Oral argument in civil cases

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on how to make the most of this valuable opportunity

Despite the 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.

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, 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 treat it merely as an occasion for commentary on their written submissions, the worst offenders being those who read them aloud verbatim. This has been called a "brief with gestures": William H Rehnquist, "Oral Advocacy: A disappearing Art" 35 *Mercer L Rev* 1015, 1024 (1984). 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?

It is taken as given that counsel has intensely 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.

OPENING STRONGLY

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 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 for novice advocates. 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. If you sound tired or bored, your argument will lack conviction. 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 pause and a switch to a very quietly spoken statement can emphasis an important point with deadly effect.

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.

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. This was done effectively in *Man O'War Station v Auckland City Council* [2000] 2 NZLR 267 (CA), a case about the implied dedication of land as a public highway. The appellant, who owned a farm property on a remote and rugged part of Waiheke Island, contended that the prior owner, Mr Hooks, had not agreed to the construction by the Council of a road over the property. 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. However, in a forensic context it should be used discerningly lest it fall flat. Spontaneous rather than prepared humour is preferable. But usually it is best to leave any drollery to the judge and to more experienced counsel. Recently a senior silk, having displayed impressive mastery of a difficult telecommunications concept, observed "Well Your Honour, it just shows that you can teach an old dog new tricks".

Try to avoid beginning with a dubious or unnecessarily provocative assertion that might alienate the judge or invite immediate interruption.

This is not the time for blandness. 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 these twenty corrections of the typos in my written submissions…".

Provide a "roadmap": the court wants to know what the case is about and where the argument will 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 oral "roadmap" identifying the key points that will be addressed during argument. A basic outline helps maintain the structural integrity of the

argument during oral presentation, but it is also important to retain the flexibility to deal with the unexpected.

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.

INTERACTION DURING QUESTIONS

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 judge. It may well 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 unspoken concerns. A silent judge may therefore be "a positive menace who may occasion an injustice by not exposing preliminary views": M D Kirby, "Ten Rules of Appellate Advocacy" (1995) 69 ALJ 964. That is especially so if the case is then decided on a basis not canvassed in argument. An extreme example of judicial reserve is US Supreme Court Justice Clarence Thomas. For over six years Justice Thomas has not asked a single question during oral argument. He asked his last question on 22 February 2006.

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

Listen: carefully listen to the question, and wait until the judge has finished before replying. If a question is unclear, ask for clarification. If necessary, pause and take time to think about how to reply.

Answer: give a direct, simple answer. The judge's question may raise an issue that counsel intends to address later in the argument. However, it is unwise to say that you will deal with the point later. The time to answer the question is now. Otherwise the judge may assume you have no convincing answer, or be irritated by your rigid adherence to your script. A compromise is to give an immediate brief answer and then develop it at a more convenient time. But be prepared, if need be, to reorganise the order of your argument. The advantage of having filed a detailed written submission is that the oral presentation can, and should, be much more fluid. Adaptability is essential.

Never bluff: if you do not know the answer with a reasonable degree of confidence, then say so. Never bluff. It 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.

Be helpful: not all questions are hostile. In most civil hearings the issues are finely balanced and questions are inevitable. The judge wants to understand the factual and legal issues, and the implications of the argument. The court may even be attracted to the argument but still wish to test its cogency. The judge has to write a judgment, and needs counsel's help. ("Help the Judge, help yourself": The Hon Justice Winkelmann, "Judicial perspective on effective advocacy in commercial cases", *NZ Lawyer* (20) 8 Jul 2005 10, at 11). 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. More about that later.

It is not a confrontation: it is unwise to be combative, although senior silks, the grizzled veterans, 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 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 advocacy.

Take advantage of the questions: try to use the questioning positively, as an opportunity to demonstrate that the argument is sound. Judicial interrogation may drive counsel into a more trenchant analysis. The argument may well be strengthened by the debate if it hangs together under difficult questioning, and survives a few "judicial upper cuts" (A F Mason, "The Role of Counsel and Appellate Advocacy", (1984) 58 ALJ 537, at 539).

CONTENT: SPARE, LUCID AND RESPONSIVE

An oral presentation is vastly different from a written one. It is not a mere re-play of the written submissions. It should be pithy, lucid, and above all responsive to the court's concerns. To achieve this:

Be clear where you are going: always let the court know what issue is currently being addressed, by reference to your initial roadmap. Use a "point-first" approach: state the proposition first and then develop it, instead of launching straight into the supporting detail (Justice David Rothstein, Federal Court of Appeal (Canada), "Some tips on oral advocacy from Justice Rothstein", www.davidstratas.com/queensu/rothstein.htm). Otherwise the judge will be unclear where the argument is heading and become frustrated, as occurred in a recent case in the Court of Appeal. Counsel (who was in full flight) was unceremoniously cut short by the Presiding Judge: "I am totally at sea in terms of where this is going".

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 makeweight points should be jettisoned. Be bold, not timorous. "Get quickly to your real point and hit it with a two-by-four" (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), at 4).

Start with the best point: It is usually wise to begin with the strongest argument on a critical issue. It is a mistake to lead off with a less convincing argument, lest it infect what follows. However, occasionally a different sequence may be more appropriate. For example, it generally makes sense to deal with any jurisdictional issue first.

Use case citations discriminatingly: an oral presentation cluttered with case citations will be tedious and obscure. Be selective. Leave the detail for the written submissions. Cite only the most important cases. State why the case is relevant (again, "point first"), and take the judge to the case and read the key passage, for emphasis. Similarly with key legislative provisions. Judges generally appreciate being taken direct to the key material. But do not bore the court with slab quotations.

Go directly to the evidence: take the Judge also 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 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 material.

Judge the moment: the colour and forcefulness of the oral delivery will need to be judged as the case unfolds, depending on the mood of the court. 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.

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. Counsel's job is to be attentive to, and address, the issues that are exercising or interesting the Court. As Justice Binnie put it ("A Survivor's Guide", at 3):

> 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, the Hon Justice Doyle stated ("Sinful Oral Advocacy", speech delivered at the Bar Association of Queensland's annual conference, February 2008, at 1):

> 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: COURTESY AND CIVILITY

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

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 and is ready for you to proceed. Do not race on. There is no point in being what former Chief Justice William Rehnquist of the US Supreme Court once described as "Casey-Jones" — counsel who knows the case well but races ahead, not bothering to "pick up passengers along the way". Watch what the judge is doing, and keep pace with the court. Racing on repeatedly will annoy the court.

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 expressions may range from crushed defeat, scorn (occasionally even accompanied by a shaking head or rolling eyes), or amusement, to triumph. This should not be done. Nor should co-counsel make obvious "asides" to each other, interject, huff, or sigh 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 remain quiet while I address you".

Correcting misstatements by opponent: if opposing counsel has misstated a material fact or circumstance, it must be corrected. But you should always be courteous. Unless there is 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 do so when it is your turn to address the court, 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. Be firm but stay on the high road.

Be discreet: counsel sometimes appear to forget the presence of the registrar or other court staff, or to assume that they have impaired hearing. During a break, counsel often cannot resist talking to their co-counsel about how brilliantly, or badly, the case is going. Some counsel will even launch into complaints about opposing counsel and even the judge. This may get back to the judge, and is in any event inappropriate. The review, or post-mortem, of the day's hearing should be saved for the war room.

JUNIOR COUNSEL

Junior counsel's behaviour during the hearing is important. The interaction between junior and lead counsel should contribute positively, not negatively, to the impact of the oral argument. Counsel should operate together as a well-oiled machine. The key is for lead counsel to make clear to the junior, in advance, how they are to work together and what the leader expects. Some suggestions for junior counsel include:

Play a helpful supporting role: junior counsel's role is primarily to support the leader. While the latter is

addressing the Court the junior should closely follow the argument, observe the judge, make thorough notes, and be ever ready to pass up legislation, cases, or documents when signalled to do so. Junior counsel should also shield the leader from overly zealous instructing solicitors.

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. Crown Law have an effective system where the junior types in large font on his/her computer a note which then appears on the screen in front of the leader. The leader will glance at it and either use it or not.

Present a united front: even if lead counsel appears to be destroying the argument, junior counsel should not grimace or otherwise display disquiet. A delicate and tactful discussion during the break may be appropriate.

Take responsibility: junior counsel should, where possible, have a speaking part. When addressing the court he or she is responsible for their own presentation. Do not constantly look to lead counsel for approval, and be 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.

Be ready to step up: occasionally lead counsel may be unable to appear due to unforeseen circumstances, in which case junior counsel may need to present the argument. Or the junior may unexpectedly be asked to deal with a particular issue. Anything can happen during a hearing, and frequently does. Be prepared.

RELIABILITY AND FAIR PLAY

During oral argument the court relies 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 dependent on the reliability of what counsel puts before it. Candour and trustworthiness are therefore crucial to good advocacy (The Hon Justice G T Pagone, "Advocacy" (speech delivered at Melbourne University Law School Guest Lecture Series 2011, 24 March 2011). "An advocate's most precious asset is their reputation" (Winkelmann J "Advocacy in commercial cases" at 10). If a Judge has confidence in counsel, and can trust what is said, that considerably enhances counsel's ability to engage the judge.

As well as being good advocacy, 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 (Justice Marilyn Warren, "The Duty Owed to the Court — Sometimes Forgotten", speech at the Judicial Conference of Australia Colloquium, Melbourne, 9 October 2009). 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 (D A Ipp "Lawyers' Duties to the Court" (1998) 114 LQR 63). 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; or 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.

If counsel demonstrates unreliability during a hearing, or worse, gains a bad reputation with the court and fellow barristers, that will undermine his or her effectiveness as an advocate. Memories can be 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.

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:

overly selective reading from cases and evidence: when quoting from a judgment, do not just read the helpful parts of a passage and omit the unhelpful parts. Judges are 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;

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 no longer listen quite as hard.

Bluffing about knowledge of a case, legislation, or fact. 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, correct it (if necessary by filing a memorandum). That is so even if the other side have not disputed what was said.

Reneging on agreements with the other side: co-operation between counsel is always appreciated by the court, and reduces distractions during the hearing. Not observing 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.

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 containing new material, without notice or leave, on the morning of the hearing. 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.

Not following through: this includes such things as evading or attempting to postpone answers to hard questions, or promising to cover matters later, but never doing so. The judge will likely not forget the unanswered question.

PERSEVERANCE

This is what Justice Kirby calls "courage under fire" (M D Kirby, "Ten Rules"). 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". However, counsel should not give up. Do not panic, become visibly flustered, despondent, or resigned to defeat. As Justice Binnie stated ("A Survivor's Guide" at 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.

Always remember that the case is not over until judgment is delivered. The fortunes of both parties can change during the progress of the hearing. The court may seem hostile to an argument one day, but be far more receptive the next morning. 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.

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. The ability to remain steadfast when things get tough is the test of a good advocate. In a recent case the judge severely rebuked counsel for his fast-paced, chaotic, delivery. Defeat was looming. He returned the next morning armed with a short, clear summary of his position, an effective visual aid handout, and slowed down. He persuaded the court to accept his argument, and won the case.

VISUAL AIDS

The judicious use of visual aids has the potential to enhance significantly the persuasiveness of an oral argument, by stimulating interest and aiding comprehension and 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, blow-ups of images or documents, a model or a display object; or
- *a high-tech display*, such as a video, DVD, PowerPoint or other software, interactive Flash presentation, 3-D animation or recreation.

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.

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 the judge to remember. Images typically have a more dramatic impact than words alone. Studies show that when people merely hear information they recall about 70 per cent of it after three hours and 10 per cent after three days. By contrast, people exposed to a combination of oral argument and visual images recall 85 per cent after three hours, and 65 per cent after three days.

In the US visual aids, particularly computer graphics, are now commonly used, and this has spawned a significant body of case law and writing. In New Zealand, 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 (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 (1996); R D Young and S Susser, "Effective Use of Demonstrative Exhibits and Demonstrative Aids" 79(11) Mich Bar J (2000)). The potential advantages of using visual aids are readily apparent.

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 effectively with 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, graphs 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, 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.

Visual aids are more commonly used in trials than at appellate level. However, both our Court of Appeal and Supreme Court are equipped for PowerPoint, videos and other high-tech presentations. The Supreme Court's sophisticated technology includes two monitors on the bench for each judge, and large screens hidden behind retractable wall panels on each side of the courtroom.

In a copyright appeal in the High Court of Australia (*Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 79 ALJR 1850) the Court was shown a Play-Station CD-ROM in operation. The video game was demonstrated by counsel. Justice Kirby later described this 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, 21 February 2006).

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.

Visual aids are merely aids to oral advocacy: the visual aid should not merely be another summary of the written submissions or teleprompter to help steer counsel through the argument. The kind of bullet point PowerPoint presentation popular in other forums, such conferences, is inappropriate. Such aids should be used as a visual representation of a particular concept or fact — to explain, clarify, illustrate or emphasise.

The content of a visual aid must itself observe the basic rules of advocacy: a visual aid should not introduce information that is not already part of the record, 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.

Advance notice should be given: visual aids have the potential to have dramatic impact, and should not therefore take the other side by surprise. Where prior exchange of written submissions is required, counsel should seek a direction 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, counsel need time to assess the proposed display, and to verify its basis in the evidence. There may be occasional exceptions, where a visual aid is simple and uncontentious.

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.

Be selective: 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, respond to questions and deal with unexpected developments. The choice of visual aid must preserve counsel's flexibility and spontaneity, not impose its own tyranny.

Keep the content simple: visual aids should be simple and easy to understand. Simplicity is the essence of oral argument. An elaborate visual aid that swamps the judge with information will be counter-productive. Keep graphics clean and minimalist.

Appearance matters: 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 prepare the display.

Know the content: counsel should 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. That will kill your oral delivery.

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 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.

Do not use visual aids as gimmicks or stunts: in the US the use of visuals has sometimes been overly enthusiastic, 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 negligence 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. The final scenes showed empty life jackets were floating on the water as the ship disappeared: "Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial", Federal Judicial Center at 209, http://www.fjc.gov/public/pdf.nsf/lookup/CTtech00.pdf/$file/CTtech00.pdf. The case was overturned on appeal.

Get set up in advance: if possible, meet court staff and arrange for the equipment you need to be set up and ready to go before the court session begins. Try to position the equipment to give the judge an optimal view, to maximise impact, and to minimise the need for counsel to move away from the lectern.

Be prepared for malfunctions: despite advances in computer technology, there is always a risk of a technical mishap on the day. Murphy's law. Delays and fumblings while trying to fix a malfunction will cause embarrassment and disrupt the flow of the oral argument. Have backup copies of the presentation, and access to a technician. If the worst happens, you should have an alternative plan for presenting the argument.

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 ("New Challenges" at 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:

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

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Shared liability and asset pooling

Directors may at times find themselves liable not only personally but also jointly as a group of fellow directors. This can enhance the chance that wrongs will be set right, and that assets will be replaced or distributed as ordered by the court. In *Robinson v Tait*, a case taken under s 37(6) of the Securities Act 1978, directors were found liable to repay subscriptions where there was a void allotment of securities.

Pooling of assets is a mechanism by which insolvent companies can become infused with assets to satisfy creditors (Companies Act, s 271). They gain these assets by having them transferred from sister companies under ss 271 and 272. The question is whether claw-back provisions or corporate director liability theory can be used to bring assets personally from directors (or shareholders) to the sister companies, and then have those assets pooled into the insolvent company to satisfy creditors.

THE COMMERCE ACT

Section 9 of the FTA has an analogue in the Commerce Act. Provisions of the Commerce Act have been held by to engender liability on the part of defendants acting as a director (or other senior position in a company such as upper level employee) where the director was not directly trading on his or her own account (*Giltrap*, at [51]–[56]). Directors are liable for breaches of the Commerce Act for their roles in their companies as members of the class of "persons" in s 80. Directors and former directors are precluded from indemnification by their company where the directors are found liable under the Commerce Act and suffered pecuniary penalties.

CONCLUSION

This article has discussed the intriguing fact that although a primary benefit sought by those forming companies is to shield them personally from liability for the business conducted under their corporate umbrella, this shield can be perforated in many ways. Over time, the protection offered by the corporate veil seems to be diminishing.

It is commonly known that outsiders are normally unable to hold a director personally liable to them either for the actions of the company, or for the actions committed by the director while acting for the company. Furthermore we know that corporate directors have generally not been subject to personal liability to anyone, excepting perhaps the shareholders in certain limited situations, but that mechanisms exist to engender liability upon them.

One of the most potent assortments of mechanisms for perforating the corporate umbrella is found in the FTA. Many provisions of the FTA offer novel approaches to attaching personal liability upon corporate directors when outsiders wish to do so.

The author contends that the future evolution of law in this arena will slowly continue the erosion of the director's corporate liability shield. This seems inevitable as the interests of justice are advanced to ensure that the unjust not be shielded by company law. ❐

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

REPLY

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 pinnacle, 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.

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.

FINISHING STRONGLY

Finish 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.

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.

Again, humour can be effective, especially if it also demolishes a point made by opposing counsel. In *Commerce Commission v Telecom Corporation of New Zealand Ltd* (2011) 13 TCLR 270, 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 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:

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

CONCLUSION

The reality is that some counsel are more effective oral advocates than their colleagues. In many cases the advocates are unevenly matched. 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 acquired and sharpened — by experience, observation and, most importantly, learning the ground rules. Putting into practice the above suggestions will help you to achieve that central aim of engaging the Court. Your efforts will always be respected, and sometimes you may even win. ❐