APPELLATE ADVOCACY:
PRESENTING THE ORAL ARGUMENT

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Nothing is so difficult to believe that oratory cannot make it acceptable, nothing so rough and uncultured as not to gain brilliance and refinement from eloquence.
Marcus Tullius Cicero[1]

...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 that night.
Justice Robert H. Jackson, U.S.S.Ct.[2]

I. INTRODUCTION

It has been said that a trial is a search for truth and that an appeal is the search for error[3]. Appeals differ from trials in many respects, and these distinctions have multiple implications for those who practice criminal law[4]. Whatever the forum, the advocate's goal is to persuasively influence the outcome - "to resolve a controversy between human beings according to...rules of fair play that have for their grand objective the substitution of reason for force[5]". While certain rules apply across the board, appellate advocacy tests different skill-sets and involves different strategies for success than does trial litigation. An argument presented to a panel of judges will be framed very differently than a plea to a jury. Legal argument is governed by similar principles in both venues. The difference is that a lawyer debating a point of law before a trial judge can exploit the malleability of the record, a liberty denied counsel on appeal. Once the matter has reached an appellate court, the evidence is in, the ink has dried, and counsel must live with a factual foundation that is indelibly set. Save for limited exceptions, the factual findings and credibility determinations immortalized in the transcript are immune from retrial or review[6].

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*Crown Counsel, Ministry of the Attorney General. The opinions are those of the author only, and do not necessarily reflect the views of the Ministry of the Attorney General.

[1] The Columbia World of Quotations, 1996. Marcus Tussius Cicero (106-43 B.C.), Cicero Collection

[2] *Lawyer's Wit and Wisdom*, ed. Bruce Nash, Allan Zullo (Running Press: Philadelphia, 1995) at p.268

[3] The Honourable Mr. Justice D.G. Blair, "The Court's Use of Factums", unpublished paper prepared for the Law Society of Upper Canada program entitled *Appellate Advocacy: A Skills Course*, January 16, 1987 at p.3.

[4] One author has identified four major distinctions between the trial and the appellate process: 1) Trials are for creating the record while appeals are for interpreting the record; 2) Trials are about the credibility of witnesses, while appeals are about the credibility of counsel; 3) Trials are in "real time", while appeals are in compressed time; and 4) Trials affect immediate litigants, while appeals affect future litigants. See William F. Ehrcke, Q.C. "Some Thoughts on the Differences between Appellant and Trial Advocacy" prepared for the C.L.E.Symposium on Advocacy, Vancouver, British Columbia, November, 2001, p.13.2.01

[5] Chief Justice Arthur T. Vanderbilt "Forensic Persuasuion" The 1950 John Randolph Tucker Memorial Lectures delivered at Washington and Lee University, at p.6

[6] An appellate court may be entitled to revisit factual decisions when they are based upon a misapprehension of the evidence, see Harper v. The Queen (1982) 65 C.C.C. (2d) 193 (S.C.C.) Similarly, the assessment of the reasonableness of a verdict necessarily involves some weighing and reassessing of the evidence "through the lens of judicial experience" see

Countless texts and articles have been written on the art and science of advocacy. It is impossible to capture the collective wisdom of these sources in a single paper, and it is humbling to try to contribute to the mass of work in this area. Some comfort can be gleaned from the fact that certain themes tend to permeate the literature. The following will begin by briefly examining the role of the advocate and its many dimensions. The paper will then turn to its main focus: the principles that govern the preparation and presentation of oral argument on appeal. It will be assumed that the factum has already been drafted and filed[7], and that counsel are preparing to present their case in court. It will also be assumed that counsel is presenting their case in a provincial Court of Appeal, as distinct from the Supreme Court of Canada.[8] While preparation and presentation are discussed under separate headings, it is difficult to draw a bright line between the two topics. Comments made in connection with one may well have application to the other.

R.v.Biniaris (2000) 143 C.C.C. (3d) 1 (S.C.C.)

[7] Issues concern written argument and the elements of factum writing are adressed in a separate paper authored by Kenneth Campbell for this program.

[8] While many rules apply to both appellate contexts, appeals in the Supreme Court of Canada are unique in certain respects. Space constraints do not permit a full discussion of the rules and requirements of advocacy in Canada's highest Court. Reference should be made to Justice Ian Binnie "A Survivor's Guide to Advocacy in the Supreme Court of Canada" Ontario Criminal Lawyers Association Papers 1998-001, John Sopinka Advocacy Lecture, November 27, 1998. Counsel should be aware that, according to a recent press release, ***the Supreme Court of Canada has enacted new Rules of Practice, published in Part II of the Canada Gazette on April 24, 2002.*** The current *Rules of the Supreme Court of Canada*, SOR/83-74, will be repealed on June 28, 2002, the date that the new rules come into force. The new rules and and a guide to the changes will be available on the Court's Web sit at http://ww.scc-csc.gc.ca and at the Court on May 15, 2002.

II. THE ROLE OF THE ADVOCATE

Within the profession of law, the work of the advocate is highly demanding. Lord Chancellor Eldon graphically captured this intensity when he proposed the following advice for would-be advocates: "I know of no rule to give them but that they must make up their mind to live like hermits and work like horses"[9]. While the current reality may not be quite so harsh[10], the modern lawyer faces many daunting challenges in grappling with the forensic, personal, and public aspects of the advocate's role. On the forensic side, the advocate must strive for an encyclopedic mastery of the facts, however voluminous; a sophisticated fluency in the law, however complex; and divine insight into the subjective proclivities of the tribunal, however opaque. Armed with this knowledge, the advocate is to use all the elements of style, rhetoric and persuasion at her disposal in an effort to sway the controversy in her favour. This is no mean feat. It requires hours of diligent, focussed and concentrated effort. This task is not only time consuming; it can be all-consuming.

There is also a personal or human side to advocacy that poses its own distinct challenges[11]. It is common wisdom that the best advocates have an intuitive sense of human nature that comes from a wealth of worldly experience. We are not to cloister ourselves in the law, but rather, are to expose ourselves to the great works of literature and other expressions of the culture in which we live. To be a great advocate is not merely to be a good lawyer, but to be a good citizen, schooled in matters ranging from the common-place to the sublime. This includes an appreciation of the broader millieu and the perpetual interaction between legal doctrine and social context. As stated by Chief Justice Vanderbilt:

...The advocate must know the economic, political, social and intellectual environment of his case the trends of the times. He must know whether he is working with or against what Dicey has called the assumptions of the age.[12]

While those words were written in 1950, they have never rung truer than in the Charter era, in which the Courts and the counsel who appear before them must wrangle with social and political issues that are often at the root of how we live as a society.

To be an advocate is to confront and transcend the limits of one's personal perspective - a world view that is the culmination of each each person's unique background and experience[13]. It is also to recognize the pull of personal morality, which exerts a profound influence on the difficult decisions that lawyers must make on a regular basis[14]. Similarly, the personal side of advocacy engages a broad range of human emotion that can be triggered by adversarial litigation. It is the advocate's mandate to become enmeshed in a broad range of human affairs: some uniquely tragic; some impossibly contentious. While lawyers must approach their work with a strong sense of professionalism, they may nonetheless care very deeply about the interests they represent. The advocate shoulders a great deal of responsibility, but ultimately exercises very little control. Advocates are human and therefore not immune from experiencing frustration and disappointment.

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[9] This quote appears in Chief Justice Vanderbilt, supra, note 5 at p.14

[10] Lawyers are accused of being many things, but the public has, at least to date, refrained from calling us hermits.

[11] This aspect of the advocate's role is eloquently discussed by Fred Ferguson,Q.C. in his paper "Advocacy in the New Millenium", presented upon being awarded the Milvain Chair of Advocacy, Calgary, 2002.

[12] Vanderbilt, supra, note 5 at p.11

[13] According to Justice Benjamin Cardozo: "We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own", see The Nature of the Judicial Process (1921) at pp.12-13; see also R.v.S.(R.D.) (1997) 118 C.C.C. (3d) 353 (S.C.C.)

[14] see Justice Michel Proulx and David Layton Ethics in Canadian Criminal Law, Irwin Law, Toronto, Ontario, 2001

There is, finally, what one might call the public dimension of advocacy. The public face looks outward to the perceptions and attitudes of those in the non-legal community. Regretably, the reflection gazing back is sometimes less than flattering. Advocates must contend with the growing cynicism of a public that has become increasingly skeptical of our judicial system and its ability to mete out justice. Trials are often seen as gamesmanship and the vindication of human rights perceived as technicalities. The media has become increasingly activist and subjective in its coverage of legal events. In discharging their role, advocates must defend a system that, at least in some quarters, attracts distrust and disdain.

While demanding in many spheres, legal advocacy is nonetheless one of the most exhilirating and gratifying professional endeavours. It stimulates and ignites the passions of those who have embraced this role. However herculean the labour, it is invariably matched or exceeded by its rewards. As Justice Cardozo put it: "What we give forth in effort comes back to us in character. The alchemy is inevitable"[15]. To be an advocate is to be something much more than merely a wordsmith or technician. Advocacy tests our judgment, our character, our ethics, our commitment to justice and, on occasion, our moral courage. However you put it, it tests something much more profound and personal than our knowledge of legal rules[16].

III. THE PREPARATION AND PRESENTATION OF LEGAL ARGUMENT ON APPEAL

A. PREPARATION

Preparation is the lynch-pin of effective advocacy. Its importance cannot be overstated. While this paper is concerned with oral argument - as distinct from factum writing - it would be a grave mistake to assume that the task of oral advocacy is restricted to the performance of counsel in court. To the contrary, as noted by Justice David Watt, the art of advocacy extends well beyond its visible manifestation to encompass "all that which precedes the formal presentation of evidence, addresses or argument, whether at trial or on appeal"[17]. The hidden work of the advocate - the arduous and isolated hours spent preparing, crafting and honing submissions - is the key to successful oratory. Words that appear to flow effortlessly at the time of the hearing may reflect the end-product of many hours of thoughtful reflection. The apparent ease and spontaneity of counsel's delivery is often directly related to the amount of painstaking work that preceded it.

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[15] As quoted in Vanderbilt, supra, note 5 at p.14

[16] Even Professor Wigmore, in his classic text on evidence - a multi-volume treatise that is fundamentally about rules - acknowledged that "all the rules in the world will not get us substantial justice if the judges and counsel have not the correct living moral attitude towards substantial justice"

[17] The Honourable Mr. Justice David Watt "The Argument of Appeals", unpublished paper, at p.1

Preparation methods tend to be idiosyncratic. Over time, a lawyer will develop a routine that best suits his own temperament and style. Systems may vary, but the object is always the same - to achieve a full mastery of the case and a working facility with the arguments *before* entering the courtroom door. While appeals are more predictable than are trials, the oral hearing can take unanticipated twists and turns. Counsel must be ready for every contingency. The best way to prepare for the unexpected is to have a thorough, working knowledge of the case. It could be said that, for any given appeal, counsel effectively prepares for two arguments. The first consists of what counsel would say if the court sat mute during the hearing and did not interrupt with any comments or questions. This free-standing narrative would convey each essential point necessary to support counsel's conclusion - nothing more and nothing less - and contemplates a smooth sail toward the desired destination. The second argument is the one that actually takes place. Counsel is rarely given licence to stand up and deliver a soliloquoy. Be it minor turbulence, judicial headwinds or the "perfect storm", the appeal panel will almost always intervene in some fashion or another that takes counsel off the charted course. The dialogue with the court is one of the most invigorating aspects of oral advocacy. But the advocate must know how to reach his destination in both calm and stormy seas, and must be able to access reserves that will keep the boat from sinking[18].

While effective preparation involves several tasks, I suggest that three are amongst the most important: 1) mastering the facts; 2) structuring the outline of the argument; and 3) crafting the opening remarks.

i) The Facts

The overwhelming consensus is that the facts matter; that they matter a great deal; that they can matter more than anything else; and that they are often dispositive of the appeal[19]. The law is never applied in a vacuum. Save for abstract constitutional challenges, the ultimate question is always *how* the legal principles apply to the particular case before the Court. The facts tell a story. They define the equities of the case and, to this extent, may themselves exert a persuasive impact on the Court. The power of the narrative can and should be exploited by the advocate. As Binnie J. observed in R.v.Rose[20]: "... the same underlying facts can be used to create very different impressions depending on the advocacy skills of counsel"[21]. Moroever, while the appeal panel will often be cognizant of the leading cases in the area, they are much less likely to be intimately familiar with the *minutia* of the record. This is often where counsel can be of greatest assistance. The most important facts will have been summarized in the facta. Nonetheless, counsel must have a keen appreciation of *both* the forest *and* the trees. One must aim for a deep and comprehensive understanding of *all of the* evidence, in order to field a potentially broad range of questions from the court, and where necessary, to answer or correct one's opponent.

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[18] As will be discussed later, counsel must also know when it is time to abandon ship.

[19] see e.g. Justice John Laskin "A view from the other side: What I would have done differently if I knew then what I know now" [1998] Advocates Society Journal 16 in which the author asserts at p.20: "What I now find in many appeals - certainly in most error - correcting appeals - is how much the facts matter and how little the law matters. Most appeals are decided by the panel's view of the facts".

[20] (1998) 129 C.C.C. (3d) 449 (S.C.C.)

[21] ibid. at para. 19

The hearing will often take place some months after the factum was drafted. By this time, the transcript may have become something of a distant memory. After reviewing the briefs, the next step in preparing the case should involve refamiliarization with the record. Some portions of the transcript can be skimmed; others will require a more careful reading. Certain passages may assume a new significance as the hearing looms large. The level and intensity of review will depend on the evidence, the issues, and the quality of counsel's pre-existing recollection. Nonetheless, a return visit to the transcript is never a wasted trip. It is often indispensable and permits the facts to become firmly and vividly embedded in the mind's eye. The appeal book, containing copies of relevant exhibits, should also be given proper attention. The exhibits may facilitate a spatial comprehension of the scene and surrounding geography that is critical to understanding the offence. In some instances, the exhibits essentially *are* the case, as with many frauds and economic crimes. In either event, one can presume that there was *some* good reason for presenting these items to the trier of fact. That same reason commends review by counsel on appeal. Unfortunately, the appeal book will sometimes prove inadequate to the task. For example, where photographs are concerned, the black and white photocopy machine is an unkind tool. Counsel acting for Respondents have been known to receive appeal books containing pages of what could fairly be mistaken for grainy Rorschach blots. Colour photocopies are now used more frequently, but where the copy is indecipherable, the original exhibit should be reviewed, as should those exhibits that are not capable of reproduction and do not appear in the appeal book at all[22].

Appellate advocacy also demands a certain manual dexterity with the record. The facts must not only be embedded in the mind; they must be accessible at the fingertips. During the hearing, counsel must be able to turn to relevant portions of the transcript or appeal book with ease, dispatch, and unwavering accuracy. The Court will often ask to be taken directly to a portion of the evidence. Ineffective fumbling and page turning will leave a less than stellar impression. For those of us who lack a photographic memory or a perfect system of mnemonics, there are various tools that can make a voluminous record more manageable. Consider the use of summaries, tabs, a master index, a list of important references, and/or itemized notes on transcript covers or spines. Counsel may also wish to prepare a book of excerpts containing the most salient features of the record to be filed in advance[23]. However accomplished the point is simply that counsel must be able to deftly manouevre through the factual landscape. It helps to have a roadmap.

ii) The Structure of the Argument

[22] While a controversial suggestion, in some cases, counsel may choose to actually attend at the scene, in order to achieve a more holistic understanding of the relevant geographical area. For example, standing in a room and looking around can be much more informative than trying to assimilate and consolidate a series of photographs, each depicting a particular corner. The "view" can enable counsel to achieve a deeper and more visual understanding of the record. On the other hand, this approach can be fraught with danger, as appellate counsel clearly cannot *supplement* the record with what he or she has seen. Many would insist that it is much safer to rely exclusively on what was shown to the trier of fact. The concept of the "view" can have great utility, but must be exercised with caution. It may be best reserved for cases involving fresh evidence, where the issues require counsel to go beyond the record and assume a more trial-oriented role in any event.

[23] In a Notice to the Profession dated March 22, 2000, the Court of Appeal for Ontario has set out a mandatory requirement that a "Compendium of Evidence and Exhibits" be filed in all civil matters at least 60 days before the hearing of the appeal.

While "readings" are an accepted practice in the literary world, they have no place in a criminal courtroom. To the contrary, to merely recite the contents of one's factum in court is the antithesis of true advocacy. The factum is best viewed as a springboard for oral argument. It should not be ignored - it is good practice to advise the Court which paragraphs of the factum correspond to the argument at hand - but neither should the written brief define oral presentation[24]. The point of oral argument is to build upon what has been written, buoyed by the wisdom of hindsight and the foresight of what one's opponent might say. It can generally be presumed that the appeal panel will have read the factum in advance and will not be requesting an encore. Moreover, the very structure of the factum impedes crisp and succinct oratory. The factum erects an artificial barrier between the facts and the law. Oral argument provides an important opportunity for synthesis. Ideally, the facts and law will be fused into a seamless presentation that sways or compels the court toward the desired conclusion.

An oral presentation is only as good as its organizational structure. Counsel must decide which points will be advanced and how they fit together to form an integrated whole. Counsel may choose to follow the sequence of arguments as they appear in the factum. But even the best facta warrant critical appraisal when deciding how best to present the oral argument[25]. There is much to be said for stepping back, taking a long hard look at the case, and examining whether there is a more compact and compelling way of packaging counsel's submissions. There usually is, particularly when the argument is complicated and counsel are bound by strict time limits[26]. The idea is to reduce a mass of material into a logical, cohesive structure that allows argument to unfold in a concise and orderly way, while avoiding unnecessary repitition. In some cases, the structure of the argument will be quite obvious. In other cases, finding the perfect flow can be maddeningly elusive and time consuming. Yet, once the task is complete, it reaps many rewards. After the structure has been set, the finer points of argument tend to fall into place quite naturally. Building the structure facilitates good advocacy. It also fosters a deep understanding of the issues, by forcing counsel to think each point through to its logical conclusion. Lawyers who have done so will be well-equipped to move around within the subject matter without losing the main focus. A one page flow-chart, recording the sequence of points and how they interrelate, can serve as an invaluable aid during the thrust and parry of submissions.

iii) Planning The Opening

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[24]This is subject, of course, to the caveat that counsel cannot advance *new* arguments at the oral hearing that were not set out in the body of the factum.

[25] As stated by Professor Richard H. Seamon "Preparing for Oral Argument in the United States Supreme Court" 50 S.C.L.R. 603 at p.605: "When the advocate picks up his brief on the first day of preparation, he must scrutinize it. To do this, the advocate must set aside pride (or shame) of authorship, because that can lead to an unfruitful focus on the elegance or awkwardness of the prose. Rather than being self-conscious and superficial, the advocate's scrutiny of the brief needs to have a dual nature. One part is backward-looking, recollective and personal. The other part is forward looking, predictive and impersonal".

[26] see Justice George Finlayson "Appellate Advocacy in an Abbreviated Setting" (1999), 18 Adv. Soc. J.
Thomas Jefferson saw "amplification" as the vice of modern oratory. As he put it: "Speeches measured by the hour, die by the hour" The Columbia World of Quotations, 1996, Thomas Jefferson (1743-1826), Letter, April 20, 1824

It is fair to say that the Court will be most attentive to counsel when they first rise to their feet. These first few moments are critical and set the tone for what is to follow. This is the first, and perhaps the most opportune, time to seize the court's interest and attention. It is the time when the panel is most likely to be poised with pen and paper waiting to record counsel's words. It is the time when counsel is least likely to be interrupted. In short, it is a time that is not to be squandered. Opening statements have traditionally consisted of bland recitals along the lines of: "This is an appeal from the judgment of so and so....". But why not choose a more enticing introduction? Pithy, evocative language, designed to stimulate interest, will magnify the impact of opening remarks. The advocate should aim to get straight to the point, identifying the central issue; counsel's position; and why it should prevail. Counsel may wish to provide the Court with an itinerary - "I will be making three points" - and then conveying each in a single sentence. The opening must be concise, or it will be mistaken for argument. At the same time, it must capture the essence of where counsel is going and why he should get there. *At this juncture, every word counts and should be accounted for*. Even if nothing else is written out verbatim, it is beneficial to scrupulously plan each word of the opening in advance. Condensing complex ideas can be tricky. The perfect turn of phrase is more likely to materialize while sitting at a notepad or computer than while facing the gaze of an expectant panel having just approached the lecturn. This prescription for a concise introduction may seem an ineffective antidote to blandness. But it should not be forgotten that: "Brevity is the soul of wit"[27] The opening salvo that sizzles from the tongue to explode in the judges' minds is more likely to be found in the simple search for clarity than it is anywhere else.

B. PRESENTING THE ARGUMENT

As was stated by Justice David Watt: "...the oral argument of an appeal is the climax of a case"[28]. It reflects the culmination of "the long and wearisome work[29]" carried out during the tenure of both the trial and the appellate proceedings. Its significance lies in the opportunity to engage in a personal, two-way communication with the judges. It is the most direct, but also the final opportunity, to convince and persuade the Court. Once argument is complete, and the Court has risen, the perfect retort that pops into counsel's mind will either be doomed to obscurity, or will live on in regretful tales told to everyone *but* the panel that is deciding the case.

Various authors have succinctly described the cardinal qualities that counsel should stive for during oral argument. Some have referred to the three "Cs": clarity, conciseness and candour[30]. Justice Estey coined the three "Bs": "...be brief, be clear, and be gone"[31]. However expressed, the message is clear. Counsel must aim for brevity, precision and, above all, honesty in advancing their cause. Counsel is also wise to adopt the perspective of the tribunal when when crafting and presenting oral argument[32]. As Alan Gold put it: "Argue unto others as you would have them argue unto you"[33]. This adage has several performance implications, but one warrants particular mention. We tend to focus on the lawyer as the one who seeks to persuade, but it has been observed that judges are, themselves, a species of advocate. According to one commentator: "Every judgment is ... an attempt to persuade counsel, fellow judges and the public of the inherent validity or "rightness" of the conclusion reached"[34]. On this model, the advocate appeals to the judge who then must appeal to a much broader audience[35]. If this is so, it suggests that that goal of advocacy is, not only to persuade the court that *it* agrees with you, but to demonstrate that others will likely be convinced as well.

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[27] William Shakespeare, Hamlet, Act ii, Sc.2

[28] The Honourable Justice David Watt, supra at p.43

[29] see Chief Justice Vanderbilt, supra note 5 at p.14

[30] see Richard C.C. Peck, Q.C. "Preparing and presenting a Criminal Appeal: the Perspective of the Appellant", unpublished paper prepared for C.L.E. Advocacy Symposium, Vancouver, British Columbia, November, 2001 at p.13.3.15. See also John

Arguments should always be advanced with confidence, but never with disrespect. Counsel should not shy away from bold speech, but should never resort to the inflammatory. Language should be conversational but not colloquial. Counsel should maintain eye contact, a comfortable stance, and a keen awareness of all members of the court. Lately, there has been a discerable shift away from undue formality in appellate courts. Reference to M'Lord and M'Lady is highly discouraged in some venues[36]. Used too often, the phrase: "It is respectfully submitted" can clutter up oral speech and distract the listener. Be that as it may, traditions of decorum and civility remain touchstones of the Canadian approach to advocacy. While litigation is not a "tea-party", "counsel can disagree, even vigorously, without being disagreeable"[37]. Some have bemoaned the apparent decline of civility amongst Canadian lawyers[38], but restorative measures have been taken in some jurisdictions[39] and we have yet to descend to the level of legal warfare that has come to typify litigation in the United States[40]. One can only hope that we never will. As stated by Justice Warren Burger, civility is the necessary "lubricant" that stands "as a barrier between a courtroom and a bar room brawl"[41].

Counsel for the Appellant enjoys a great advantage in being the first to speak. It is she who sets the stage for the hearing of the appeal. The power of the opening statement has already been discussed, above. The question is where to proceed after the opening has been delivered. Counsel is well-advised to avoid a lengthy stand-alone recital of the facts. This is *not* to say that facts should be ignored. It is only to say that they are best woven into and the web of legal argument. A succinct overview of the facts can sometimes provide context for the legal issues. However, on the assumption that the Court has read the facta, any stand-alone statement of facts is best reduced to the salient highlights. Counsel should move quickly to the heart of the appeal. As it was put by Justice John Laskin: "There may be a few cases - such as a long appeal - that require a more elaborate introduction, but in most appeals, forget the windup and make the pitch"[42].

Davis, the Argument of an Appeal (1940), 26 A.B.A.J. 895.

[31] This formula is quoted by John J.L. Hunter, Q.C. in "Presenting a Civil Appeal" unpublished paper prepared for C.L.E. Advocacy Symposium, Vancouver, British Columbia, November, 2001 at p.13.3.23-24

[32] This approach is strongly commended by Justice Binnie, supra note 8 at p.8

[33] Alan D. Gold "Effective Advocacy in Judge Alone Trials" 1998 National Criminal Law Program; 14.2 at p.3

[34] Jennifer Nadelsky "The Nature of Judgement" presented at Panel on Legal Reasoning, National Judicial Institute, April, 2001 at p.5

[35] This hypothesis arguably derives some support from case law that discusses the requirement that trial judges and, in some instances, appellate courts furnish reasons in support of their conclusions. See R.v.Sheppard, [2002] S.C.J. No. 30; R.v.Biniaris, supra

[36] Both the Supreme Court of Canada and the Court of Appeal for Ontario have issued Practice Directions requiring that members of the Court be addressed in gender neutral terms such as Justice (surname)

[37] Principles of Civility for Advocates, The Ontario Advocates Society, preamble

[38] see R.R. Sugden, Q.C. "Civility in the Legal Profession" in The Splendour of the Law: Allan McEachern, a Tribute to a Life in the Law, ed. Jack Giles (Dundurn Press, Toronto, 2001) at p.89

[39] see Principles of Civility, supra

[40] Sugden, supra, note 43

[41] ibid. at p.95

[42] The Honourable Justice John I. Laskin "A View from the Other Side: What I would have done differently if I knew then what I know now"[1998] *Advocates' Society Journal* 16 at p.20

When it comes to the legal issues, counsel must aim to be selective. If too many points are raised, there is a risk that any gems will be lost in the surrounding rubble. Justice George Finlayson has suggested that: "As an *aide memoire* to be attached to every counsel's brief, permit me to state unequivocally that no judge in a single trial has made more than three reversible errors"[43]. Restrict your argument to your best points and, whenever feasible, present the most compelling ground first. An early demonstration of merit will inspire confidence and set a positive tone for the case as a whole. The spill-over effect may increase the apparent attractiveness of other grounds that have less intrinsic merit.

As part of preparation, counsel should always try to anticipate questions from the bench. The advocate's utopia consists of a world in which every question has been forseen in advance and answered in devastatingly clever terms. Reality is rarely, if ever, so kind. On the other hand, it is much easier to predict what one's opponent will say, as fair notice should be contained in the Respondent's Factum. It is a mistake for the Appellant to proceed as if counsel for the Respondent has gotten lost on the way to the hearing. It is far *more* effective to directly adress and dismantle the Respondent's arguments before he has even had a chance to make them. Similarly, counsel should candidly confront and deal with "unruly facts and uncooperative legal arguments[44]" that are germane to the case but weigh against his position. Willful blindness is no more helpful to the advocate than it is to the person charged with possession of stolen property. One can generally assume that hidden warts and imperfections will be happily exposed by one's opponent, or worse yet, the court. When this happens, the potential harm can extend beyond the case and injure the advocate's most precious commodity - his or her credibiliity.

Counsel should exercise restraint when deciding what, if any, source material should be read aloud to the Court. Where a case is relied upon, it can be quite enough to simply identify the authority, where it is found in the materials, and the proposition that it stands for. Similarly, relevant facts can often be summarized without forcing the court to listen to endless recitals from the transcript. On the other hand, there will be occasions where a passage in a case is so pithy, persuasive, or dispositive that counsel can do no better than to take the court directly to it. Similarly, certain exchanges in the transcript may be so vital or compelling that they cannot be suitably paraphrased[45]. Where a passage *is* to be read, it should be identified in advance, and kept as brief as possible. As John Davis put it: "There is something about a sheet of paper interposed between speaker and listener that walls off the mind ... It obstructs the passage of thought as the lead plate bars the X-rays[46]. All of that said, counsel must know where to find extra ammunition should she come under fire. A hostile challenge from the court can occasionally be defused by taking the court to relevant precedents or portions of the evidence.

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[43] The Honourable Justice G. Finlayson "Appellate Advocacy in an Abbreviated Setting". supra at p.3.

[44] see Richard H. Seamon, supra

[45] Where the Charge to the jury is in issue, it will often be impossible *not* to take the Court to the transcript to examine just what the trial judge said and the context in which he or she said it.

[46] John Davis, "The argument of an Appeal", supra, note 30

Much has been written on how best to deal with questions posed by the Court. As pointed out by Justice Binnie in his oft-quoted paper[47], different types of questions will call for different forms of response. However, Justice Binnie's general advice - "listen before you leap" - holds true for all categories. Counsel must resist the temptation to fill any apparent silence with immediate verbiage. The answer *may* be at the tip of the tongue and allow for instantaneous response. If not, taking a few moments taken to collect one's thoughts will spare the advocate the indignity of collecting them aloud. Moreover, a precipitous response may paint counsel into a corner that she does not wish to inhabit. Questions will often jump from issue to issue, interupting the flow of counsel's argument. However, this should not be seen as an unwelcome intrusion. To the contrary, questions identify the court's key concerns and the issues that it finds most troubling. Counsel should seize upon this information and address such matters as quickly as possible. Questions should never be entirely deferred or left hanging; one risks losing the attention of the inquisitor. So long as all of the relevant points have been made, it will not usually matter whether they were made out of sequence. Occasionally, counsel's entire performance will consist of a socratic dialogue with the Court. Where questions do fall into reprieve, a useful transitional phrase - "If I could return to the issue of x" - can help restore the thread of argument that preceded the onslaught. Some questions will have a distinctly hostile flavour. When challenged, counsel should stand firm and politely defend her position with every arrow in her quiver. Yet, at a certain point, it may become depressingly obvious that nothing more can be said to address the court's concerns. A submission is not made more convincing through repitition any more than a foreign language is made understandable through shouting. To avoid invoking the ire of the Court, counsel should take note of when it is time to sit down or move on, perhaps with the signal: "I don't believe that I can be of any further assistance on this issue".

Certain rules have special application to counsel for the Respondent. The first and perhaps most obvious point is that the Respondent must be respons*ive*. This requires flexibility. Counsel must be able to quickly modify a planned presentation to meet the contingencies of the hearing, as defined by both the Appellant and the court. The Respondent's chair offers a unique perspective. By the time counsel rises to his feet, he will have already witnessed the exchange between his opponent and the Court. This can provide a helpful, albeit tentative, barometer of the court's views. The Respondent should never become smug merely because the Appellant's counsel received a rough ride. This *may* signal that the Court is unconvinced. But there is no guarantee that the Respondent will not be met with the same type of reception. The Court may wish to test the limits of both parties' positions. Moreover, the Respondent faces certain disadvantages. The Appellant has had the first monopoly on the court's attention. Effective counsel can imprint a portrayal of the facts and issues that may be difficult for the Respondent to dismantle. The Respondent faces an even greater incentive to move straight to the issues, and to troubleshoot in areas that appear to have piqued the interest or concern of the Court.

Finally, there is the issue of reply. This topic is probably best addressed by saying absolutely nothing at all. At least, that seems to be the proper approach in the vast majority of cases[48].

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[47] Justice Ian Binnie, supra, note 8

[48] see e.g. the comments of Justice George Finlayson, supra, note 26 at p. 5-6, in which he describes reply as "the most effective, but regrettably, most misused tool of advocacy". While acknowledging that "a good reply can be devastatingly effective if you can score but one point", he concludes by cautioning that "reply is for experts...learn when to leave well enough alone".