ORAL ARGUMENT IN CIVIL CASES -- DON'T WRITE IT OFF

Gillian Coumbe, Barrister

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Introduction

1. Despite the New Zealand Courts' increased dependence on written submissions, greater use of technology, and shortened hearing times, oral argument has by no means drawn its last breath. It is still the pivotal part of a defended civil hearing. As it should be.

2. What is the fundamental objective of the oral argument? It is universally said to be persuasion. But persuasion is surely the purpose of all advocacy,[1] including the written submissions. The oral argument is, above all, counsel's chance to engage the Court – to ignite the Court's interest and persuade through direct communication. It is, however, all too easy to squander this valuable opportunity. Some counsel do so by treating it merely as an occasion for commentary on their written submissions, the worst offenders being the "lectors"[2] who read them aloud verbatim.[3] At the other extreme are the "debating champions", who are impressive orators but lack attentiveness to the Court. How can counsel make the most of this opportunity to address the Court face-to-face?

3. It will be taken as given that counsel has thoroughly prepared, knows the facts and the law, and has filed concise, well-structured, written submissions. Those are basic expectations. The purpose of this paper is to go beyond that – to examine how the persuasiveness of oral argument can be enhanced by successfully engaging the Court. What follows are generic suggestions, applicable to oral argument in all kinds of civil hearings, including interlocutory hearings, trials and appeals. The topics to be covered are:

   (a) opening strongly;

   (b) handling effectively questions from the Bench;

   (c) content – keeping it simple, pithy and responsive;

   (d) good behaviour, including suggestions for junior counsel;

   (e) reliability and fair play;

   (f) perseverance under fire;

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1 Advocacy arguably covers the conduct of a civil case from start to finish, including pleadings, witness briefs, written submissions, and oral argument: The Hon Justice Doyle, "Sinful Oral Advocacy" (speech delivered at the Bar Association of Queensland's annual conference, February 2008).

2 William H Rehnquist, *The Supreme Court and its Justices,* 1987, pp 245-48.

3 This has been called a"brief with gestures": John G Roberts Jr, *Oral Advocacy and the Re-emergence of a Supreme Court Bar,* 30 J.SUP.Ct. HIST. 68, 78 (2005).

(g) judicious use of visual aids;

(h) making the most of the reply;

(i) finishing strongly.

Opening strongly

4. First impressions matter in the courtroom, as elsewhere. The way an argument is opened sets the stage and may influence the rest of the hearing, for better or worse. Counsel may succeed in establishing instant credibility. Or the reverse may occur. Following are some essentials of a strong opening.

(a) **Make a positive personal impression.** From the outset counsel needs to command attention, and convey competence and sincerity. In an oral hearing tone and visual impact are important. You will, and should, feel nervous. Terror is a common emotion. However, it is essential to appear calm and confident. An inaudible, tremulous, overly-formal or apologetic tone, with matching body language, will diminish the argument. Equally ineffective is a flat, dead, voice – this can make you sound tired or bored, and the Court will soon begin to yawn. What is required is a clear, audible, lively, and respectful delivery. Modulate the volume, pitch and pace as appropriate. Emphasis will be lost if every point is delivered with the same forceful rhetoric, or the same dull monotone. Sometimes a switch to a very quietly spoken statement can emphasis an important point with deadly effect.

(b) **Look at the Judge.** Make eye contact with the Judge from the beginning, and continue to do so appropriately throughout the argument. If there is more than one Judge, as in an appeal, counsel should not concentrate all their attention on the Presiding Judge, or the Judge who intervenes the most frequently. Each Judge will equally influence the outcome, and none should be (or feel) ignored.

(c) **Grab the Judge's attention.** Begin the argument with content that has impact, and preferably some flair. For example:

- Find a colourful and memorable theme or story, or even a catchy phrase, that encapsulates the essence of the case. An example is *Man O'War Station v Auckland City Council.*[4] The appellant had contended that Mr Hooks had not agreed to the construction by the Council of a road on his property on a remote and rugged part of Waiheke Island. Mr Galbraith QC, opening for the respondent Council, queried whether it was seriously being suggested that the "elderly Mr Hooks and his blind wife" had purchased a motorcar in order to "hoon about" over the hilly paddocks.

- Humour can be highly effective, but must be used discerningly lest it fall flat. Usually it is best to leave the jokes to the Judge and to more senior counsel.

[4] [2000] 2 NZLR 267 (CA). This was a case about the implied dedication of land as a public highway.

- Try and avoid beginning with a dubious or unnecessarily provocative assertion that might alienate the Judge or invite immediate interruption.

- The argument should not begin "This is the hearing of..." or "Section 27 of the Commerce Act states...", or "If I could first just ask Your Honour to note the following 20 corrections of the typos in my written submissions...".

(d) **Provide a "roadmap".** The Court will immediately want to know what the case is about and where the argument is going to go. Frustration will quickly set in if this is unclear. After making a carefully-crafted statement that succinctly captures what the case is about, including the key facts, provide a brief "roadmap" – identifying the key points that will be addressed during argument. A basic outline is needed to help maintain the structural integrity of the argument during oral presentation, but it is also important to retain the flexibility to deal with the unexpected.

(a) **Be attuned to the Court.** Where counsel is representing a defendant or respondent the other side will already have presented their argument. Tailor the opening to reflect this. If the Court has already exposed weaknesses in the opposing case it can be powerful to pick up on those. However, if Court is well on its way to a hostile conclusion about critical aspects of your case then it is best to address those concerns up front. Leave inconsequential points aside.

Effective interaction during questions

5. A silent Bench, where the Judge asks no questions and does not challenge the argument, may seem like a dream run. It seldom is. It defeats the purpose of the oral argument because there is no dialogue between counsel and the Judge. And it may lead to unfairness. Silence does not necessarily mean that the Judge agrees with the argument, and may conceal grave doubts. Counsel has no way of addressing the Court's unspoken concerns. A silent Judge may therefore be "a positive menace who may occasion an injustice by not exposing preliminary views".[5] That is especially so if the case is then decided on a basis not canvassed in argument.

6. An extreme example of judicial reserve is US Supreme Court Justice Clarence Thomas. Justice Thomas has not asked a single question during oral argument for six years.[6] He asked his last question on 22 February 2006. New Zealand Judges are relatively interventionist, although the level of questioning naturally varies from Judge to Judge.

7. The conversation with the Judge during questioning is the most valuable part of oral argument. It is counsel's best opportunity to reinforce what the Judge is already thinking (if it is favourable), or to change the Judge's mind (if unfavourable). Counsel should welcome, rather than shrink from, questions. They serve to sharpen the issues and enable correction of any misunderstandings. In answering questions:

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5 M D Kirby, "Ten Rules of Appellate Advocacy" (1995) 69 ALJ 964.

6 "Six years of silence for Justice Clarence Thomas", http://abcnews.go.com/blogs/politics/2012/03/545532/ ABC News, 27 March 2012. His explanation is that he goes into oral argument knowing his decision so he does not need to ask questions.

(a) **Listen.** Carefully listen to the question, and wait until the Judge has finished before replying. If a question is unclear, or inaudible, ask for clarification. If necessary, pause and take time to think about how to reply.

(b) **Answer**. Give a direct, simple answer. The Judge's question may raise an issue that counsel intends to come to later in the argument. It is unwise to respond by saying that the question will be dealt with later and then just plough on. The time to answer the question is now. Oral argument is not a solo performance by counsel; it is about engaging the Judge. If the Judge then continues to ask questions on the topic, you may have to reorganise the order of your argument.

(c) **Never bluff**. If you do not know the answer with a reasonable degree of confidence, then say so. Never bluff. Bluffing will harm your credibility with the Court. Instead, offer to find the answer during the next break, or to file a supplementary memorandum. Do not then omit to do this.

(d) **Be helpful.** Remember that not all questions are hostile. In most civil hearings the issues are finely balanced and questions are inevitable. The Judge will want to better understand the factual and legal issues, and the implications of the argument. The Court may even be attracted to the argument but still want to test its cogency. The Judge has to write a judgment, and needs counsel's help. "Help the Judge, help yourself"[7]. Some questions may, however, be hostile. A few may resemble guided missiles. That is when it is most important to display fortitude -- to persevere, answer clearly, and not fall apart under fire -- but more about that later.

(e) **It is not a confrontation**. It is unwise to be combative, although senior silks may enjoy greater licence. While debate with the Court may be vigorous, it should always be respectful. An alienated Judge will almost certainly not be open to persuasion. If the Court is bombarding counsel with so many questions that there is barely a chance to put the essentials of the case, counsel may need to try and be firm in bringing the Court back to the argument. Politely ask for permission to move on. On rare occasions the circumstances may demand courage in standing up to a Judge – do not be bullied, but just be sure that the Court's frustration is not due to inept submissions.

(f) **Take advantage of the questions**. Try and use the questioning positively, as an opportunity to demonstrate that the argument is sound. If the argument hangs together under difficult questioning, and survives a few "judicial upper cuts"[8], it may well be strengthened and confirmed by the debate. This will empower the Judge to find in your favour.

Content

8. An oral presentation will not be effective unless the content is as pithy as possible, simple, and responsive to the Court's concerns. To achieve this:

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7 The Hon Justice Winkelmann, "Judicial perspective on effective advocacy in commercial cases", NZ Lawyer (20) 8 Jul 2005 10, at p 11.

8 A F Mason, "The Role of Counsel and Appellate Advocacy", (1984) 58 ALJ 537, at p 539.

(a) **Be clear where you are going.** Always let the Court know what issue is presently being addressed (by reference to your initial roadmap), so the Court knows where you are in the argument. Use a "point-first"[9] approach. This means stating the proposition first and then developing it, instead of launching straight into the supporting detail. Otherwise the Judge will be unclear where the argument is going and express frustration, as occurred in a recent case in the Court of Appeal:

> Mr X, in fairness to you...I must admit that I am not finding this any more helpful than I found Mr Y's submission. It might be because we keep being told that we are getting to things and we are not there, but what I would quite like is somebody to go through the issues on the case and perhaps at the beginning or sometime tell me exactly what the position is in respect of those issues. Because one difficulty is I can understand things that are being said, but I just don't know how they relate either to the judgment or to the evidence or the case. So in fairness I am actually totally at sea in terms of where this is going.

(b) **Cull weak points**. Be ruthlessly selective in choosing which arguments to advance. Key points at the heart of the case should be the focus of the oral argument. Bad and 'make weight' points should be jettisoned. Be bold, not timorous. "Get quickly to your real point and hit it with a two-by-four".[10]

(c) **Start with the best point.** It is usually best to begin with the strongest argument on a critical issue. It is a mistake to lead off with a less convincing argument. However, occasionally a different sequence may be more appropriate; for example, it generally makes sense to deal with any jurisdictional issue first.

(d) **Use case citations discriminatingly.** A presentation cluttered with case citations will become tedious and the Judge will tune out. Again, be very selective. Cite only the important cases. State why they are relevant (again, "point first"), and then take the Judge to those cases and read the key extracts.[11] Similarly with key statutory provisions. Judges generally appreciate being taken direct to the key material.

(e) **Go directly to the evidence.** Also take the Judge to key extracts of testimony, rather than leave them for the Judge to find later. The time to make your point is now. But first be very clear why the document is being referred to ("point first"). Have the relevant pages tabbed and marked up in advance so that references can be readily located. It is distracting if counsel is fumbling about trying to locate references.

(f) **Play it by ear**. The appropriate level of forcefulness and colour of the oral delivery will need to be judged as the case unfolds. If you pitch the case too high it may come back to haunt you. But if it is going well and the Court is responding favourably it may be timely to lob a grenade or two at the other side.

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[9] "Some tips on oral advocacy from Justice Rothstein", a speech given by Justice David Rothstein, Federal Court of Appeal, www.davidstratas.com/queensu/rothstein.htm.

[10] Justice Ian Binnie, Supreme Court of Canada, "A Survivor's Guide to Advocacy in the Supreme Court of Canada" (John Sopinka Advocacy Lecture presented to Criminal Lawyers' Association at Toronto on 27 November 1998), p 4.

[11] The Hon Justice Winkelmann, "Judicial perspective on effective advocacy in commercial cases", *ibid,* n 7, at p 11.

(g) **Be responsive to the Court**. Above all, be flexible, watch and listen to the Court, and be attuned to the Court's reactions. The Court may go in unplanned directions. But counsel's job is to be attentive to, and address, the issues that are exercising or interesting the Court. As Justice Binnie put it:[12]

> If you are a good advocate you won't necessarily talk about what you want to talk about, you'll talk about what they want to talk about.

Similarly, Justice Doyle stated:[13]

> There are advocates who have forgotten that advocacy is the art of persuasion. They present their case on a "take it or leave it" basis, not on a "can I help you" basis".

Good behaviour

9. The behaviour and demeanor of counsel during oral argument will influence, for good or bad, counsel's persuasiveness.

(a) **Keep pace with the Court**. Fundamental to engaging the Court is the need to have, and retain, the Court's attention. If a Judge is not paying attention because he/she is still organising papers, locating a reference, still taking notes of the argument, or having a sleeping spell, pause until the Judge looks up. Do not race on. There is no point in being "Casey-Jones" -- counsel who knows the case well but races ahead, not bothering to "pick up passengers along the way".[14] Watch what the Judge is doing, and keep pace with the Court. Racing on repeatedly will eventually annoy the Court, as the following exchange between senior counsel and the Bench in a recent case in our Supreme Court illustrates:

> **Judge A:**
> Could you just slow down a little, Mr X, please. I'm finding it difficult to manage the documents at the speed at which you're proceeding
> **Counsel:**
> Yes, I do apologise.
> **Judge A:**
> I've got so many documents here. Now, which is the one you say to look at?
> ....
> **Judge B:**
> Can we go back to [expert witness]? I need to check this.
> **Counsel:**
> Yes certainly
> **Judge B:**
> You're moving too fast.
> **Counsel:**
> I'm sorry Your Honour
> **Judge B:**
> Because we've got lots of different documents.
> **Counsel:**
> Yes.
> **Judge B:**
> Now you're saying that [expert witness] didn't say what?
> ....
> **Judge C:**

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12. Justice Binnie, "A Survivor's Guide to Advocacy in the Supreme Court of Canada", ibid, n 2, p 3.
13. The Hon Justice Doyle, "Sinful Oral Advocacy", *ibid*, n 1, p1.
14. William H Rehnquist *The Supreme Court and its Justices", ibid,* n 2, pp 245-248.

So just, which paragraph – so which bullet point I suppose in 77 are you on at the moment I put it to you.
Counsel:
5.5(b) of our friend's outline.
...
Judge C:
Sorry, you're on that. I'm sorry I thought you'd moved back.
Judge B:
Are we back on the submissions again?
...
Judge B:
You're jumping around so much and moving so fast, it's very difficult to follow you.
Counsel:
I do apologise Your Honour. I will slow down.
Judge B
Can you remind me which page we're on in the submissions?
Counsel
Our learned friend's outline, paragraph 5.5, page 30, little (b) is...
....
Judge B:
You're going rather fast on that and I havn't a hope of taking notes at that speed.
Counsel:
I'll slow down Your Honour.
Judge B:
Is it in the voluminous written submissions?
Counsel:
Not in enormous detail Your Honour.
Judge B:
Everything else is, I don't know why you didn't put this in.
Counsel:
We tried to keep the length down.
Judge B:
Well it was far too long really. One's eyes started to glaze at about page 40.

(b) **Be courteous**. The Judge is well-positioned to observe everything that occurs at the Bar table. Counsel sometimes forget this and allow their facial expressions or body language to betray their reactions while opposing counsel are addressing the Court. Depending on how the case is going, these reactions may range from crushed defeat, outrage, scorn (occasionally even accompanied by a shaking head or rolling eyes), to triumph. This should not be done. Nor should co-counsel make obvious 'aside' comments to each other, or interject, sneer or smirk while the opponent is addressing the Court. This can be very distracting and will be noticed by the Judge.

If the other side continually engage in distracting behaviour, or unnecessarily interrupt, what can be done to stop them? One effective response is simply to pause, look at the Judge and give a 'helpless' shrug. Or a timely retort may shut them down. A recent example: "Well Your Honour, my learned friend has just had two days to present his argument but it seems he still wants more time." An example when the disruption was particularly bad: "Your Honour I would ask that you direct my learned friend to keep quiet while I address you."

(c) **Correcting misstatements by your opponent**. What if opposing counsel misleads the Court? How should that be dealt with? You should always be respectful and courteous. If opposing counsel has misstated a material fact or circumstance, it should be corrected. But unless there is very good reason, do not

interrupt opposing counsel's argument. If there is an opportunity during a break, inform the other side of the error, and give them an opportunity to correct it themselves. Otherwise you may, when it is your turn to address the Court, do so graciously -- for example: "I believe my learned friend was mistaken when discussing this point", or "I would just like to clarify a point from the record". Do not accuse opposing counsel of "misleading" the court or "misrepresenting" the record. Stay on the high road no matter how tempting it may be to strike a hard blow.

(d) **Be discreet.** Counsel sometimes appear to forget the presence of the Court registrar or other Court staff, or to assume that they have impaired hearing. During a break, counsel often cannot resist expressing a view to their co-counsel as to how well, or badly, their argument is going, and whether the Judge is with them or against them. Some counsel will even launch into complaints or criticisms of the Court or opposing counsel. This may get back to the Judge, and is in any event inappropriate. Review of the day's events should be saved for the war room.

Junior counsel

10. The role of junior counsel -- counsel appearing with a QC, SC, or other lead counsel – warrants special mention. The interaction between junior and lead counsel, can also contribute positively or negatively to the impact of the oral argument. In particular:

(a) **Play a supporting role**. Junior counsel's role is primarily to assist lead counsel. While the latter is addressing the Court junior counsel should observe the Judge, make thorough notes, and be ever ready to hand documents or cases to lead counsel when signalled to do so.

(b) **Be disciplined.** Passing frequent notes, tugging on lead counsel's gown, or attempting to coach him/her during argument should be avoided. Not only is this distracting, it conveys a disquieting message that lead counsel is not in command of the material. Occasionally a discreet, helpful note may be timely. But generally any communication should wait until the next break. Junior counsel should also protect senior counsel from overly zealous instructing solicitors during the hearing, by taking and filtering requests.

(c) **Present a united front.** Even if lead counsel appears to be destroying the argument, junior counsel should not grimace or otherwise display displeasure. Nor, if things are going well, is the Court likely to be any more persuaded by the nodding approval of the junior.

(d) **Take responsibility.** Junior counsel may have a speaking role and is responsible for his/her own presentation when addressing the Court. Do not constantly look to lead counsel for approval, and be very sparing in conferring with lead counsel during questions from the Bench. Nor is it wise to try and outshine the leader. Unless questioned by the Court, do not re-traverse arguments already covered by lead counsel. The argument may unravel and hard-won ground may be lost.

(e) **Be ready to step up.** Very occasionally lead counsel may be unable to appear due to illness or other unforeseen event, in which case junior counsel may need to present a greater part, or all, of the argument. Or lead counsel may unexpectedly invite junior counsel to deal with a particular issue. Do not assume you are only there as an observer.

Reliability

11. During oral argument the Court depends on counsel for a fair representation of the relevant facts and adequate instruction of the law. Constraints of time, heavy caseloads, and the limitations of the judicial role in the adversarial system, mean that the Court is heavily dependent on the accuracy of what counsel puts before it. Reliability is therefore crucial to good advocacy.[15] If a Judge has confidence in counsel, and can trust what is said, that considerably enhances counsel's ability to engage the Judge.

12. As well as being good advocacy, attributes of honestly and candour are required by the duties owed by counsel to the Court. These duties reflect the status of counsel as an officer of the Court and an integral participant in the administration of justice.[16] They include the duty of disclosure, the duties not to abuse the Court process or to corrupt the administration of justice, and the duty to conduct cases efficiently and expeditiously.[17] Integrity is everything. Counsel must not, for example:

- deceive or knowingly mislead the Court, or allow the Judge to take what counsel knows is a bad point in the client's favour;

- omit to bring to the attention of the Court all relevant cases and legislative provisions of which counsel is aware, even those adverse to the argument.

13. If counsel demonstrates unreliability during a hearing, or worse, gains a bad reputation with the Court and fellow barristers, that will undermine his/her effectiveness as an advocate. Memories can be very long. The Judge will be on guard as to the correctness of what counsel says. This wariness will lead to closer scrutiny of assertions. If counsel also breaches the duty to the Court, he/she may also be exposed to a wasted costs order, or a disciplinary complaint.

14. The need to comply strictly with counsel's duties to the Court is a given. But to be an effective advocate, the requisite degree of reliability extends beyond the strict parameters of those duties. Conduct that falls short of being dishonest or misleading but is perceived by the Court as sneaky or unfair will also damage counsel's reputation: Take no risks, even small ones. Examples of sneaky tricks include:

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[15] The Hon Justice Pagone, "Advocacy" (speech delivered at Melbourne University Law School Guest Lecture Series 2011, 24 March 2011); The Hon Justice Winkelmann, "Judicial perspective on effective advocacy in commercial cases", *ibid,* n 9, p 10: "An advocate's most precious asset is their reputation".

[16] The Hon Justice Warren, "The Duty Owed to the Court – Sometimes Forgotten", (speech delivered at the Judicial Conference of Australia Colloquium, Melbourne, 9 October 2009); The Hon Justice Pagone "Divided Loyalties? The Lawyer's Simultaneous Duty to Client and the Courts" (speech delivered at Monash Guest Lecture in Ethics, 20 November 2009.

[17] D A Ipp "Lawyers' Duties to the Court" (1998) 114 LQR 63.

(a) **Overly selective reading from cases and documents**. When quoting from a case, do not just read the helpful parts of a statement in the judgment and omit the unhelpful parts, especially if the omitted part changes the meaning. Judges tend to be adept at reading on from where counsel stops reading, to get the context, and will spot any trickery. Similarly with extracts from the evidentiary record.

(b) **Putting counsel's own "spin" on facts**. While it is good advocacy to present the facts in their best light, counsel should not unfairly distort the facts. The Judge will quickly detect obfuscation and will not listen quite as hard any more.

(c) **Bluffing** about knowledge of a case, statute, or fact. As stated above, if you do not know the answer to a question, say so. If counsel inadvertently says something incorrect or misleading during oral argument, counsel should, unless it is trivial, file a memorandum correcting the position. That is so even if the other side have not disputed what was said.

(d) **Welching on agreements with the other side.** Co-operation between counsel is always appreciated by the Court, and reduces distractions during the hearing. Not sticking to an agreement, and disadvantaging the other side (for example, not adhering to an agreed time allocation for presenting argument), will be noticed by the Court.

(e) **Trying to circumvent the rules**. Some counsel will try to push the boundaries. For example, where written submissions have been filed in advance, counsel may still seek to hand up further documents, sometimes multiple documents, without notice or leave, on the morning of the hearing. They may contain new material. The Courts too readily let this in. The other counsel is then in the difficult position of having to choose between making an objection, or attempting to deal with new material on the fly.

(f) **Not following through.** This includes such things as evading or attempting to postpone answers to hard questions, promising to cover matters later, but never doing so. The Judge will likely not forget the unanswered question.

Perseverance

15. This is what the Justice Kirby calls "courage under fire".[18] It may also be described as "attitude". Fearlessness in an advocate in representing a client is an essential quality. That is because there will almost certainly be difficult moments during the hearing. There may be a barrage of hostile questions. Or a quiet statement of scepticism: "But that can't be a serious argument, surely?" The Court may appear to be embracing opposing counsel's argument. Or questions from the Bench may dry up and a frosty silence may descend, like a "death watch".[19] However, counsel should not give up. Do not panic, become visibly flustered, despondent, or resigned to defeat: [20]

[18] M D Kirby, "Ten Rules of Appellate Advocacy", *ibid*, n 5.
[19] Justice Binnie, "A Survivor's Guide to Advocacy in the Supreme Court of Canada", *ibid*, n 10, p 24.
[20] Justice Binnie, "A Survivor's Guide to Advocacy in the Supreme Court of Canada", *ibid*, n 10, p 24.

> Attitude is everything in advocacy. No matter how disastrously you think the hearing is unfolding, be steadfast and defiant. Don't crumple. Don't take up the posture of a whipped cur, signalling by your body language that you wish you were somewhere else".

16. Always remember that the case is not over until judgment is delivered. Even if you feel as though you are on the Titanic, do not abandon your deckchair until the band has played.[21] The fortunes of both parties can shift and change during the progress of the hearing. The Court may seem hostile to an argument one day, but be far more receptive the next. Judges can change their minds during a hearing, after the conclusion of the hearing and before delivery of judgment. The Court may genuinely be undecided. If the case is an appeal, counsel cannot be sure which Judges have been won over and which lost. Good advocates have the will to keep trying, and, as Justice Kirby has pointed out, it is counsel's duty to do so.[22]

17. It is therefore important to be able to recover from setbacks, persevere, and maintain morale within the legal team. Make the most of the breaks to 'regroup' and focus on ways of better presenting the case. In the example given in paragraph 9(a) above, the counsel who incurred the Court's displeasure did not give up. He returned the next morning armed with a short, clear summary of his position, an effective visual aid handout, and adopted a slower delivery pace. He persuaded the Court to accept his argument, and won the case.

Use of visual aids

18. The judicious use of visual aids has the potential to enhance significantly the persuasiveness of an oral argument, by stimulating interest or aiding comprehension or retention. A visual aid may comprise:

- **a simple low-tech display**, such as an A4 handout, a blackboard, whiteboard, flip chart, magnetic board, transparencies, slides, a model, blow-ups of images or documents, or a display object; or

- **a high-tech display**, such as a video, PowerPoint, interactive Flash presentation, 3-D animation or recreation, or a 3-D model.

The main focus of this discussion is on visual aids that are created solely for use in oral argument in civil cases. Visual aids may also include demonstrative exhibits that have already been produced in evidence, usually by experts.

19. Visual aids can be valuable tools to illustrate, simplify, explain or emphasise aspects of the oral argument. As well as helping the Judge to understand, they will help him/her to remember. Images typically have more impact than words alone. Studies show that when people merely hear information they recall about 70% of it after three hours and 10% after three days. By contrast, people exposed to a combination of oral argument and visual images recall 85% after three hours, and 65% after three days.

20. In the US visual aids, particularly computer graphics, are now very commonly used, and this has spawned a significant body of case law and writing. In New Zealand

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[21] Justice Binnie, "A Survivor's Guide to Advocacy in the Supreme Court of Canada", *ibid*, n 10, p3.
[22] M D Kirby, "Ten Rules of Appellate Advocacy", *ibid.*n 5.

simple A4 handouts, containing tables, lists, graphs, and diagrams, are commonly used in civil cases. With rapidly developing computer technologies, the use of more sophisticated visual aids can be expected to increase here.[23] The potential advantages of using such visual aids are readily apparent. For example:

- A chronology or timeline, to which events can be added as each event is discussed, can be a compelling way of explaining what happened and putting the events in their proper context. This can be done very effectively with a PowerPoint, which provides graphics in a variety of media.

- In a technically very complex case, for example one involving telecommunications, a visual diagram can be used to illustrate the key technical concepts. Such a diagram, if produced early, in opening, can become the 'bible' -- a reference point during the trial, and subsequent appeal. If it remains on display throughout the argument it is constantly available to the Judge and to counsel.

- Blow-ups of maps, photographs and key documents can have more impact than a simple handout. In a High Court case relating to the offer-back provisions of s 40 of the Public Works Act 1981,[24] the history of ownership and reclamation of a surplus parcel of Railways Corporation land on the Auckland waterfront, going back to the 1850s, needed to be illustrated and explained. This was done using a large map with a series of superimposed transparencies. Each transparency depicted the position at different dates. Today this could be presented even more effectively with computer graphics.

21. In the US visual aids are more commonly used in trials than at appellate level. That is also the case in New Zealand. However, visual aids, used appropriately, would also be helpful in the Court of Appeal or Supreme Court. Those Courts are very well equipped with technology for PowerPoint, videos and other high-tech presentations.[25] In a copyright appeal in the High Court of Australia the Court was shown a Play-Station CD-ROM in operation. The video game was demonstrated from the Bar table.[26]

22. As stated above, it is the *judicious* use of visual aids that is important. Visual aids should enhance, not detract from, oral advocacy. If they are not used correctly and appropriately they will have little positive impact, and may instead damage the presentation. There are a number of important guidelines that should be observed:

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[23] The Hon Justice Kirby, "The Future of Courts – Do They Have One?", (1998) 9(2) Journal of Law, Information and Science, 141; M Borelli, "The Computer as Advocate: An Approach to Computer-Generated Displays in the Courtroom 71 Indiana LJ 439; R D Young and S Susser, "Effective Use of Demonstrative Exhibits and Demonstrative Aids", http://www.michbar.org/journal/article.cfm?articleID=151&volumeID=13&viewType=archive.

[24] *Auckland Regional Council & Ports of Auckland Ltd v Attorney-General,* CP 583/88. The case settled.

[25] The Registrar of the Supreme Court, Mr Thatcher, advises that so far there has been no use of visual aids using the Court's sophisticated technology, which includes two monitors on the bench for each Judge, and large screens, hidden behind retractable panels, on each side of the courtroom. In the Court of Appeal there has been use of videos showing police interviews with witnesses, and recently a blow-up of a Google map was shown on the large screen.

[26] *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 79 ALJR 1850. The Hon Justice Kirby, in a subsequent speech, described the demonstration as follows: "The video game was safely demonstrated from the Bar table by an advocate who appeared to have more than a purely professional familiarity with its operations. He was justly rewarded with silk in the next list", "Appellate Advocacy – New Challenges", The Dame Ann Ebsworth Memorial Lecture, London, Tuesday 21 February 2006.

(a) **Visual aids are merely aids to oral advocacy.** The role of a visual aid is to add to, not merely to repeat or summarise, the content of the oral argument. Nor should the visual aid merely be another summary of the written submissions -- a teleprompter to help steer counsel through the argument. The kind of bullet point PowerPoint presentation popular in other forums, such conferences, is inappropriate. The correct use of such aids is as a visual representation of a particular concept or fact – to explain, clarify or emphasise.

(b) **The content of a visual aid must observe the basic rules of advocacy.** A visual aid should not introduce new information that is not already part of the record[27], or common knowledge. It is not an opportunity to sneak in an enhancement to an expert witness' disappointing testimony (for example, by providing an improved diagram or table) or to otherwise present, under the guise of counsel's argument, material that requires, but does not have, a proper evidential foundation. Nor should it misstate what a witness has said or otherwise misrepresent the evidence. If a visual display is challenged or attacked for infringing these rules, the negative impact will be all the greater. The offending material may literally be up there in lights.

(c) **Advance notice should be given.** Ambushing the other side by handing up new written material without prior notice is a sneaky trick. The same applies to visual aids, indeed even more so as they have the potential to have more impact. Advance notice should be given. Where prior exchange of written submissions is required, counsel should seek a direction, or agreement, that the timetable also provide for prior notice to be given of any intended use of visual aids, and for hard copies, or a memory stick or disk to be provided. To avoid unfairness and potential prejudice, counsel need time to assess the proposed display, and to verify its basis in the evidence. There may be occasional exceptions, as where a visual aid is very simple and uncontentious and no prejudice arises if it is simply produced on the day.

(d) **Find out whether prior leave is required.** The Courts are also likely to require that prior permission be sought for use of a visual display, especially one that requires setting up of equipment in the courtroom, and/or use of the Court's own network – for example a PowerPoint presentation or a video.

(e) **Be very selective about use of visual aids.** It is important to exercise good strategic judgment, in deciding whether to use visual aids at all, and if so, to what extent. In many cases their use will not add anything. Where they are used, that should normally be done sparingly. An oral presentation cluttered with graphics and other visuals will overwhelm and distract from the argument. A visual display that presents material in a particular order may also limit counsel's ability to engage the Court, maintain eye contact, answer questions and deal with unexpected developments. The choice of visual aid must preserve counsel's flexibility.

(f) **Keep the content simple.** Visual aids should be simple and easy to understand. As discussed above, simplicity is the essence of oral argument. A visual aid that

[27] If the visual aid is also a demonstrative exhibit, it will already be part of the record.

swamps the Judge with information will be counter-productive. Keep graphics clean and minimalist.

(g) **Appearance counts.** To maximise impact and effectiveness, the visual presentation should be polished and professional, with appropriate use of images, size and colour. With computer graphics it may be best to retain an experienced external consultant to create the display.

(h) **Know the content.** Counsel should know the visual aids sufficiently so that they can continue to face and engage with the Judge while presenting, and not focus their attention solely on the demonstration. With aids such as PowerPoint it is easy to lapse into talking to the slides rather than the Court.

(i) **High tech is not always necessary.** A high tech display may not necessarily be the most effective. Sometimes a simple sketch on a whiteboard can make a powerful impression. So do not begin with an assumption that a computer-generated display is best.

(j) **Be clear what the purpose of the visual aid is.** A case some years ago in Sydney before the Australian Federal Court illustrates this point. The claim was for damages for misleading and deceptive conduct, in relation to defects in a Kenworth truck that had been purchased for long distance goods haulage. The instructing solicitor thought it would be a good idea to have a model of the truck – approximately two feet long – on the Bar table as a visual aid. The presentation of the case, over several days, went extremely badly, until finally the Judge exploded at counsel: "And another thing –what's that truck doing on the Bar table? Counsel did not really have an answer, and humiliation was complete.[28]

(k) **Do not use visual aids as gimmicks or stunts.** There have been many examples of overly enthusiastic use of visuals in the US, especially in jury trials. That is perhaps unlikely to happen in a civil hearing in New Zealand. A graphic example was in a 1988 Arizona auditors' negligence case. In closing submissions the plaintiff's lawyers used a short video entitled "The Titanic" to illustrate their argument that the defendant's negligent audit sank the plaintiff's bank. The video used scenes from the 1960s Titanic film "A night to remember". The bank's logo was superimposed on a segment where water was pouring into the Titanic's engine room. In the final scenes empty life jackets were shown floating on the water as the ship disappeared, while the narrator intoned "[the auditors] had numerous warnings [the bank] was in troubled water but also chose not to listen. Perhaps they too thought they were invincible."[29]

(l) **Get set up in advance.** If possible, meet with Court staff and arrange for the equipment you need to be set up and ready to go before the Court session begins. Try and position the equipment to give the Judge an optimal view, to maximise impact, and to minimise the need for counsel to physically move away from the lectern.

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[28] This anecdote was provided by Jim Farmer QC, who was then practising at the Sydney Bar.

[29] "Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial", Federal Judicial Center publication, p 209, http://www.fjc.gov/public/pdf.nsf/lookup/CTtech00.pdf/$file/CTtech00.pdf. The case was overturned on appeal, on numerous grounds relating to the visual display.

(m) **Be prepared for malfunctions.** Despite advances in computer technology and in their ease of use, there is always a risk of a technical breakdown on the day. Counsel should have a technical adviser on hand, and backup copies of the presentation**.** Delays and fumblings while trying to fix a malfunction will create a bad impression and completely disrupt the flow of the oral argument. If the worst happens, have an alternative plan for presenting the argument.

(n) **A visual aid will not fix a bad argument.** No matter how much sophisticated technology is utilised, that will not mask or fix any basic weaknesses in an argument. Indeed, if the gloss is stronger than the substance then the flaws may be even more apparent. As His Honour Justice Kirby said:[30]

> ...the technology, as such, is no more than a tool to be used. By itself, it cannot transform a losing argument into a winning one. It will not mask or improve factual or legal deficiencies or poor advocacy. Even with the development of technology the basic skills of effective advocacy remain the same as they have always been. A flashy power-point summary of arguments, if permitted, will not hide gaps in logic. Indeed, the technology may make such gaps more visible more quickly.

Borelli put it even more bluntly: [31]

> If you feed a garbage argument into a computer, the output, even if three-dimensional and in bright colour, will still be garbage.

Counsel's main focus will always need to be, first and foremost, on making a good argument.

Reply

23. The first question is whether to reply at all. It can be powerful for counsel to announce that, unless the Court has any questions, he/she does not propose to reply. Sometimes it is clear that the other side's case has imploded, and there is nothing more that can usefully be added. Or counsel may sense that the case has already reached its highest point, and that to revisit any issue might cause it to unravel, or needlessly reopen a debate. It may then be best to leave well alone. The old adage "Quit while you are ahead" sometimes applies.

24. But those cases are rare and usually a reply is necessary. If both counsel have adhered to agreed time allocations there should be time for an oral reply on the day. A written reply filed after the hearing is much less effective. Be bold and just hit the important points. They should be points that have real force. There is no need to ransack the other side's argument and try and respond to everything.

Closing strongly

25. Close with impact. This is not the time to just peter out, mumbling apologetically that "those are my submissions...". Counsel should end with the same enthusiasm and sincere conviction with which he/she began. Both opening and closing remarks are the most memorable part of any courtroom presentation.

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30 The Hon Justice Kirby,"Appellate Advocacy – New Challenges", *ibid,* n 26, p 30.

31 M Borelli, "The Computer as Advocate: An approach to Computer-Generated Displays in the Courtroom," *ibid*, n 23.

26. Showy theatrics or rhetorical flourishes are unnecessary, and may fall flat. An effective ending may be a "bookend" to the opening, where counsel picks up on a colourful phrase, theme or story used in opening; and then, in a short sentence or two, tells the Court what they want it to do and why.

27. Again, humour can be effective, especially if it also demolishes a point made by opposing counsel. In *Commerce Commission v Telecom Corporation of NZ Ltd*,[32] a competition law case, the issue before the High Court was what penalty should be fixed. Telecom had been found to have breached s 36 of the Commerce Act by taking advantage of its substantial market power in its supply to competitors of an essential input known as "data tails". Counsel for Telecom described the Commission's argument – which sought a very heavy penalty for what Telecom asserted was a mere inadvertent technical error (albeit over a five year period) – as "Old Testament". In closing, counsel for the Commission countered with the following quote from the New Testament:[33]

> "...anyone who competes as an athlete does not receive the victor's crown except by competing according to the rules."

Conclusion

28. The reality is that some counsel are more effective oral advocates than their colleagues. Some are great. They are blessed with both intellectual brilliance and powerful communication skills. As Justice Kirby said in a recent speech, "whereas all barristers are equal, some are more equal than others". But skill in oral advocacy can be honed – by experience, observation and, most importantly, learning the ground rules. Putting into practice even some of the suggestions above will help counsel to achieve that central aim of engaging the Court. Your efforts will always be respected, and sometimes you may even win.

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32 *Commerce Commission v Telecom Corporation of New Zealand Ltd* (2011) 13 TCLR 270.

33 From the Second Epistle of Paul to Timothy, chapter 2, verse 5.