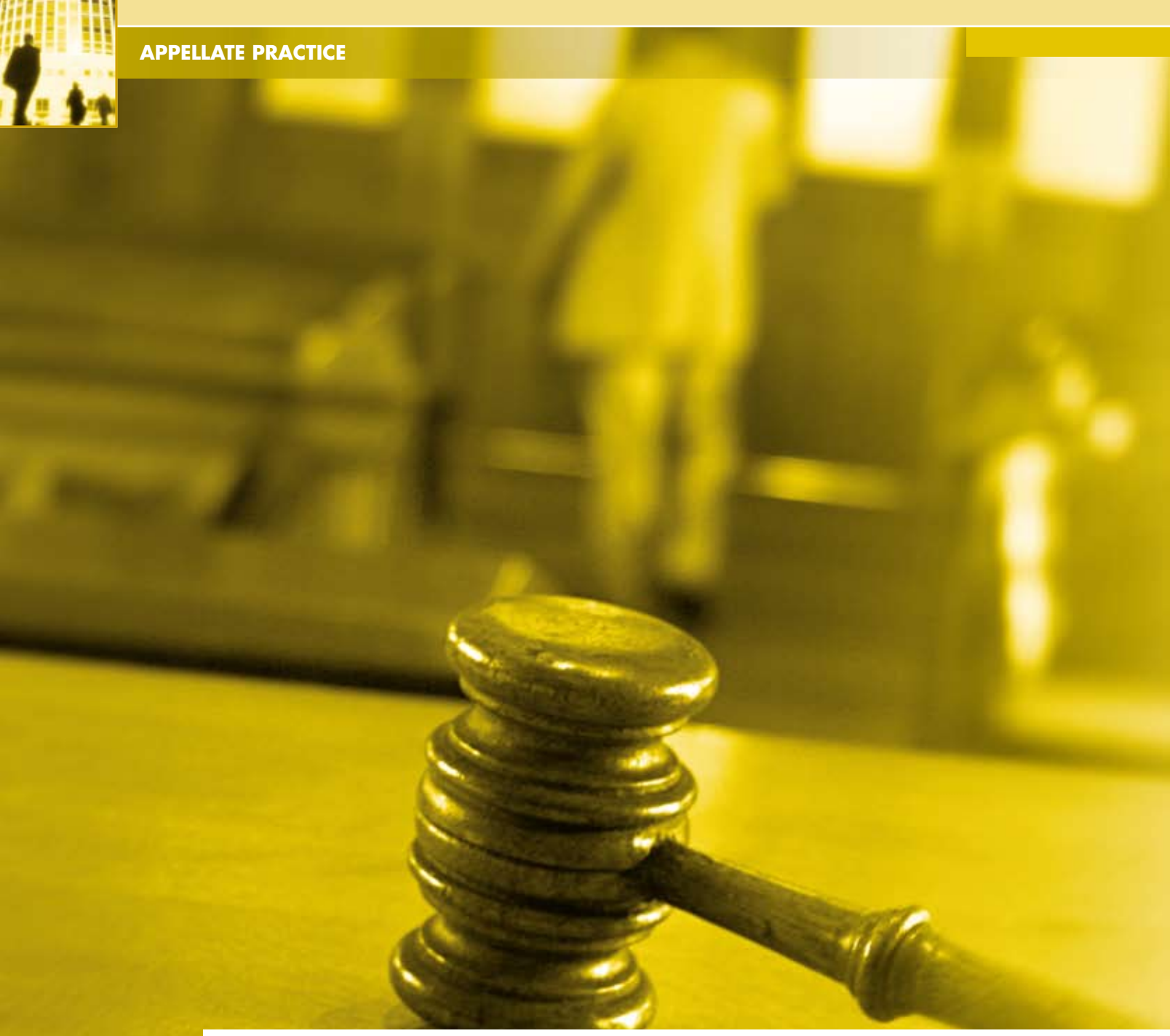

A Practitioner's Guide to Effective Oral Advocacy Before the Michigan Supreme Court

With Special Tips from Benjamin Franklin

By Mary Massaron Ross

Benjamin Franklin said: "Experience is a dear teacher, but fools will learn at no other."[1] Franklin's aphorism offers advice for any advocate who wants to succeed in argument before the Michigan Supreme Court. Your clients will not thank you for learning the lessons of oral advocacy in the school of experience provided by their cases. Clients expect and need an advocate who can acquit himself or herself with intelligence, and perhaps even panache. One way to prepare is by observing other arguments before the Court. When I clerked for the Michigan Supreme Court,[2] I attended oral arguments as often as I could. Some advocates were masters of logic, some were spellbinders, some professorial; others were plodding, muddled, and pedantic. Whether they were modern-day Clarence Darrows or appeared to be mimicking *My Cousin Vinny*,[3] I learned from them. Those teaching oral advocacy often list principles of preparation and argument as a map to success before an appellate tribunal. I have done so myself, telling potential advocates to know their court, to master the record, and to answer the questions from the bench.[4] Such lists are helpful reminders of the basic principles for successful oral argument. But a list of guiding principles is no substitute for attending an argument in person. A student of oral advocacy can also benefit from reading transcripts of arguments, which are available from the Supreme Court Clerk's Office. Hearing an advocate struggle to answer the tough questions of a court, listening to the kinds of questions asked, and paying attention to the advocate's graceful or hard-hitting or ineffective response to points made by opposing counsel, offers insight not to be gained from any abstract list of key principles of advocacy.

The Michigan Supreme Court allows an hour for oral argument for merits cases—30 minutes per side. If the case is argued and submitted with another case, the time is ordinarily split between the two cases, giving each side only 15 minutes. The justices come well-prepared, having read the briefs, studied the key authorities, reviewed the appendix, and written difficult questions. Often, the justices will have arrived at a tentative conclusion about how to decide the case, which they will test with their questions. Sometimes, the justices may be struggling with the outcome, sometimes with the breadth of the rule, and sometimes with the import of the facts or procedural posture on the outcome or rule.

Imaginative openings can be effective as long as the advocate does not go overboard. A presentation to an appellate court ought not sound like a jury summation.

Whatever their initial thoughts, justices on our Supreme Court take oral argument seriously and will look to the advocates to assist them in reaching a decision. They expect you to come prepared to discuss the lower court opinion, to identify the factual findings within it, any legal pronouncements made by the court, and any errors of fact, law, or logic, that are part of your argument. They expect you to be familiar with the authorities and arguments set forth in all the briefs, those of the parties, and any *amici*. They will look to you to answer questions about the issues in the case, including their relationship to each other. They want to know whether they must reach all the issues, and whether the outcome regarding one issue controls the outcome of others, or allows the Court to avoid them. They expect you to answer their questions with candor, acknowledging the difficult points in the facts and law, and explaining why your client should nevertheless win. Advocates should prove that Benjamin Franklin was wrong when he said, "God works wonders now and then; Behold a lawyer, an honest man."[5] To the extent that you persuade the Court by your precision, candor, knowledge, and reasoning that you are an honest advocate, your views will carry more weight.

The Michigan Supreme Court offers advocates an opportunity to present a unifying theme. Under the Court's procedures, each advocate is given five minutes at the beginning of his or her time in which to proceed without interruption. If two or more parties are separately represented and are splitting time, each will be afforded this same five-minute period to introduce the main points of the argument. Since the rest of the time is virtually certain to be taken up with questions, this time must be carefully used. When discussing opening arguments, David Frederick observed: "Individuality and inspiration-in-the-moment mark the greatest

Fast Facts:

The best openings present the court with an overarching theme.

Prepare by anticipating questions from the court and refining your answers to precisely convey your client's position.

Justices on the Supreme Court expect you to answer their questions with candor, acknowledge the difficult points of law, and explain why your client should nevertheless win.

Any advocate venturing before a hot court of last resort, such as the Michigan Supreme Court, must prepare by intensely studying the facts and law, and thinking about the nuances of the issues.

argument performances [but] an advocate cannot realistically expect lightening to strike at an appropriate moment."[6] Thus, a good advocate will carefully prepare the opening presentation.

Advocates often begin with an enumeration of the issues, or a recitation of the procedural posture of the case. While such openings are helpful in a high-volume intermediate appellate court, in which the judges decide a dozen or more cases in a single day, they squander valuable time in a court of last resort. The best openings present the court with an overarching theme or theory that crystallizes the advocate's position. They also introduce the essential points the advocate believes are necessary for the court to rule in its favor. Mark Granzotto offered such an opening in *Woodard v Custer*[7] for the plaintiff-appellant. In a few words, he introduced a theme he returned to repeatedly during his argument. He characterized the requirements for expert qualification set forth in MCL 600.2169 as a "bright line rule" and insisted that it was not based on knowledge, skill, or experience, except as those qualities were embodied in the achievement of the specialization or board certification.[8] Similarly, when arguing *In re Haley*[9] for the Judicial Tenure Commission, Paul Fischer told the Court there were "two specific problems regarding this matter, the actual acceptance of the gift, and the appearance of an impropriety." This point was crucial to respond to the respondent's contention that, if the gift of football tickets had been accepted at home or in private in his chambers, it would not have been a judicial misconduct problem. By highlighting the existence of separate violations, Fischer established a different analytical framework for deciding the appeal.

Persuasive openings may employ analogies or quotations that help convey a point. I began the oral argument in *City of Mt. Pleasant v State Tax Comm*[10] by quoting Mark Twain, who said that "the difference between the right word and the almost right word is lightening and lightening bug." The point of the quote was to emphasize that a tax statute exempting "property used for public purposes" does not mean the same thing as a constitutional provision barring the taking of property for "public use," a phrase I had successfully argued did not mean the same thing as taking property for "public purposes" in *County of Wayne v Hathcock*.[11] The opening sought to focus the Court on subtle but important textual differences from the outset of the discussion—differences that were overlooked in the Michigan Court of Appeals decision I was trying to overturn.

Imaginative openings can be effective as long as the advocate does not go overboard. A presentation to an appellate court ought not sound like a jury summation, as occurred before the Michigan Supreme Court in one argument in which the advocate launched into a diatribe on relativism in the modern world, or another in which an advocate trying to defend a judgment criticized his opponent and the members of the Court because no one mentioned the tragic facts of the plaintiff's decedents, children who had died in a fire.[12] Such presentations engender impatience from the Court because they predicate the argument on grounds that are, or should be, irrelevant or impermissible under the rule of law.

Benjamin Franklin said: "By failing to prepare, you are preparing to fail."[13] Any advocate venturing before a hot court of last resort, such as the Michigan Supreme Court, must prepare by intensely studying the facts and law, and thinking about the nuances of the issues. Preparation allows an experienced appellate advocate to anticipate many questions that the members of the Court will ask. One way to prepare is by studying a checklist[14] of kinds of questions and using it to generate potential questions for your case.

Consider questions about:

- The parties involved, including their business or background concerns
- The opinion under review
- The view of different courts to address the same issue
- The record
- The context
- Why the court is hearing the case
- The scope of the rule being advocated
- The party's position and its implications
- The impact of a particular conclusion on the disposition of the case
- Precedent
- Distinctions in the case law
- Statutory text
- Legislative history
- The policies underlying the rule
- The implications of the rule being urged
- Analogous legal contexts

Additional potential questions include those seeking concessions, hypothetical questions, questions stemming from the judge's professional experience or personal knowledge, and questions

based on judicial philosophy or approach. The advocate can then carefully refine answers to precisely convey the advocate's position, to avoid walking into troublesome areas, and to answer concisely, thus saving time for other points.

Unexpected questions can derail even an experienced advocate—although it is not infrequent to face such questions. The advocate must answer unanticipated questions by employing the understanding developed from his or her preparation. Answers to questions should be designed to help the advocate make the affirmative and responsive points that are essential to the advocate's position. In addition, answers should articulate and refine a theory of the case that offers the Court a guiding principle or principles for reaching a favorable decision and sets forth the boundaries of those principles articulating a rule of decision in a manner that results in a win for the advocate's client.

Here are some illustrative questions from justices on the Michigan Supreme Court during oral argument in recent years:

- During oral argument in *In re Certified Question from U.S. Court of Appeals for Sixth Circuit,*[15] a case involving the punitive damages provision of the Sales Representative Commission Act, Justice Kelly asked: "How could we interpret the statute given the addition of the word 'intentionally' to the model act so as to prevent the outrage that you allude to without opening the door for employers to continue a practice that gave rise to the model act in the first place?" The question seeks an interpretation of the statute to harmonize the text at issue with the policy purpose of the act. Justice Young asked a series of questions pertaining to the legislative history, noting that the bill, as initially enacted, was vetoed by the governor because he did not think that exemplary damages should be available simply for the failure to pay the sales commissions. Justice Young pointed out that the word "intentionally" was added in response to those concerns. He also questioned how the word advanced that cause, whether it was ambiguous, whether it was a term of art, and whether the advocate had a dictionary that defined "intentional" as negating or encompassing bad faith.[16] Justice Taylor asked whether, if this were a jury-question, the jury would be "told to apply an objective standard or a subjective standard."

- Oral argument in *Dressel v Ameribank*[17] illustrates the kinds of questions an advocate may expect when the members of the Court are trying to define a concept or to draw a line. The concept at issue in the case was what conduct amounts to the unauthorized practice of law. Members of the Court asked a series of questions seeking the rule, offering hypotheticals, and challenging the articulation of the rule offered by both advocates.

- Another argument in which the justices tested the boundaries of a rule occurred in *Greater Bible Way Temple of Jackson v City of Jackson,*[18] an appeal involving zoning and RLUIPA issues. Justice Markman questioned whether RLUIPA applied even if there were arguably no individualized assessments of the request because "the government had in place procedures that permitted you to make an individualized assessment, namely, the variance process."[19] Justice Young asked a question also focused on this aspect of the case: "Can we look at all the language and construe it in a way giving meaning to all the words that does not result in coverage whenever there is an ancillary discretionary process whether it has been invoked or not?"[20] Members of the Court also grappled with the boundaries of RLUIPA as they relate to defining religious exercise—a difficult question. Justice Taylor questioned the advocate about his "larger view": "I mean is the church able to say that Instant Oil Change is part of the mission and make it so?"[21] This use of a hypothetical with difficult facts is an often-used approach for members of the Court to test the limits of the principles they are being asked to embrace. When the advocate answered, "I don't believe so," he drew

the predictable question, "Okay, why is that?"[22] Members of the Court followed these questions with a series of questions pressing the advocate to offer a test to distinguish the Instant Oil Change example from the high-rise apartment building sought by the church.

- In *People v Clay,*[23] members of the Court sought to clarify the relationship between an illegal arrest, the exclusionary rule, and crimes later charged that were possible only because of the illegal arrest. Justice Kelly asked whether "if an officer picks somebody up just because they don't like their looks, throws them in jail, that person escapes from jail, they can be charged and convicted and imprisoned for the crime of prison escape or jail escape."[24] Justice Cavanagh asked: "Do you have the right…to resist an illegal arrest?"[25] When the advocate answered yes, Justice Corrigan followed up by asking: "But that wouldn't necessarily get you to a right to break out of jail."[26] Justice Taylor then jumped in to question the advocate about an old case that touched on the subject.[27]

- In *Cameron v Auto Club Ins Ass'n,*[28] the Court grappled with a complex question under no fault. Justice Taylor acknowledged the "compelling situation that the Court of Appeals construction created," but urged the advocate to "tell us why they're wrong."[29] Justice Taylor also questioned whether the Court should pay any heed to legislative bill analyses in light of the fact that they contain language indicating they do not constitute an official statement of legislative intent.[30] Justice Young asked about "the actual history" of the statute—how "the actual history of language changes and how this Court responded to those changes. Do you have the most significant history that we ought to be paying attention to as we try to understand and determine what the Legislature meant in adding the limitation we're talking about here?"[31] Justice Weaver also questioned the advocates about the legislative changes to the statute. She asked: "So in your mind then, are these under this act the most significant changes that were made during that amendment to the act? There were other changes made."[32]

Failure to sufficiently prepare for questions during argument is the biggest single cause of a failure to succeed. Benjamin Franklin said: "A slip of the foot you may soon recover, but a slip of the tongue you may never get over."[33] This is, unfortunately, an apt description for those oral arguments where an unwise, or imprecise, or inaccurate response early on takes the argument so far off track that the advocate never recovers. One advocate drew a series of withering remarks from members of the Court after failing to consistently respond to a series of questions regarding a hypothetical. Another drew a series of questions when he failed to offer a workable limit to the rule he proposed, culminating in a justice telling him: "And what is—come on there has to be more than that." Another offered a shifting discussion of his position on the meaning of a statutory term, offering an approach that made him "happy" and another that made him "happier,"—resulting in a justice stating: "I mean you seem to be going back and forth and what I am trying to understand what you would like to see here I mean are you happy or just happier?"

The best advocates are able to use the hard questions to advance their argument. A study of past arguments offers many examples of how to do this. Order transcripts of the last several cases argued before the Court dealing with the subject area of your appeal. They may offer clues about how members of the Court will approach the case, and ideas about how to use the questions to advance your argument by making your affirmative points. They also offer a study in what *not* to do.

Moot courts add to the expense, but they are invaluable for obtaining input into the advocate's approach, refining answers, and anticipating questions or problems with the advocate's argument.

Preparation for oral argument before a court of last resort should, if at all possible, include a moot court. Moot courts add to the expense, but they are invaluable for obtaining input into the advocate's approach, refining answers, and anticipating questions or problems with the advocate's argument. An advocate can ask other members of the firm or government office to serve as judges. Or he or she can seek out other members of the Supreme Court bar, or solicit participation by law professors. Clients typically want to participate in the moot court, which allows them to better understand the strong and weak points of their case, and to participate in decisions about fall-back positions or concessions that might be made during questioning. Some clients have difficulty accepting that there are weak points in their case. Benjamin Franklin cautioned about this tendency to reject advice, saying: "Those that won't be counseled can't be helped."[34] It is your job, however difficult, to serve as your client's counselor as well as his or her advocate during this pre-argument stage of the proceedings. If reason suggests a certain approach, such as conceding or abandoning an issue, or urging a narrower rule than would be ideal from your client's perspective, or offering a fallback position or even a last-ditch effort to settle, it is worth having the discussion. On the other hand, if your client desires to vindicate

important principles or settle the law for the future or has other reasons to proceed, then your job is to present the case to its best advantage, however difficult the odds.

As you refine the argument, you should prepare what you will take with you to the podium. Some few gifted advocates have such superb memories that they can stand at the podium and speak from memory, with citations to the record and cases ready. Most of us rely on aids to trigger memory, which we may or may not use. One way to organize these aids is to use a binder tabbed with dividers. The binder should include the opening, the closing, the outline of affirmative and responsive points, and copies of key cases, documents, or transcript pages. It should include a chronology or outline of critical facts with page references to the record. It should include your answers to the most difficult questions, with citations to authority and the record. Try to prepare this binder a week or two ahead of the date of argument. You can then practice and study by reading it, just as you might have studied an outline to prepare for a law school examination. It helps to read your argument out loud. You will notice and can change the wording of any points that do not read well—because the word order or sentence structure is incompatible with spoken as opposed to written language. This reading out loud, and studying, allows you to know the material so well that you may barely need to look at your outline during argument, and if you do look down, it will only be for a moment.

I always arrive at court early. For argument before the Michigan Supreme Court, I like to be in Lansing the evening before argument, unless my case is set for argument during the afternoon. If my case is not first on the docket, I like to hear the earlier arguments to get a feel for the Court's approach on that day. If you have not visited the Michigan Supreme Court's courtroom before, be sure to arrive in time to practice raising and lowering the podium. The justices often suggest that an advocate raise or lower the podium if it looks uncomfortable or the microphone is not at an appropriate level given the advocate's height. I have seen several advocates spend a minute or two at the start of their argument fumbling for the switch—an embarrassing start to an argument. Also, check with the court officer about the light system to be sure you understand the timing signals. Then, just relax and do your best.

David C. Frederick described the emotional roller coaster of oral advocacy:

> In virtually all cases, if the attorney does not experience abject fear at least several times during the preparation period, he probably is not fully applying himself to the task. That fear properly stems from a deep appreciation of the opponent's position and a realization that the issues are complex and nuanced. As the advocate develops answers to difficult questions and becomes more facile with the material, that fear recedes and transforms into confidence that the advocate's position is, in fact, correct and that the court should uphold it.[35]

Frederick also described the emotional intensity of the argument's aftermath during which the advocate may be filled with self-doubt as "the advocate realizes that there were, in fact, better answers to the questions posed from the bench."[36] In addition, the "adrenaline rush and stress of intense preparation gives way to fatigue and exhaustion."[37] I almost never finish an important oral argument without experiencing this sense of self-doubt and exhaustion. It helps to remind myself that this is part of the process.

Find a way to take care of yourself after a tough oral argument. You have done your best, and you deserve it. ■

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FOOTNOTES

1. BrainyQuote, *Benjamin Franklin Quotes* <http://www.brainyquote.com/quotes/quotes/b/benjaminfr125395.html> (accessed January 13, 2008).
2. I served as law clerk to Justice Patricia J. Boyle, from whom I learned a great deal about advocacy before the Court.
3. *My Cousin Vinny,* a 1992 movie (once named by Judge Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit, as his favorite movie about the law), tells the tale of a Brooklyn lawyer trying to save his cousin and his cousin's friend, both of whom are on trial for murder. Not knowing procedure, courtroom etiquette, or the facts, Vinny relentlessly but ineffectually advocates on their behalf. But his efforts and those of his fiancée are successful because they uncover favorable facts in their investigation outside the courtroom.
4. See Ross, *The dos and don'ts of effective oral advocacy: An approach and checklist for oral argument preparation,* included in 2007 Michigan Appellate Bench Bar Conference Handbook.
5. BrainyQuote, *Benjamin Franklin Quotes* <http://www.brainyquote.com/quotes/quotes/b/benjaminfr151634.html> (accessed January 13, 2008).
6. Frederick, *Supreme Court and Appellate Advocacy: Mastering Oral Argument* (Thomson West, 2003), p 160.
7. *Woodard v Custer,* 476 Mich 545; 719 NW2d 842 (2006).
8. Transcript of Oral Argument at 1, *Woodard,* 476 Mich 545 (No. 124994).

9. Transcript of Oral Argument at 12, *In re Haley,* 476 Mich 180; 720 NW2d 246 (2006) (No. 127453).
10. Transcript of Oral Argument at 2, *City of Mt. Pleasant v State Tax Comm,* 477 Mich 50, 729 NW2d 833 (2007), (No. 129453).
11. *County of Wayne v Hathcock,* 471 Mich 445, 462; 684 NW2d 765 (2004).
12. In an effort to avoid embarrassing anyone while simultaneously shining a spotlight on some great performances, I have included specific references to examples that we can emulate while offering only a general reference to arguments in which advocates struggled to present their case.
13. BrainyQuote, *Benjamin Franklin Quotes* <http://www.brainyquote.com/quotes/quotes/b/benjaminfr138217.html> (accessed January 13, 2008).
14. Frederick, *supra* at 75-118. The checklist provided here has been drawn from David Frederick's wonderful book on advocacy before the United States Supreme Court. The author is grateful to Mr. Frederick for his work, and has drawn from his approach in writing this article, and in presenting her own oral arguments.
15. Transcript of Oral Argument at 2, *In re Certified Question from U.S. Court of Appeals for Sixth Circuit,* 468 Mich 109, 659 NW2d 597 (2003) (No. 120110).
16. *Id.* at 2–4.
17. Transcript of Oral Argument at 3, *Dressel v Ameribank,* 468 Mich 557, 664 NW2d 151 (2003) (No. 119959).
18. Transcript of Oral Argument at 1, *Greater Bible Way Temple of Jackson v City of Jackson,* 478 Mich 373; 733 NW2d 734 (2007) (No. 130194, 130196).
19. *Id.* at 3.
20. *Id.* at 5.
21. *Id.* at 16.
22. *Id.*
23. Transcript of Oral Argument at 1, *People v Clay,* 468 Mich 261; 661 NW2d 572 (2003) (No. 120024).
24. *Id.* at 5.
25. *Id.* at 7.
26. *Id.*
27. *Id.*
28. Transcript of Oral Argument at 1, *Cameron v Auto Club Ins Ass'n,* 476 Mich 55; 718 NW2d 784 (2006) (No. 127018).
29. *Id.* at 3.
30. *Id.*
31. *Id.* at 6.
32. *Id.* at 14.
33. The Quotations Page, *Benjamin Franklin Quotes* <http://www.quotationspage.com/quote/34290.html> (accessed February 4, 2008).
34. Brainy Quote, *Benjamin Franklin Quotes* <http://www.brainyquote.com/quotes/quotes/b/benjaminfr151576.html> (accessed February 4, 2008).
35. Frederick, *supra* at 71.
36. *Id.* at 73.
37. *Id.* at 74.