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ORAL ADVOCACY

WILLIAM H. REHNQUIST*

Oral advocacy is a subject dear to my heart and also dear to the hearts of most appellate judges.¹ My colleagues and I may disagree among ourselves about many legal questions, but I think we would all

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1. Justices of the Supreme Court of the United States have almost unanimously agreed that effective oral advocacy is one of the most powerful tools of the profession. Mr. Chief Justice Hughes observed that once a judge determined the precise question to be decided, he was generally not slow in reaching his conclusion. In 1928, Mr. Chief Justice Hughes wrote:

I suppose that, aside from cases of exceptional difficulty, the impression that a judge has at the close of a full oral argument accords with the conviction which controls his final vote. A Judge of the Court of Appeals of New York told me some years ago that he had kept track for a time of his impressions after the oral arguments and found that in ninety per centum of the cases . . . his final judgment agreed with his view at the end of the oral argument.

C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 61-62 (1928).

Mr. Justice Harlan wrote that oral argument was perhaps the most effective weapon of the advocate and advised that it should be given the time and attention it deserved. "Oral argument is exciting and will return rich dividends if it is done well." Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 CORNELL L.Q. 6, 11 (1955).

The writings of Mr. Justice Jackson on the importance of oral argument are well-known and often quoted. "I think the Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations . . . The Bar must make its preparations for oral argument on the principle that it always is of the highest, and often of controlling, importance." Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 801 (1951), reprinted in 37 CORNELL L.Q. 1, 2 (1951).

A partial listing of articles and books written by appellate judges addressing the topic of oral advocacy includes: Breitel, *A Summing Up*, in COUNSEL ON APPEAL 195 (A. Charpentier ed. 1968); F. COFFIN, *THE WAYS OF A JUDGE* (1980); Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801 (1976); Gurfein, *Appellate Advocacy, Modern Style*, 4 LITIGATION, Winter 1978, at 8; Hiscock, *The Court of Appeals of New York: Some Features of Its Organization and Work*, 14 CORNELL L.Q. 131 (1929); Loughran, *The Argument of an Appeal in the Court of Appeals*, 12 FORDHAM L. REV. 1 (1943); Marshall, *The Federal Appeal*, in COUNSEL ON APPEAL 139 (A. Charpentier ed. 1968); Miller, *Oral Argument*, 9 D.C.B.A. J. 196 (1942); Prettyman, *Some Observations Concerning Appellate Advocacy*, 39 VA. L. REV. 285 (1953); E. RE, *BRIEF WRITING AND ORAL ARGUMENT* (5th ed. 1983); Rosenberry, *Briefs on Appeal in Wisconsin*, 1943 WIS. L. REV. 5; Rossman, *Appellate Court Advocacy: The Importance of Oral Argument*, 45 A.B.A. J. 675 (1959); Schaefer, *Appellate Advocacy*, 23 TENN. L. REV. 471 (1954); Schaefer, *The Appellate Court*, 3 U. CHI. L. SCH. REC. 10 (1954); Tate, *Federal Appellate Advocacy in the 1980's*, 5 AM. J. TRIAL ADVOC. 63 (1981); Wilkins, *The Argument of an Appeal*, 33 CORNELL L.Q. 40 (1947); and see also the opinions expressed by seven judges of the Third Circuit Court of Appeals, *In the Matter of Oral Argument*, 1 PRAC. LAW. 12 Jan. 1955, at 12.

agree that a poorly presented case is apt to be a poorly decided case; therefore, we have every reason to hope that litigants before us will do a good job.² By doing so, they not only benefit themselves; they benefit us. Oral advocacy is no great mystery. You don't even have to be a lawyer to get experience in oral advocacy—all you have to do is get married.

When I was admitted to the Arizona Bar thirty years ago, oral argument of an appeal was a matter of course. Each side was given half an hour in the Supreme Court of Arizona, and my recollection is that in the United States Court of Appeals for the Ninth Circuit, which of course included Arizona within its jurisdiction, the appellant was given thirty minutes and the appellee twenty. During this same era—the 1950's—each party to a case in the Supreme Court of the United States was customarily allotted one hour to present his oral argument. All that has changed in the last thirty years.³ Parties in the Supreme Court of the

2. In an address by Mr. Justice Powell entitled *The Level of Supreme Court Advocacy*, presented at the Fifth Circuit Judicial Conference (May 27, 1974) he stated:

Of course, no one expects John W. Davis in every case, but I had hoped for greater assistance from briefs and oral arguments than we often receive . . . I have only admiration for those who recognize the potential importance of, and who prepare carefully for, Supreme Court litigation. I wish their example were more widely followed.

(as quoted in R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE*, 732-33 (5th ed. 1978)).

In 1929, Mr. Justice Stone firmly expressed his views on the duty of counsel to be adequately prepared for oral argument in an opinion of the Court. The opinion states:

[A]rgument here was so inadequately prepared and exhibited such lack of familiarity with the record as not to be of assistance to the Court . . . The occasion seems appropriate to remind counsel that the attempted presentation of cases without adequate preparation and with want of fairness and candor discredits the bar and obstructs the administration of justice.

New York Cent. R.R. v. Johnson, 279 U.S. 310, 319 (1929). See also Wasby, D'Amato, & Metrailler, *The Functions of Oral Argument in the U.S. Supreme Court*, 62 Q.J. SPEECH 410 (1976).

3. It has been suggested that the shift away from oral argument began in the United States Court of Appeals for the Fifth Circuit in the 1960's. In an effort to manage their immense case load, the Fifth Circuit promulgated Local Rule 21 which permitted the court to decide whether oral argument would be heard in the first level of review above the trial court—in an appeal of right rather than a discretionary appeal. Meador, *Toward Orality and Visibility in the Appellate Process*, 42 MD. L. REV. 732, 733 (1983). See also Huth v. Southern Pac. Co., 417 F.2d 526, 527 (5th Cir. 1969) (explaining the screening procedure utilized by the Fifth Circuit); R. MARTINEAU, *MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS* § 12.1 (1983) ("Beginning in the mid 1950's, however, increasing case loads began to influence how a court dealt with each case. Oral arguments became shorter. Oral argument was no longer automatic in every case."). See generally Christian, *Using Prehearing Procedures to Increase Productivity*, 52 F.R.D. 55 (1971); Haworth, *Screening and Summary Procedures in the United States Courts of Appeal*, 1973 WASH. U.L.Q. 257; Wasby, *Oral Argument in the Ninth Circuit: The View from Bench and Bar*, 11 GOLDEN GATE L. REV. 21 (1981); Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195 (1975).

United States are now given only half an hour to present their case.⁴ And I gather that in many state and federal appellate courts, a litigant has his choice: he may get oral argument but no written opinion, a written opinion but no oral argument, sometimes neither, but seldom both.⁵ Contrast the attitude of present day courts with an oral argument which took place in the Supreme Court of the United States more than 150 years ago in the famous case of *Gibbons v. Ogden*.⁶ The Supreme Court consisted of seven justices, presided over by Chief Justice John Mar-

4. In 1970, Supreme Court Rule 44 was amended to reduce the time for oral argument from one hour to one-half hour for each side to present their case. This provision currently is found in SUP. CT. R. 38:

Unless otherwise directed, one-half hour on each side is allowed for argument. Counsel is not required to use all the allotted time. Any request for additional time shall be presented by motion to the Court filed under Rule 42 not later than 15 days after service of appellant's or petitioner's brief on the merits, and shall set forth with specificity and conciseness why the case cannot be presented within the half-hour limitation.

SUP. CT. R. 38.3.

5. The Federal Rules of Appellate Procedure provide:

(a) In General; Local Rule. Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why, in his opinion, oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral argument will be allowed unless

- (1) the appeal is frivolous; or
- (2) the dispositive issue or set of issues has been recently authoritatively decided; or
- (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

FED. R. APP. P. 34.

Most circuits automatically utilize a screening device to determine the necessity for oral argument and instruct parties to set forth reasons for hearing oral argument in their briefs or in a separate statement. See Godbold, *supra* note 1, at 801-02 ("Approximately half of the Fifth Circuit's cases are placed on the summary calendar and decided on the briefs and record."). *Contra* 2D CIR. R. 34(g)(1) (providing for oral argument in all cases before the Second Circuit unless the court "*sua sponte*, contemplates deciding an appeal without hearing oral argument . . .").

For an example of the wide diversity among state appellate courts, E. RE, *supra* note 1, at 157 n.21 (1983) suggests a comparison of the rules of the Appellate Divisions in the four Judicial Departments of the State of New York governing oral argument: 1ST DEP'T R. 600.11; 2D DEP'T R. 670.22; 3D DEP'T R. 800.10; and 4TH DEP'T R. 1000.10.

6. 22 U.S. (9 Wheat.) 1 (1824). At issue was whether the federal government had the power to regulate commerce under U.S. CONST. art. I, § 8, cl. 3, which confers on Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States" Known in its day as the "Steamboat Case," *Gibbons* was a popular topic of national debate at the time oral argument was heard by the Supreme Court:

shall.⁷ In the view of the Court's most eminent historian, Charles Warren, the case of *Gibbons v. Ogden* "was destined to express, in immortal terms, [the Court's] views as to the broad extent of Federal power over internal commerce."⁸

The oral argument in the case was opened by Daniel Webster, who began at eleven o'clock in the morning of February 4, 1824. Webster argued for two-and-one-half hours in an "excessively crowded" courtroom.⁹ Thomas J. Oakley, counsel for Ogden, followed and spoke for an hour on February 4th, and for the entire Court day of February 5th. Thomas Emmet spent the whole of the third day, February 6th, and two hours of February 7th, delivering his argument. The case was finally closed on the 9th by William Wirt for the appellant Gibbons. Five full

Gibbons was of particular interest and magnitude in that it combined the political question of state sovereignty with the economic question of monopolistic control of navigation. At issue was the constitutionality of a grant from New York State to Robert Livingston, Robert Fulton, and their successors and licensees (of whom Ogden was one), of the exclusive right to operate steamboats on New York waters. The grant had been challenged by one Gibbons, who had chosen to operate coastal steamers on the Hudson River between New York and New Jersey in defiance of the Livingston-Fulton monopoly.

G. WHITE, *THE AMERICAN JUDICIAL TRADITION* 30-31 (1976). See also *THE FOUNDATION OF THE FEDERAL BAR ASSOCIATION, EQUAL JUSTICE UNDER LAW* 37-40 (1965); M. FRIBOURG, *THE SUPREME COURT IN AMERICAN HISTORY* 63-81 (1965); J. MARKE, *VIGNETTES OF LEGAL HISTORY* 1-32 (1977); R. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 68-71 (1960); 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 597-610 (1926).

7. Oral arguments in *Gibbons v. Ogden* were actually heard by only six of the seven members of the Supreme Court of the United States: Chief Justice John Marshall, Justice Bushrod Washington, Justice Thomas Todd, Justice Gabriel Duvall, Justice William Johnson, and Justice Joseph Story. Although appointed in 1823, Justice Smith Thompson did not take his seat on the Bench until February 10, 1824, the day after the conclusion of oral arguments in *Gibbons v. Ogden*. 1 C. WARREN, *supra* note 6, at 607; 1 L. FRIEDMAN & F. ISRAEL, *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969 passim* (1969) (providing biographical information on individual Justices of the United States Supreme Court).

8. 1 C. WARREN, *supra* note 6, at 597.

9. It is of interest to note that some methods of preparation by attorneys have perhaps not changed too dramatically in the last 150 years. Relating that Daniel Webster stayed up all night to prepare his argument, Curtis reported:

To use his own phrase "the tapes had not been off the papers for more than a year!" He worked all night and, as he has told me more than once, he thought he never on any occasion had so completely the free use of his faculties At nine A.M., after eleven hours of continuous intellectual effort, his brief was completed. He sent for the barber and was shaved; he took a very slight breakfast of tea and crackers; he looked over his papers to see if they were all in order, and tied them up; he read the morning journals to amuse and change his thoughts, and then he went into Court and made that grand argument which, as Judge Wayne said about twenty years afterward "released every creek and river, every lake and harbor in our country from the interference of monopolies."

Id. at 602 n.3 (quoting from G. CURTIS, *LIFE OF DANIEL WEBSTER* 216-17 (1870)).

Court days—twenty hours at four hours each day—were devoted to the argument of this important case.

By contrast, in *Dames & Moore v. Regan*,¹⁰ a similarly important commercial case in which our Court granted certiorari before judgment a few Terms ago, two hours were allotted for oral argument. Without implying that one practice was good and the other bad, let us simply note for the moment that, in two cases of comparable importance, the time for oral argument was reduced from twenty hours to two.

One senses from reading contemporary accounts of the arguments in *Gibbons v. Ogden* that the judges had genuine respect, even awe, for some of the counsel who appeared before them;¹¹ and the lawyers had equal respect for some of the judges. A New York correspondent described William Wirt,¹² one of the advocates in *Gibbons v. Ogden*, in these words: "His voice is powerful, his tones harmonious, and his enunciation clear

10. 453 U.S. 654 (1981). The case involved important questions of Presidential power. In connection with negotiating the release of the hostages taken in the 1979 seizure of the American Embassy in Tehran, the President entered into an agreement to suspend pending claims of United States nationals against the government of Iran. The potential effect on the economic livelihood of many United States businesses was far reaching. The terms of the agreement between the United States and Iran obligated the United States to:

[T]erminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

Id. at 665 (citing *petition for cert. app.* at 22). The Court held that the action did not exceed the President's claim settlement authority, specifically limiting the decision to the questions of this case.

11. Justice Story described Daniel Webster's argument:

Of Mr. Webster's argument in the opening of this cause . . . it may be said to furnish as good a specimen of the characteristics of his mind, as any which could be named. We have here, in as favorable light as we could desire, his clearness and downright simplicity of statement, his vast comprehensiveness of topics, his fertility in illustrations drawn from practical sources; his keen analysis, and suggestion of difficulties; his power of disentangling a complicated proposition, and resolving it in elements so plain as to reach the most common minds . . . Whoever, with a view to the real difficulties of the case and the known ability of his opponents, shall sit down to the task of perusing this argument, will find that it is equally remarkable for profoundness and sagacity, for the choice and comprehensiveness of the topics, and for the delicacy and tact with which they were handled.

1 C. WARREN, *supra* note 6, at 603-04 (quoting from manuscripts in the Congressional Library and quoted by E. WHEELER in DANIEL WEBSTER, THE EXPOUNDER OF THE CONSTITUTION (1905)).

12. William Wirt, 52, was Attorney General of the United States at the time and had been for six years. He was retained by Thomas Gibbons along with David B. Ogden, 55, (not to be confused with Gibbons' opponent, Aaron Ogden) and Daniel Webster, 42, to take the appeal to the Supreme Court. Gibbons was passionately committed to breaking the steamboat monopoly and to the economic significance of the freedom of transportation. Gibbons even changed his will to provide "for a fund of \$40,000 to be established to carry the costs of the

and distinct His arguments are constantly enlivened by classical allusions and flashes of wit. Many a dry cause, calculated to fatigue and weary, is thus rendered interesting to the spectator as well as to the Court"¹³

Daniel Webster¹⁴ himself wrote of his feelings at the opening of the argument in the *Gibbons* case:

I can see the Chief Justice as he looked at that moment. Chief Justice Marshall always wrote with a quill. He never adopted the barbarous invention of steel pens And always, before counsel began to argue, the Chief Justice would nib his pen; and then, when everything was ready, pulling up the sleeves of his gown, he would nod to the counsel who was to address him, as much as to say, "I am ready; now you may go on." I think I never experienced more intellectual pleasure than in arguing that novel question to a great man who could appreciate it, and take it in; and he did take it in, as a baby takes in its mother's milk.¹⁵

It may be that reporters then were less cynical than they are now, or that lawyers and judges were more florid in expressing their praise for one another in that bygone age. Or it may be that there were giants among us then who are present no longer. But there cannot be the slightest doubt that the oral presentation of the case of *Gibbons v. Ogden* to the Supreme Court of the United States was of commanding significance in getting across to the judges the lawyers' views of the case. Perhaps the tendency of present day courts to curb or even eliminate oral argument may indicate that in the minds of many judges it is now a less favored method of advocacy.¹⁶ Whatever one may think about such a view,

litigation in the event of his death." J. MARKE, *supra* note 6, at 15. See also 1 C. WARREN, *supra* note 6, at 599-600.

13. 1 C. WARREN, *supra* note 6, at 600 (quoting from the New York Statesman, Feb. 24, 1824).

14. At age 42, Daniel Webster was regarded by many as one of the most eminent members of the Bar. "Daniel Webster's reputation as a great constitutional lawyer had been markedly enhanced by his triumphant victories in two landmark cases the Supreme Court had just decided—the *Dartmouth College Case* and *McCulloch v. Maryland*. Webster was being hailed as one of the foremost lawyers of the American Bar" J. MARKE, *supra* note 6, at 15. See also 1 C. WARREN, *supra* note 6, at 599-600.

15. 1 C. WARREN, *supra* note 6, at 603. See also J. MARKE, *supra* note 6, at 20-21 (attributing this description to a record made by Peter Harvey of a conversation with his friend Daniel Webster).

16. *Contra* Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 254 (1975) (quoting remarks by Mr. Justice Brennan before the Third Circuit Judicial Conference in 1972: "I have had too many occasions when my judgment of a decision has turned on what happened in oral argument, not to be terribly concerned for myself were I to be denied oral argument."); Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 CORNELL L.Q. 6, 7 (1956) ("[O]ral argument gives an opportunity for interchange between court and counsel which the briefs do not give. For my part, there is no substitute, even within the time

surely we can all agree that so long as oral advocacy is practiced, it ought to be practiced in the best traditions of the profession.¹⁷

What is it that judges of an appellate court expect from oral advocates? My first point is something of a disclaimer. So long as we have literally hundreds of appellate courts in this country, there cannot possibly be any uniform rules on the subject. One can venture generalizations based upon the observation of others; or one who, like me, has listened to oral arguments for nearly twelve years can venture his own subjective views as to what *he* expects. But the starting point for the oral advocate must be the particular court before whom he is to appear. He is not, after all, presenting his case to some abstract, platonic embodiment of appellate judges as a class, but to three, five, seven, or nine flesh and blood men and women.¹⁸ The advocate must have some feel for the wishes of

limits afforded by the busy calendars of modern appellate court"); Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 801 (1951) ("Over the years the time allotted for hearing has been shortened, but its importance has not diminished. The significance of the trend is that the shorter the time, the more precious is each minute.").

Anthony Lewis, author of *GIDEON'S TRUMPET*, states:

Too often lawyers think it is just a ceremony, an old-fashioned business that does not really matter as long as all the arguments are in the brief. The justices do not feel that way. A good oral argument, Justice Harlan has said, "may in many cases make the difference between winning and losing, no matter how good the briefs are."

A. LEWIS, *THE SUPREME COURT AND HOW IT WORKS* 125 (1966); *see also* R. MARTINEAU, *MODERN APPELLATE PRACTICE* 211 (1983) ("This is not to say that oral argument is no longer important. But it is important in a much different way than it once was."); T. MARVELL, *APPELLATE COURTS AND LAWYERS* 76 (1978) (quoting an unnamed Ninth Circuit judge as stating the argument "is more meaningful than other offerings . . . because the lawyer is finally required to reduce his case to its lowest terms and to submit his best thinking."); E. RE, *supra* note 1, at 153 ("Limitations upon the time allowed for oral argument, however, should not be misinterpreted to mean that appellate judges do not consider it important.").

17. *See generally* Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895 (1940) (This classic address, delivered by John W. Davis in 1940, set forth his ten commandments of oral argument. Under the current time limitations imposed on oral argument the more pertinent rules include: Always go for the jugular vein; Rejoice when the court asks questions; and Read sparingly and only from necessity.); Godbold, *supra* note 1; M. MOSKOVITZ, *WINNING AN APPEAL* (1983); Prettyman, *Some Observations Concerning Appellate Advocacy*, 39 VA. L. REV. 285, 294 (1953) ("In oral argument stern, courageous selectivity is a necessity, diffusion is fatal."); E. RE, *supra* note 1, *passim*; Wiener, *On the Improvement of Oral Argument*, 1967 TRIAL LAW. GUIDE 349, 351 (Quoting Mr. Justice Jackson, "[t]he Bar must make its preparations for oral argument on the principle that it is of the highest, and often of controlling, importance.").

18. One advocate advises:

[L]earn all you can about the members of the panel before whom you are to appear. Appellate advocacy is the art of persuasion, and it is your job to persuade every member of that panel—three, five, seven, or even nine men—of the justice of your client's cause. The more you know about them and their backgrounds, the more likely it is that you can touch a responsive chord. Believe it or not, appellate judges are human beings. They suffer the infirmities and enjoy the strengths of other people;

the particular court before which he is to make his presentation.¹⁹

When I practiced in Arizona, I had occasion to argue cases before the Supreme Court of Arizona and before different panels of the Court of Appeals for the Ninth Circuit. These courts functioned in quite different ways. I realized during my first argument before the Supreme Court of Arizona what I should have somehow found out earlier: that the judges simply did not read the briefs in the case before coming on the bench to hear oral argument.²⁰ To me this is almost a waste of the time set aside for oral argument, which at its best should be a refinement and a polishing of the issues in the case, not an introduction to the facts out of which the litigation arose. But when in Rome, do as the Romans do:²¹ if the appellate court before which you are arguing makes a practice of not reading the briefs before they come on the bench, you had better be prepared to develop the facts in some detail.

The Court of Appeals for the Ninth Circuit, when I practiced before it in the 1950's and the 1960's, had a much different practice; although here, too, because the composition of the three-judge panels changed, one could not speak with assurance of the court as a whole. But generally, these judges had read the briefs, their reading of the briefs had generated questions in their minds, and they felt free to ask these questions. An advocate before the Ninth Circuit would be wasting his time and the court's time if he felt obliged to make a detailed presentation of the facts.

some are quick, others slow. All have been influenced by their environment and their experiences; they have their predilections and emotions, even as you and I.

Gates, *Hot Bench or Cold Bench*, in COUNSEL ON APPEAL 107, 112 (A. Charpentier ed. 1968). See also Prettyman, *supra* note 17, at 299 (Judge Prettyman suggests "[t]he lawyer should imagine to himself what he would want done were he in the judge's place, how he would want the problem stated, the skeins unraveled.").

19. E. RE, *supra* note 1, at 167 (quoting Mr. Justice Marshall: "Indeed, knowledge of a judge's recent opinions aside, knowing the panel members, their background and interests, provides valuable clues that will enable you to answer questions in a way that will, as the late Karl Llewellyn once said, 'capture the court.'"); Gates, *supra* note 18, at 110 (pointing out that "what proves successful before one appellate court falls like a lead balloon before another.").

20. For a discussion of the practical consequences of the difference between whether a court has or has not read the briefs prior to hearing oral argument, see Gates, *supra* note 18, at 107 *passim*. Judge Prettyman's view is:

Sometimes the judges read the briefs before the oral argument. Sometimes they do not. To the lawyer preparing and making an oral argument the difference is a material one It is my firm conviction that every appellate court should have an announced custom in this phase of its proceeding. Counsel should be allowed and expected to assume that the announced custom has been followed.

Prettyman, *supra* note 17, at 301.

21. J. BARTLETT, FAMILIAR QUOTATIONS 127 (15th ed. 1980) (The proverb "when in Rome, do as the Romans do" can be traced to advice given to St. Augustine in a letter: "When you are at Rome live in the Roman style; when you are elsewhere live as they live elsewhere.").

"Knowing your court" can be carried further, even to the extent of being familiar with the physical attributes of the courtroom in which the judges sit.²² In our courtroom, for example, which is very large, the acoustics are terrible; the attorneys and questioning judges all speak into a microphone. The courtroom itself is so large, and the Bench stretching across the entire width of the room is so massive, that an attorney may feel it necessary to use the manner of a speaker at a public meeting. But this is not at all desirable; while there may be several hundred people in the audience listening to you, your message is directed to the nine individuals on the bench, and the more you can keep your tone conversational, rather than oratory, the better your case will fare.²³

Once we go beyond knowing the court and courtroom, I think the most important message I can convey to you is that appellate advocacy

22. Mr. Justice Jackson suggests that the advocate arrive a day or two early and observe the proceedings in a court with which he is unfamiliar. See Jackson, *supra* note 1, at 861.

Additional detailed suggestions for the prospective appellate advocate can be found in MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS:

If the appellate attorney is new to the appellate court before which he is to argue, he should visit the court when it is in session. He should observe whether there is more than one courtroom, their locations, the arrangement of counsel tables and lectern, how the cases are called, how the court controls the length of oral argument (lights or other signals), whether a clock can be seen from the lectern, where he can place his notes and other materials he plans to use during oral argument, whether a sound system is used, the acoustics, and anything else that may affect his argument. The more familiar an appellate attorney is with the surroundings and details of the appellate court before which he is appearing, the more comfortable and relaxed he will be when making his oral argument. A minor *faux pas* will probably not upset the court, but may be enough to disrupt the attorney's concentration on his argument.

R. MARTINEAU, *supra* note 3, at § 12.3.

23. There are numerous concerns to keep in mind while attempting to keep your tone conversational. As Mr. Justice Jackson wrote:

If your voice is low, it burdens the hearing, and parts of what you say may be missed. On the other hand, no judge likes to be shouted at as if he were an ox. I know of nothing you can do except to bear the difficulty in mind, watch the bench, and adapt your delivery to avoid causing apparent strain.

Jackson, *supra* note 1, at 861.

A much earlier view on the same topic was written in a letter in 1824, describing a visit to the Supreme Court of the United States:

I may say in truth I am pretty well gorged with Washington The great men of the Supreme Court almost read their speeches The counsel in argument begin so low as scarcely to be heard and gradually swell until they fairly rave; then they gently subside into a soft whisper; their gesticulation is menacing, both to the Court and the bystanders

1 C. WARREN, *supra* note 6, at 606 n.1.

Mr. Justice Minton has suggested that "[a] brief should be *brief*" and that if the lawyer is skillful in both writing the brief and in arguing the case he will "challenge and command the attention of the court." Minton, *Foreword* to F. WIENER, BRIEFING AND ARGUING FEDERAL APPEALS at v (1967).

consists of two instruments to be employed by counsel: first, the brief, and second, the oral argument.²⁴ Many able lawyers seem to regard these as the functional equivalent of one another, as you will observe from this account of an oral argument which one of the presiding judges of the Appellate Division in New York City told me a number of years ago. The court had a rule prohibiting counsel from reading their briefs, and this particular lawyer was not long into his argument before it was apparent that he was violating the rule. The presiding judge cautioned him, reminding him of the rule, but he nonetheless persisted in simply reading his brief, albeit in a rather florid way. The presiding judge finally interrupted to say: "Counsel, I think you may be sure that we have read your brief." Whereupon counsel righteously replied: "Yes, but you have not heard it with gestures."

The Supreme Court gets more advocates than it should who regard oral argument as a "brief with gestures."²⁵ Actually, the brief in an appellate court has about the same relation to oral argument as the pleadings in a case do to arguments before the trial judge or even a jury. The oral arguments you make must necessarily be structured by what is covered by your brief, but under no circumstances should you simply recite, summarize, or selectively read from your brief and consider it a satisfactory oral argument.²⁶

You naturally try to make your brief readable, even interesting if

24. See generally H. LEVY, *HOW TO HANDLE AN APPEAL* *passim* (1968); K. LLEWELLYN, *THE COMMON LAW TRADITION DECIDING APPEALS* *passim* (1960); R. MARTINEAU, *supra* note 3, *passim*; M. MOSKOVITZ, *supra* note 17, *passim*; E. RE, *supra* note 1, *passim*; Rutledge, *The Appellate Brief*, 28 A.B.A. J. 251 (1942); R. STERN & E. GRESSMAN, *supra* note 2, *passim*; F. WIENER, *BRIEFING AND ARGUING FEDERAL APPEALS* *passim* (1967); Wiener, *Essentials of An Effective Appellate Brief*, 17 GEO. WASH. L. REV. 143 (1949).

25. Appellate judges sometimes wonder if counsel appearing before them has even taken the time to read the rules of the court prior to his appearance. See, e.g., SUP. CT. R. 38.1 which states: "Counsel should assume that all Members of the Court have read the briefs in advance of argument. *The Court looks with disfavor on any oral argument that is read from a prepared text.*" (emphasis in original). See also Jackson, *supra* note 1, at 861 ("If one's oral argument is simply reading his printed brief aloud, he could as well stay at home.").

26. Insight into an appellate judge's reaction to poor oral argument can be found in remarks made by Thurgood Marshall:

All the lawyers I know . . . stress the importance of oral argument. Most judges do, too. I suspect that those who don't have become so inured to the poor arguments that are often made that they do not appreciate the value of oral argument in general. During a few arguments in the Second Circuit, I've recalled with approval the remark in *King Henry VI*, Part II, "The first thing we do, let's kill all the lawyers."

Marshall, *The Federal Appeal*, in COUNSEL ON APPEAL 139, 144 (A. Charpentier ed. 1968). See also Schaefer, *Appellate Advocacy*, *supra* note 1, at 473 ("The only advantage our court has been able to ascertain from the reading of a brief is that when a man is reading, we can tell pretty well when he is going to finish.").

possible; but you are hampered in this regard by the commonsense dictate that your brief must cover every point you wish to preserve within a limited number of pages. A brief may often be top-heavy with citations to cases or quotations from them, quotations from portions of statutes, and the like. There is no help for this. But when it comes to oral argument, the more flesh and blood you can insert into it, as opposed to a dry recitation of principles of law or decided cases, the more interesting and effective that argument can be.²⁷ The difference in the two may perhaps be summarized by the difference between a "preview" of a movie and the movie itself. The "preview" consists solely of scenes from the movie, but the preview selects dramatic or interesting scenes that are apt to catch the interest of the viewer and make him want to see the entire movie.²⁸

Lawyers who practice before our Court, or for that matter before any appellate court, should also consider the different contexts in which oral argument and brief reading occur. Brief reading is a solitary occupation; it is very difficult to get much out of someone else's reading a brief for you—it is something you must do yourself, and in a relatively quiet environment.

27. Pollack, *The Civil Appeal*, in COUNSEL ON APPEAL 29, 45 (A. Charpentier ed. 1968) ("The advocate's job is to tell a quick-breaking story. He is dealing with real people and real problems, each of which had a substantial and human interest for the contestants. It is the re-creation of that human story which is the job of the advocate on the civil appeal."); Wiener, *Oral Advocacy*, 62 HARV. L. REV. 56, 63 (1949) ("High on the list of essentials is the use of a good opening sentence or paragraph to catch the court's interest and attention and effectively to lodge the major points of the case in the court's mind in the critical first two minutes of argument.").

28. The parable used by Mr. Justice Jackson to illustrate the difference between various presentations of argument is helpful on this point:

Once upon a time three stone masons were asked, one after the other, what they were doing. The first, without looking up, answered, "Earning my living." The second replied, "I am shaping this stone to pattern." The third lifted his eyes and said, "I am building a Cathedral." So it is with the men of the law at labor before the Court. The attitude and preparation of some show that they have no conception of their effort higher than to make a living. Others are dutiful but uninspired in trying to shape their little cases to a winning pattern. But it lifts up the heart of a judge when an advocate stands at the bar who knows that he is building a Cathedral.

Jackson, *supra* note 1, at 864. See also Schaefer, *Appellate Advocacy*, *supra* note 1, at 476 (Mr. Schaefer quotes Mr. Justice Jackson's parable and concludes: "The law lives . . . in the physical, economic and social order of conditions of actual life that have given rise to the rules of law, and the lawyer who is building a cathedral is the lawyer that realizes that fact."); Godbold, *supra* note 1, at 809-10 (providing several examples of both effective and ineffective presentations of oral argument); Prettyman, Jr., *Supreme Court Advocacy: Random Thoughts in a Day of Time Restrictions*, 4 LITIGATION, Winter 1978, at 16, 19 ("[T]he fact is that to convince a court of your viewpoint—which is what advocacy is all about—you have to catch the Court's attention in the first place."). This same article contains short excerpts from the arguments in *Brown v. Board of Education* demonstrating the very different but equally effective styles of John W. Davis and Thurgood Marshall.

Oral argument, on the other hand, is an essentially collegial function. It is one of only two occasions on which the judges get together to consider the case.²⁹ As an oral advocate you should take advantage of this opportunity to be present with the Court when it collegially concentrates on your case.³⁰ Hopefully the judges will have read the briefs, and are now ready to begin hearing your explanation of both your strong points and your weak points, and to ask you some questions. Because of the different nature of an oral presentation from a written one, your oral argument can be more "freeform" than your brief. But you must not let the greater latitude of oral argument produce any sloppiness in your presentation.

Look at the matter from a commonsense point of view. If you were discussing with your husband or wife whether or not you should go to the mountains or the seashore for your vacation that year, would you read your arguments to your spouse? Of course not. There are only two of you, and the tremendous advantage that comes from face-to-face eye contact in any effort at persuasion more than offsets the possibility that you will forget a part of your argument. What if you had gotten together with your brothers and sisters to discuss an important piece of family

29. See, e.g., E. RE, *supra* note 1, at 154 (quoting Mr. Justice White's remarks to the National Judicial Conference in 1981: "[O]ral argument remains an important step in the decision-making process. It is then that all of the Justices are working on the case . . . and attempting to clarify their own thinking and perhaps that of some of their colleagues."). See also the comments of Mr. Chief Justice Charles Evans Hughes:

The desirability . . . of a full exposition by oral argument in the highest court is not to be gainsaid. It is a great saving of time of the court . . . to obtain the grasp of the case . . . and to be able more quickly to separate the wheat from the chaff. Our records in these days of typing are apt to be full of chaff.

C. HUGHES, *supra* note 1, at 62-63.

30. Samuel Gates sets out cardinal rules for the art of appellate persuasion, and the first one is:

[N]ever miss an opportunity to present oral argument by following the easy course of saying "Submitted." An apt simile has often been used: it's a lot more difficult to persuade a pretty young thing to say "Yes" by letter than by the spoken word; in the latter case you can see the glint of approbation or the frown of a prospective negative and, if necessary, change your tactic in order to get that "Yes."

Gates, *supra* note 18, at 111-12. See also Vanderbilt, *A Unified Court System*, 9 F.R.D. 635, 639 (1949) ("[C]ases that are not argued are not well decided . . .").

The Supreme Court of the United States has upon occasion requested the presentation of oral argument in cases that counsel had merely "Submitted." SUP. CT. R. 38.1 provides: "The Court is also reluctant to accept the submission of briefs, without oral argument, of any case in which jurisdiction has been noted or postponed to the merits or certiorari has been granted. Notwithstanding any such submission, the Court may require oral argument by the parties." See, e.g., *Brown v. Board of Educ.*, 344 U.S. 141, 142 (1952) (per curiam) ("The Court has been advised by counsel . . . that it does not propose to appear in oral argument Because of the national importance of the issue presented and because of its importance to the State of Kansas, we request that the State present its views at oral argument.").

business? Would you read to them from a prepared statement in order to get your views across? Of course not. Why then should you give up the advantage of eye contact and the openness of direct speech when you are addressing a group of three, five, seven, or nine appellate judges? The answer, it seems to me, is that you should not. You will, of course, want to have notes to refer back to, in order to make sure you cover the points which you intend to cover, or so many of them as is possible in the time allowed you.³¹ But an oral argument top-heavy with references to controlling cases is very apt to be a poor oral argument. I have heard very good oral arguments which scarcely mentioned more than one case.

One point commonly made by all those who talk on the subject of oral advocacy is the advocate's response to questions from the bench. Obviously, a lawyer arguing before an appellate court should welcome questions, even hostile or skeptical questions, and try to use them to the advantage of his position.³² But after several years on the Bench listening to oral argument, I am going to emphasize this point once more because it bears repeating. The same principles govern questions and answers during oral argument as govern questions and answers in ordi-

31. Mr. Justice Jackson advises that the advocate become accustomed to considering his points of argument in different arrangements in order to achieve the flexibility that is necessary for skillful oral argument. He shares his personal methods with us:

My practice was to prepare notes, consisting of headings and catchwords rather than of details, to guide the order of argument and prevent important items from being overlooked. Such notes help to get back on the track if one is thrown off by interruptions. They will tend to limit rambling and irrelevance, give you some measure of confidence, and at the same time let you frequently meet your judges eye to eye.

Jackson, *supra* note 1, at 861. See also E. RE, *supra* note 1, at 163 ("Unless a point has *some appeal*, it should not be argued. The oral advocate must be *selective*.") (emphasis in original); R. STERN & E. GRESSMAN, *supra* note 2, at 742 ("[R]eading is more than a breach of Courtroom etiquette. It is also a poor way of conducting an oral argument, for it lacks the spontaneity and flexibility that should mark effective oral advocacy. An outline can be, and often must be, rearranged instantaneously in response to questions. . . .").

32. Questions from the court is a topic that always comes up when oral argument before an appellate court is discussed. Many experienced advocates realize there are benefits to be reaped from such questions:

If the question does nothing more it gives you assurance that the court is not comatose and that you have awakened at least a vestigial interest. Moreover a question affords you your only chance to penetrate the mind of the court, unless you are an expert in face reading, and to dispel a doubt as soon as it arises.

Davis, *supra* note 17, at 897.

Stern & Gressman estimate questioning from the Court will consume at least one third of counsel's time before the Supreme Court of the United States. But they also point out there are a few cases in which no questions are asked and some cases in which questioning goes on continuously. Counsel, therefore, must be prepared for whatever unfolds. R. STERN & E. GRESSMAN, *supra* note 2, at 746.

Former Assistant to the Solicitor General of the United States and experienced advocate Frederick Wiener writes:

nary conversation. If you are going to be able to intelligently answer a question, you must first *listen* to the question. But it is surprising how often appellate advocates, just like many people in private conversation, seem to hear only part of the question, and respond to the part of it they heard even though the answer they give may not be an adequate response to the entire question. And for heaven's sake, forget about the rather trite response "I'm glad you asked that question," or "That question goes to the very heart of the case." We have all heard this response to our questions, and we are all a little bit skeptical about it. Whether the question is hostile or friendly, first understand the question,³³ and then give the best answer you can for the purpose of advancing your cause. Answering questions from the Bench is a vital part of oral advocacy.

One might elaborate other specific techniques depending on the particular type of question being presented on appeal, but I had best leave such elaboration to those who teach courses on the subject in the clinical or practice areas.³⁴ When I was in law school, long ago, we did not have the benefit of any clinical programs, and we had precious little instruction in practice. Perhaps because of this dearth of structured advice, we were reduced to various maxims which made sense to us as law students. The maxim regarding oral argument on appeal, and I can't tell you where it came from—perhaps it is still current today—was this: "If your case is weak on the facts, argue the law; if your case is weak on the law,

Replying to the questions asked by the judges is without doubt the most difficult aspect of oral argument; certainly it is the most stimulating aspect; and it is unquestionably one of the most important. . . .

(a) *Learn to think on your feet.* . . .

(b) *Never refuse to answer a question.* . . .

(c) *Never postpone your answer.* . . .

F. WIENER, BRIEFING AND ARGUING FEDERAL APPEALS *supra* note 24, at 300-02, 324-26. See also Gurfein, *supra* note 1, at 8 ("[A]n advocate must be prepared for a dialogue with the court. It is the advocate's only chance to insinuate himself into the voting conference. A good answer to a hard question may make the difference in the decision.").

33. One example of the importance of "listening" is revealed in the story told by a former presiding justice of the Appellate Division, First Department, of the New York State Supreme Court: "We recently had before us a lawyer for an appellant in a criminal case whom we had never seen before. The presiding judge asked him, 'Did you come here *pro hac vice*?,' to which he responded, 'No, I came by taxi-cab.'" Peck, *Time for Oral Argument*, 4 LITIGATION, Winter 1978, at 39, 54.

34. It is noteworthy, however, to point out that the Appellate Advocacy Committee of the Appellate Judges' Conference has developed an Appellate Advocacy Teaching Package for third-year law students. See Farris, *Two Great Accomplishments*, 22 JUDGES' J. 28, 28 (1983) (Among the reasons stated for the development of these educational materials were: "Many judges and attorneys feel that law schools do not devote enough attention to the written and oral skills necessary for effective representation, especially on appeal. . . . Case congestion in our appellate courts has many causes. Ineffective appellate advocacy, however, has contributed greatly to congestion.").

argue the facts; if your case is weak on both the law and on the facts, pound on the table and shout like hell!"

Oral advocacy is probably more important in the Supreme Court of the United States than in most other appellate courts. For unlike other appellate courts, a grant of certiorari by the Supreme Court to review a decision of a lower court suggests that the case at issue is a genuinely doubtful one. The winning party in the court below has the benefit of a decision by that court on exactly the same issues which will be decided by the Supreme Court. Nonetheless, the most common reason members of our Court vote to grant certiorari is that they doubt the correctness of the decision of the lower court.³⁵ Thus, with the respondent having the benefit of a lower court decision in his favor, and the petitioner having the benefit of a putative though, of course, tentative view that several of the Justices before whom he will argue doubt the correctness of the lower court decision, all of the elements for a "doubtful case" are made out.

Oral advocates on both sides of a case should recognize this—the very fact that certiorari has been granted probably makes the outcome doubtful. And the time set for oral argument is the only opportunity that you will have to confront face-to-face the nine members of the Court who will ponder and decide your case. The opportunity to convince them of the merits of your position is at its highpoint. Strike while the iron is hot! A good oral argument is in the finest tradition of our profession: it confers a benefit both upon your client and upon the court. You should seize the opportunity to give the very best performance of which you are capable.

35. For a thorough discussion of the grant of certiorari in the Supreme Court of the United States see R. STERN & E. GRESSMAN, *supra* note 2, at ch. 5 ("The Manner in Which the Court Determines to Take Jurisdiction"). Basically, certiorari is granted using the "working rule" of the Court referred to as the "rule of four." If four Justices vote to grant certiorari, the Court takes the case. A 1980 analysis of case selection states:

When the justices disagree in case selection . . . they reflect differences in how they weigh the fundamental responsibilities of the Court against the circumstances of actual cases Supreme Court justices differ in the extent to which they consider the lower-court outcome relevant to case selection. The justices also differ, of course, on the merits themselves. The tendency of the justices to take their perceptions of the merits into account in voting for review thus provides a double source of disagreement in case selection.

D. PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 7 (1980). See also D. ROHDE & H. SPAETH, SUPREME COURT DECISION MAKING 118-31 (1976) (providing statistical analysis of criteria for access to the Supreme Court of the United States); Stewart, *An Inside Peek at How the Court Picks Its Cases*, 71 A.B.A. J. 110 (1985) (describing the "cert. pool" system currently being used by six Justices of the Supreme Court of the United States).

