229} Currie, \textit{supra}, note 7 at 563; Weiner, \textit{supra}, note 5 at 68; Wilkins, \textit{supra}, note 2 at 120. Judge Kaufman contends implicitly that master advocates and spellbinding narrators share common ground. \textit{Supra}, note 7 at 171

\textsuperscript{230} Wilkins, \textit{supra}, note 2 at 120

\textsuperscript{231} Medina, \textit{supra}, note 3 at 140-41

\textsuperscript{232} Weiner, \textit{supra}, note 5 at 69

\textsuperscript{233} K. Llewellyn, \textit{The Common Law Tradition: Deciding Appeals} (1960) in Rombauer, \textit{supra}, note 7 at 173

\textsuperscript{234} Davis, \textit{supra}, note 3 at 896. Mr. Justice Jackson indicates that the American Supreme Court divides more often on the laws applicability to the facts, not what the law ought to be. \textit{Supra}, note 7 at 803. Judge Loughran confesses "that the charm of a lucid fact presentation seems one of the best arguments of all." \textit{Supra}, note 7 at 5. See also Rall, \textit{supra}, note 1 at 119
One should not underestimate the considerable interest the highest courts have in the facts.

A proper statement of the facts will be accurate, complete, candid and sensibly ordered, the last factor alone the source of some disagreement amongst the experts. Some favor a chronological presentation, the assumption being that such is the easiest to grasp; others would initially emphasize the essential facts and elaborate subsequently, and still others recommend a topic division.

No respected advocate denies the obligation imposed upon the profession to reveal all the important facts to the court, and should this duty be shirked, the respondent will, with particular delight, remedy the omission. If unethical conduct of this description does not forfeit any claim to professionalism, these gaps will certainly confuse the court, to the detriment of the appellant, undermining as it will, the case.

However, with proper emphasis the merits of one side can emerge. This is not an invitation to deceive the court but simply recognition that facts can be characterized many ways, some more desirable than others, depending on the examiner's perspective. Furthermore, emotive words which connote positive images can be incorporated. Just because reference to certain concepts will

235. Medina, supra, note 3 at 141
236. Davis, supra, note 3 at 897; O'Driscoll, supra, note 6 at 213
237. Davis, supra, note 2 at 897; Gordon, supra, note 7 at 448; Jackson, supra, note 7 at 803; Medina, supra, note 3 at 140; Rall, supra, note 1 at 125
238. Mr. Davis notes that it is the natural way to tell a story. Supra, note 3 at 897. Mr. Rall comments on the ease of composition. Supra, note 1 at 125
239. Weiner, supra, note 5 at 68
240. Jackson, supra, note 7 at 803
241. Currie, supra, note 7 at 563; Davis, supra, note 3 at 897; O'Driscoll, supra, note 6 at 213
242. Wilkins, supra, note 2 at 121. After such a disclosure the court's confidence in the appellant will disappear. Currie, supra, note 7 at 563
243. Davis, supra, note 3 at 897; Medina, supra, note 3 at 141
244. Davis, supra, note 3 at 897; O'Driscoll, supra, note 6 at 212
245. See Weiner, supra, note 5 at 64-65. The appellant in Runyon v. McCrory (1976), 427 U.S. 160 maintained that an operator of a private school had the right to select its own students using whatever standard it wished. Mr. Koutoulakos argued that God, democracies and people who love children would see the merit in his case. The following transcript is reproduced in 83 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law (1977) 859 at 868-69:

THE COURT: The state law doesn't give you the right to refuse Negroes.
produce favourable associations in the judge’s mind is no reason to reject them. This is not sharp practice but common sense.\textsuperscript{246} The following passage, from \textit{McGrath v. Zander},\textsuperscript{247} where the court had to decide if the respondent’s marriage to a German national made her an enemy alien, illustrates the potency of emotive words:

Appellee, a native born adult citizen of the United States, with home and domicile in New Orleans, went to Germany in June, 1939 for a visit with her return passage booked for September 9, 1939. A train of fortuitous circumstances, starting with the sudden invasion of Poland, delayed and finally prevented her return. While so detained she fell in love with and married Dieter Zander, a German citizen... During hostilities between Germany and the United States, Mrs. Zander was registered and treated as an alien by German authorities and kept under constant surveillance.\textsuperscript{248}

\textit{MR. KOUTOULAKOS:} I am not saying that the state law gives us — I say that insofar as a private individual is concerned — and I am, of course, taking the position that the private school, that is, a purely private school, has the same rights, and that is a right that is a personal right, that is a God-given right for you to live with — and that is what I think separates the democracies from other nations — that right to choose your associates, whom you want to bring in your home, and to do as you see fit personally, as long as —

\textit{THE COURT:} This isn’t a home. A school is not a home.

\textit{MR. KOUTOULAKOS:} It is a home in a sense that it is a private establishment —

\textit{THE COURT:} It is not a home.

\textit{THE COURT:} Mr. Koutoulakos, could you tell us a little about this school, how many students are there?

\textit{MR. KOUTOULAKOS:} Yes, sir, they do. And it is a very fine school. As a matter of fact, the man that runs it used to be — and his wife — were both at — they are both fine people and love children. And let me make this observation —

Judges of course have seen fit to employ this stratagem. In the \textit{Late Corporation of Latter Day Saints v. United States}, 136 U.S. 1 (1889), a case illustrating the animosity between the American federal government and the Mormons, a Supreme Court judge after describing polygamy as a "crime", a "barbarous practice" and a "nefarious doctrine", put the question presented by the litigation this way: "The question therefore is whether the promotion of such a nefarious system and practice, so repugnant to our laws and to the principles of our civilization, is to be allowed to continue by the sanction of the government itself; and whether the funds accumulated for that purpose shall be restored to the same unlawful uses as heretofore to the detriment of the true interests of civil society."

\textsuperscript{246} Judicial minds operate like all others and an advocate takes advantage of this knowledge. Macmillan, \textit{supra}. note 7 at 23

\textsuperscript{247} (1949), 177 F. 2d 649 (D.C. Cir.)

\textsuperscript{248} \textit{Id.} at 650
A statement like this is almost all an advocate needs to prevail.249 How could a court decide against a woman who is the victim of war, romance and intrigue?

If the appellant submits an accurate statement of facts the respondent should accept it for a ponderous restatement wastes the court time250 and ineffectively utilizes a dramatic segment of the argument. Counsel’s further usefulness will also be cast in doubt should a repetitious statement be offered.

The court is now anxious to analyze the legal questions, and will have, ever since the questions presented were paraded, anticipated some of counsel’s arguments.251 This initial reference tends to prompt the judges to review their knowledge of the delineated area. Counsel can authenticate the court’s suspicions by summarizing the propositions which will be discussed. Some advocates like to give the judges what amounts to an oral table of contents. This framework gives the argument a sense of order. Leading advocates do not hesitate to develop a different approach than that used in the factum.252 A novel argument broached orally may be the outline which leaves a lasting impression on the judicial mind. There are other good reasons counsel should not be wedged to any specific system, as Mr. Justice Jackson’s admission shows:

I used to say that, as Solicitor-General, I made three arguments of every case. First came the one that I planned — as I thought, logical, coherent, complete. Second was the one actually presented — interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed at night.253

Whatever enthusiasm counsel’s opening engendered in the court, an announcement that there are ten appealable points, will promptly dissipate.254 A presentation distinguished only by the numerous grounds of appeal argued is unlikely to impress the court.255

249. Lord Macmillan has written that an artist “never argued his cases, he merely stated them.” Supra, note 7 at 25
250. Rombauer, supra, note 7 at 182; Currie, supra, note 7 at 563; Medina, supra, note 3 at 142
251. Davis, supra, note 3 at 897
252. Currie, supra, note 7 at 564. Conversations with Mr. T. C. Wakeling, Q.C. and Professor K.E. Norman confirm this. Judges also appreciate a fresh perspective. Kaufman, supra, note 7 at 171
253. Supra, note 7 at 803
254. The converse though is also true, and the court’s interest will escalate if counsel informs them that argument is restricted to one or two points.
255. A fine screen may catch some arguments the court will find attractive but the
Multiple complaints will certainly test the court’s patience and a profusion of alleged errors invites cursory coverage and judicial boredom. A shot gun approach evidences counsel’s doubts about the merits of any one point which is not an admission counsel should advertise. Confident advocates are content to stress one or two crucial issues, with some support in the writers for three. Mr. Rall encourages cursory coverage of every point but concedes the need to marshal the forces behind the best propositions. The approach of Chief Justice Ellsworth is preferable, which is to develop ‘‘the main points of the case, leaving the minor ones to shift for themselves.’

Outstanding advocates ‘‘go for the jugular vein’’ or ‘‘to the heart of the problem’’. The court welcomes boldness and such positive assertiveness leaves a permanent impression with the court. When a judge writes his opinion these forceful submissions will resurface. As well, such selectivity inevitably moves the respondent onto ground the appellant believes defensible, probably with good reason. Indubitably, the respondent’s maneuvering space is reduced when the appellant marshals all resources around one or two concepts.

This winnowing process identifies a limited number of sound

risk is worth running. Besides if a particular approach appeals to a judge he will likely raise it whether counsel does or not. Doubtful points can be discussed with associates whose frank opinions should make the selection decision easier. See O’Driscoll, supra, note 6 at 214

256. Currie, supra, note 7 at 555; Kaufman, supra, note 7 at 169. A scattergun mind may be avoided if it manifests itself in print but a judge does not have the same evasive tactics when counsel is present. Davis, supra, note 3 at 897

257. Jackson, supra, note 7 at 802. Furthermore, this indiscriminate course shifts some counsel tasks onto the court. Currie, supra, note 7 at 555

258. Davis, supra, note 3 at 897; Freedman, supra, note 7 at 309; Jackson, supra, note 7 at 803; Kaufman, supra, note 7 at 169; Medina, supra, note 3 at 142

259. Rombauer, supra, note 7 at 181. Some commentators never give specific guidelines but Mr. O’Driscoll does imply that more than two arguments are acceptable. Supra, note 6 at 215. This limit may be adjusted in unusual appeals.

260. Supra, note 1 at 122

261. L.J. Bigelow, supra, note 40 at 118

262. Davis, supra, note 3 at 897

263. Freedman, supra, note 7 at 309

264. There are not many occasions where the victor lost the major proposition but is triumphant because a secondary matter held the court.

265. Currie, supra, note 7 at 562; Medina, supra, note 3 at 142. (One solid blow is more effective than peppering away.)

266. Davis, supra, note 3 at 897; Medina, supra, note 3 at 142

267. Davis, supra, note 3 at 897
arguments and the next problem is to determine what order of presentation is most advantageous. Lord Macmillan expects counsel to interest the court from the outset but introduces this caveat, "There is something to be said for keeping your best vintage till your guests have been duly prepared for its reception."268 But the English judge stands alone; Canadian and American writers exhort counsel to "step out with one's best foot forward"269 - the message of those who "go for the jugular vein".

Lord Macmillan's proposal raises several objections. First, counsel might never have another chance to direct the course of argument, and to forfeit the opportunity to argue a major point in the manner the appellant deems best, is questionable. Second, why risk implanting a negative mood when there is a stronger argument in reserve. Third, counsel wants a receptive mind for the best point, not one jaded by exposure to peripheral contentions. Besides, Lord Macmillan's fear of weak endings can be met if the advocate discards weak material and has a one or two pronged offence. With such a narrow focus there is little danger the last argument will prove anticlimactic.

The consensus then is that a limited number of legal themes be argued and that the strongest be first. One next has to consider the safest way to establish these legal themes. Suppose counsel maintains in the Supreme Court of Canada that decisions not a product of fair procedures can immediately be impugned regardless of the availability of formal institutional appeal routes. Before asking the court to overrule any Supreme Court decision counsel will explore other alternatives with less traumatic implications.270 This means that the path of least resistance will be followed first. Imaginative advocates assert contentious arguments in their best form. They outline discernible trends in the law and establish the consistency of their solution therewith.271 This approach emphasizes the reasonableness of a position which makes it more attractive to the courts.272 Professor Norman adopted this format in

268. Supra, note 7 at 29
269. Gordon, supra, note 7 at 449. Mr. O'Driscoll, Q.C. launches the strongest argument first. Supra, note 6 at 215
270. Courts are reluctant to declare legislation unconstitutional, in contravention of Bills of Rights or reconsider their own recent decisions. See Appleman, supra, note 7 at 43. Traditional concepts are more appealing to the bench, but if these will not suffice then the novel propositions must be relied on. Currie, supra, note 7 at 559
271. Currie, supra, note 7 at 558
272. See, Appleman, supra, note 7 at 43
Harelkin,273 arguing that administrative law trends were identifiable and favorable, that a troublesome Supreme Court case was distinguishable, and only as a last resort did he ask for a reconsideration of the prior decision.

If the court clearly is not sympathetic there is little to gain by further discussion unless counsel is satisfied that the court does not understand, as opposed to endorse, the position.274 Those who proceed in the face of judicial opposition simply antagonize their listeners.

There are other ways to lose the court that are less desirable than a judicial rebuff received during the course of a novel argument or an attempt to invite judicial reconsideration. Judges do not appreciate proponents of mechanistic jurisprudence who assume that the weight of authority is determined by the number of cases cited.275 Mass recitation of cases taxes the court and gives counsel the reputation of having a "blunderbuss mind".276 An effective advocate recognizes the human limitations of judges and governs his conduct accordingly.277 Few persons can digest large numbers of cases and retain anything meaningful.278 Mr. Justice Currie confirms this when he admits that "it is almost certain that not a single case cited in argument either by name or volume and page will have been remembered."279 It follows then that counsel should attempt to leave the judge with the dispute's salient features, which makes the best use of a concrete number of available lasting images.

What is crucial is the legal principle involved, not the particular cases lodged in the legal quiver. Therefore acknowledged leaders do not distract the court with excessive case law.280 The proper use of

273. (S.C.C. March 30, 1979) (unreported)
274. O'Driscoll, supra, note 6 at 216
275. Davis, supra, note 3 at 897
276. Jackson, supra, note 7 at 804
277. Mr. Davis describes the human mind as a "pawky thing". Supra, note 3 at 898. See Denecke, supra, note 7 at 361
278. Davis, supra, note 3 at 895
279. Currie, supra, note 7 at 562. But he states that the same fate does not befall the statement of facts, the questions presented and the legal themes.
280. In Regina v. Hubbert (1975), 29 C.C.C. 2d 279 (Ont. C.A.) the court by its own figures listened to over forty cases, which in the end appeared as an appendix to the decision. Instead of a case by case analysis, the court considered the purpose of jury challenges and "[s]ome broad principles respecting criminal trials by jury". Chief Justice Culliton did not record any figures in Canadian Indus. Gas & Oil Ltd. v. Saskatchewan, [1976] 2 W.W.R. 356 at 377 (Sask. C.A.) but suggested that it was an unwieldy number in this passage: "Before concluding, I wish to make this
judicial decisions\textsuperscript{281} is a valuable aid but its overuse bores the court. Because nothing is more distracting and disruptive\textsuperscript{282} than announcing a case citation, some lawyers never do this unless the court makes a request.\textsuperscript{283} This information should be conveyed in the factum, unless of course the release date of relevant opinions followed the production date of the factum.\textsuperscript{284a}

Any court wants the best solutions and this obliges counsel to survey the responses other jurisdictions have fashioned. This is especially true if the issue is a novel one in the nation.\textsuperscript{284b} Mr. Justice Hugessen certainly is from this school, as his opinion in \textit{Re Laporte and the Queen}\textsuperscript{285} attests:

All parties before me readily concede that there is no precedent in point that they have been able to find either in Canadian or British case law. Petitioner invites me to conclude from this that the answer to the question is so self-evident that it has never been raised. I am not prepared to accept this argument. The law does not stand still but must grow and change with the times. Simply because something has never been done before is no good reason
to say that it should not be done now. I trust that the age of judicial innovation is not dead and there will always be room to extend the frontiers of jurisprudence. If the matter has not been decided before, it falls to be decided now, and the absence of precedent, while it renders my task more difficult, adds nothing to the argument one way or the other.

What is more, even though there is no English or Canadian case directly in point, the matter has arisen before in the United States and, while not binding on me, the decisions of the courts of that country may always be looked to for guidance. Indeed it is upon the American jurisprudence that the main thrust of the respondent's argument is founded, and it is to that jurisprudence that I shall now turn.\textsuperscript{286}

American case law binds no Canadian court but there is no reason for dismissing it in the absence of harsh scrutiny. The principle of \textit{stare decisis} gives provincial courts of appeal freedom to strike courses independent of their counterparts,\textsuperscript{287} yet such independence does not mean other Canadian jurisdictions should be ignored. For example, in the early 1960s when the Ontario and British Columbia Courts of Appeal divided\textsuperscript{288} on the issue whether rape was a specific intent offence, no British Columbia judge ever suggested that it was unwise to examine Ontario's position.\textsuperscript{289} And any court which adopted such a position would have been guilty of chauvinism, and in dereliction of their judicial duties. Judge Borins certainly shares this view for he states in \textit{Regina v. Shand},\textsuperscript{290} "It is my respectful opinion that it would be an abdication of my responsibility if I were to turn a blind eye to judgments and other materials that I find of assistance merely because they happen to emanate from a jurisdiction or source not binding on me.''}\textsuperscript{291} In \textit{Regina v. Miller},\textsuperscript{292} where the validity of the death penalty was challenged, Mr. Justice McIntyre necessarily made extensive use of

\begin{thebibliography}{9}
\bibitem{286} \textit{Id.} at 347
\bibitem{287} MacGuigan, \textit{Precedent and Policy in the Supreme Court} (1967), 45 Can.B.Rev. 627 at 651-52
\bibitem{289} In fact Mr. Justice Sheppard perused the Ontario decision and announced it was "with every regret" that the Ontario lead was found unacceptable. \textit{R. v. Boucher}, [1963] 2 C.C.C. 241 at 252 (B.C.C.A.)
\bibitem{290} (1976), 29 C.C.C. 2d 199 (Ont. Cty. Ct.)
\bibitem{291} \textit{Id.} at 211-12. Canadian labor arbitrators do not work in a legal vacuum even though prior arbitration awards are not binding precedent. D. Brown and D. Beaty, \textit{Canadian Labour Arbitration} (Agincourt: Canadian Law Books, 1977) at 166
\bibitem{292} (1975), 24 C.C.C. 2d 401 (B.C.C.A.)
\end{thebibliography}
American jurisprudence, because he "found it helpful in seeking principles upon which this matter should be considered in a civilized society."293 Chief Justice Laskin also devoted considerable attention to the American authorities confident of their relevance, when hearing the Miller appeal.294 He recognized that certain features of the American constitution had no parallel in the Canadian context but concluded that the dissimilarities were not significant.295 What is important is the effect these differences have on a given case, not the fact that there are differences.296 If the similarities are compelling, the dissimilarities inconsequential, then

293. Id. at 465
294. (1976), 31 C.C.C. 2d. 177 (S.C.C.)
295. Id. at 185
296. Mr. Justice McIntyre explains, "The differences between the American constitutional system and our own are many and obvious . . . It does not follow, however, that all judicial attitudes and expressions emanating from the United States are inapplicable in Canada." Regina v. Miller (1975), 24 C.C.C. 2d 401, 460 (B.C.C.A.). Lord Darling would certainly subscribe to this view for in Senior v. Holdsworth, ex. p. Independent Television News Ltd., [1976] 1 Q.B. 23, 34 (C.A. 1975), a case involving the obligation of news services to disclose evidence, the American attempt to balance competing interests was studied. Mr. Justice Ritchie though refuses to discuss the American case law because the Canadian Bill of Rights and the United States Constitution "differ so radically in their purpose and content that judgments rendered in interpretation of one are of little value in interpreting the other." Unfortunately the crucial explanation of what the radical differences are and their subsequent impact on this analysis are absent. Regina v. Miller (1976), 31 C.C.C. 2d 177, 198 (S.C.C.). For an explanation why American case law can be inadequate see Gad Ben-Izhak Yosifof v. The Attorney General (1950), 1 Selected Judgments of the Supreme Court of Israel 174 at 184-85 and Narayanan Nambudripad v. Madras, 54 A.I.R. 385 (Madras H.C. 1954). In the latter case the court had to decide whether the State of Madras could take over control of the Karikkat temple without violating the religious articles of the Indian Constitution. The hereditary trustees of the denomination maintained that such legislation was an unconstitutional breach of separation of church and state doctrine. American case law was utilized by the challengers and the decision makers dealt with it fully before declining to follow the United States lead. They were satisfied that the Indian Constitution adopted something less than the "wall of separation" argument. What is worthy of note is not the outcome, which was predictable given the explicit nature of the relevant provisions, but the receptive attitude the court displayed to the carefully prepared arguments. For an explanation of the theoretical differences between the Canadian and American Bills of Rights see Driedger, The Meaning and Effect of the Canadian Bill of Rights: A Draftsman's Viewpoint, 9 Ottawa L. Rev. 303 (1977). Unless a lawyer can justify his failure to look elsewhere the omission might be construed as "a facile excuse to avoid further study." Janisch, Book Review, 4 Dalhousie L.J. 825, 826 (1978). Professor Tarnopolsky has sharply criticized the Ritchie approach to comparative law. A New Bill of Rights in the Light of the Interpretation of the Present One by the Supreme Court of Canada, 1978 Special Lectures of the Law Society of Upper Canada 166, 177-81.
there is utility in conducting the foreign survey. It goes without saying that the same rules govern use of non-American foreign material as well.

It is true that judges display varying degrees of enthusiasm for foreign cases, but the general trend is discernible. Canadian Supreme Court judges use them and more lower courts all the time are sensitive to the dangers of parochialism. The courts should welcome new ideas, wherever they originate. Mr. Justice Dickson's scholarly opinion in The Queen v. The City of Sault Ste. Marie in which he taps the collective wisdom of judges, lawyers and academics from England, Australia, New Zealand, United States and Canada, is an excellent example of the emerging pattern. This opinion makes it abundantly clear, if it was not before, why counsel does not apologize for being thorough, a trait generally regarded as commendable.

Mr. Justice Dickson's extensive treatment of periodicals and treatises emphasizes the rewards available for diligent persons who explore this rich realm. As a general rule, authors have some expertise which allows them insights others less familiar with the topic are without. Even if these sources are never cited the

297. With respect, the hesitation of some may reflect a lack of familiarity with the research aids. Professor Janisch echoes this thought: "To some extent this [neglect of American law] is because the very sophistication and complexity of that law makes occasional unorganized forays and serendipitous research intimidating . . ." Supra, note 296. Cohen, How to Find the Law (7 ed. St. Paul, Minn.: West, 1976) is an excellent remedial source, which focuses on American, Canadian, English and international research tools. The level of enthusiasm should depend on the quality and quantity of Canadian material on the subject. See Thibodeau v. The Queen, [1955] S.C.R. 646 at 654-55

298. Some courts long ago recognized the assistance foreign jurisprudence offers. See Rex v. Naish, [1950] 1 W.W.R. 987 (Sask. Mag. Ct.) where American and Australian judgments were considered, along with the United Nations Charter of Human Rights, in interpreting the Saskatchewan Bill of Rights. Cases can also be cited where foreign courts have sought assistance outside their borders. For example, the Supreme Court of Victoria in determining the limits of the duress defence studied the law in Canada and the United States. The Queen v. Hurley, [1967] V.R. 526 at 533-34, 542-43. In State v. Clark, (1968) 104 N.J. Super 67; 248 A 2d 559 the court looked elsewhere to determine the effect improper medical procedure had on the culpability of an alleged murderer.

299. (1978), 21 N.R. 295 (S.C.C.)

300. In Regina v. Shand (1976), 30 C.C.C. 2d 23 at 35 (Ont. C.A.) Mr. Gold compared the relevant Canadian statute with those from the United Kingdom and Australia drawing the Ontario Court of Appeals' approbation.

301. Professor Gibson applauds Mr. Justice Dickson's thoroughness in Unobtrusive Justice (1974) 12 Osgoode Hall L.J. 339

302. Denecke, supra, note 7 at 362
perspective they provide might be very useful, especially if the problem involves freshly broken ground.\textsuperscript{303}

Advocates often wonder what background information to give the court.\textsuperscript{304} No one wishes to appear condescending which would happen if material all too familiar to the court was examined,\textsuperscript{305} but at the same time, an advocate is not prepared to risk losing judges on matters with which they are not conversant.\textsuperscript{306} This is a real dilemma on occasion.\textsuperscript{307}

Should counsel simply sketch in underlying principles there is little danger the court will be offended. Judges who are comfortable in the area will manifest this condition and waive counsel on. If red lights, ordering counsel to terminate the preliminaries, are not flashing, counsel can with some safety proceed. There is always the danger though on a multipartite court that the tolerance level of some judges will be reached before others.

Common sense indicates that there is no need to review authorities the court knows.\textsuperscript{308} The court's own recent works\textsuperscript{309} and other classic opinions will fall within this class. There are no precise rules, of course, and counsel must monitor the judicial reception accorded the presentation. This, as noted above, partly explains why readers labor under such disadvantages and are so intensely despised.\textsuperscript{310} Statutes are another matter and judges will not complain about detailed coverage — most experts strongly advise counsel to read statutory material.\textsuperscript{311}

The following summarize some of the important points made in

\begin{itemize}
\item \textsuperscript{303} Janisch, \textit{supra}, note 296. For example, see Mr. Justice Dickson's use of academic writing in \textit{Morgentaler v. The Queen} (1975), 20 C.C.C. 2d 449 at 497 (S.C.C.)
\item \textsuperscript{304} Mr. O'Driscoll, Q.C. would attempt to solve the problem by asking the court how familiar it was with the material. A unanimous response regardless of what form it takes will assist somewhat, but is this a likely or realistic expectation. Besides, is it counsel's place to ask this question. Some would give a negative answer, but if the appeal is a discussion there is nothing objectionable about polite inquiries on the subject.
\item \textsuperscript{305} S.T. Bigelow, \textit{supra}, note 7 at 30; Jackson, \textit{supra}, note 7 at 804
\item \textsuperscript{306} Jackson, \textit{supra}, note 7 at 804
\item \textsuperscript{307} To this the famous English barrister, Mr. F. E. Smith can attest. He was interrupted by the court while belaboring an obvious point. "Do give this court credit for some little intelligence, Mr. Smith." His famous reply: "That is the mistake I made in the court below, my lord." S. Jackson, \textit{supra}, note 40 at 75
\item \textsuperscript{308} Levitan, \textit{supra}, note 7 at 66
\item \textsuperscript{309} Jackson, \textit{supra}, note 7 at 804
\item \textsuperscript{310} See the next associated with notes 196-208
\item \textsuperscript{311} See the text associated with note 205
\end{itemize}
relation to the establishment of legal themes: The best advocates 1) use the factum for a complete exposition of the case law, 312 2) forward sensible resolutions and use authorities sparingly to justify their position, 313 and 3) attempt to show that both justice and the law favor their position, 314 in that the legal themes advanced are fair and govern the fact pattern. 315

What constitutes good advice for the appellant usually is that for the respondent. This means primarily that the latter keep in mind the aspects the judges will be interested in and that everything an advocate does is designed to produce the desired effect. 316 There are, however, some exceptions which are obvious. For example, as noted earlier, 317 a full and fair statement of the facts relieves the respondent of this task. 318 "A long repetitious rehashing of the facts" wearies the court with the attendant danger their interest will wane. 319 The respondent should do no more than correct misleading portions of the appellant's statement. 320

In the exordium the respondent should place the matter in the mould favorable to his side. Just as the appellant fashioned a sympathetic "question presented", so should the respondent, if the

312. Rombauer, supra, note 7 at 181; Freedman, supra, note 7 at 306; Wilkins, supra, note 2 at 123. Mr. Davis warns advocates that "after three or four or half a dozen such recitals [of cases] that not only are the recited facts forgotten but those in the case at bar become blurred . . . ." Supra, note 3 at 898. Besides as Lord Coke perceptively stated, "In such a farrago of authorities it cannot be but there is much refuse."

313. Freedman, supra, note 7 at 306; Rall, supra, note 1 at 128

314. Denecke, supra, note 7 at 358-59. For this reason, a clever respondent with strong procedural arguments, will not rest the case on that ground alone, but will explain why the merits favor his side as well. Kaufman, supra, note 7 at 168-69. Appellant's opening in Washington v. Davis (1976), 426 U.S. 229 illustrates the point in a different context. The following transcript is reproduced in 88 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law (1977) 353 at 355:

MR. SUTTON: Mr. Chief Justice, and may it please the Court:

At its threshold, this case presents two highly important social values — the right of a community to be free from discrimination in public employment and the right of a community to a competent police force. It is our position that both of these values may be rationally upheld in this case.

315. Anderson, supra, note 7 at 707

316. See the text associated with notes 211-13 and Jackson, supra, note 7 at 303; Kaufman, supra, note 7 at 169

317. Supra, note 250

318. Id.

319. Medina, supra, note 3 at 142

320. Id. at 143
two versions are not identical. Counsel should then develop selected legal themes and that done attack the appellant's position where it is profitable to do so.321 There is certainly no advantage in joining issue on all matters when victory depends on the court's response to one or two points.322

Differences of opinion exist here and one school favors training initial firepower at the weaknesses of the appellant's major propositions. The exigencies of the situation will determine counsel's tactics, but this approach might keep the respondent on the defensive. This will not do for the respondent must build a case the court can accept.323 It is undeniable though that a mobile strike force can do considerable damage to the appellant's framework. If adequately prepared counsel can range broadly, answering questions the court asked the appellant, clarifying the record and exposing the weakness of the petitioner's argument.

But should the situation require it this suggested order can be abandoned.324 Should the appellant sit down with the court most anxious to hear the respondent on a particular question, a lawyer would be foolish to adhere to a planned response.

In short, the respondent must have the ability to evaluate developments and respond accurately and immediately.325 Without a perfect knowledge of the record and the law counsel will be unable to make the appropriate adjustments.

The appellant has the right to reply but this opportunity can safely be declined and most experts do if the respondent has not introduced new dimensions to the case.326 The reply is not there to serve as a review mechanism for the appellant,327 and if the advocate realizes that judges make the final decisions, should not be reluctant to sit down.328

VII. Conclusion

Some lawyers think that oral argument is the easiest part of the

321. Weiner, supra, note 5 at 64
322. Medina, supra, note 3 at 142. Furthermore, if the appellant has the court with him on a point he can devote little time to the subject. Rall, supra, note 1 at 133
323. Id.
324. Weiner, supra, note 5 at 67
325. Rall, supra, note 1 at 132-33; Weiner, supra, note 4 at 74
326. Jackson, supra, note 7 at 804. At this stage of the struggle counsel should know both sides equally well.
327. O'Driscoll, supra, note 6 at 217
328. Davis, supra, note 3 at 898; Freedman, supra, note 7 at 309; Wilkins, supra,
appeal. That it is the most satisfying and exhilarating there is little doubt, but that it is the easiest party of the appellate process is debatable. I have heard counsel emotionally and physically drained by the encounter comment "that it is almost like giving birth". That is a compelling analogy given counsel's role in the development of case law, and as such it is not inaccurate then to describe the advocate as the midwife of the court. Thus, even if oral argument is the easiest component of the appellate presentation, its importance, like that of the midwife's, cannot be denied.

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note 2 at 123. Lord Chief Justice Earle put it this way: "Mr. So and So, there is a time in every man's mind at which he lets down the floodgates of his understanding, and allows not one more drop to enter, and that time in my mind has fully arrived." L.J. Bigelow, supra, note 40 at 369
329. Robinette, supra, note 7