Effective Supreme Court Advocacy: Advice from the Former Chief Justice

Former Chief Justice Robert P. Young, Jr.
Michigan Supreme Court

REQUIRED DISCLAIMER

I have attempted in this outline to provide general, not exhaustive, guidance on effective advocacy and on practical issues that most advocates are likely to face before the Michigan Supreme Court. My colleagues bear no responsibility for the observations I offer. The views expressed in this outline are solely my own.[1]

I. The Basics

Appellate advocacy in Michigan is not as effective as it should be. I spent 22 years as an appellate judge, and I was stunned by the relatively poor general caliber of advocacy in Michigan's appellate courts. A surprising number of appellate lawyers, in both their written and oral presentations, seem to be unaware of basic advocacy principles. Even some "frequent flyers"—those who argue often in the Michigan Supreme Court—do not seem to know what the drill is.

- **The merits of a case *always* matter; advocacy influences on the margins.**

I think we lawyers sometimes overstate what even excellent advocacy can accomplish. It strikes me that the impact of advocacy is *asymmetrical*: excellent advocacy never hurts but it can rarely overcome a poor case on the merits. However, poor advocacy is frequently fatal. "Adequate" appellate advocacy avoids the common mistakes, but excellent advocacy does more: it can make a marginal case look better than it otherwise might appear to be.

My point here is that an advocate must deal with the case she is given, and the merits of that cause *ought* to control the outcome. Here, I address the indicia of effective appellate advocacy—those lawyer techniques that can enhance rather than reduce the probability of success, whatever the merits of the case might be.

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[1] I would like to thank my former law clerk, Christopher Hammer, for his assistance in preparing these materials.

- ***Always* observe the core principles of advocacy: candor, credibility, and honesty.**

Excellent advocacy depends on the integrity of the work product. While it should not need to be restated, it is unfortunately necessary to note that an attorney has an ethical obligation of candor toward the tribunal. MRPC 3.3. Your professional credibility with the court matters. ***Never* mislead the Court, whether on the facts or the law.**

- **Tone matters: Make sure that your "therapeutic rants" end up in your wastebasket, not your brief.**

Use a professional tone when advocating before the Court, whether in your brief or in your oral argument. Credibility can be gained or lost by the tone with which you argue. Whining is seldom well received, and shrill attacks on *anyone*—whether your opponent, the lower courts, or the Supreme Court—will weaken your argument, however meritorious your case. Typically, if a real outrage has been committed, the principle of *res ipsa loquitur* applies: Identify the location of the wreck and explain its consequences in a measured tone, but do not over elaborate on the venality of the author of the carnage.

Two briefs that the Court recently received illustrate advocacy tone blunder. One brief stated that the Supreme Court's contract law precedents constituted "the jurisprudence of hypocrisy," likened those cases to *Dred Scott* and *Plessy v. Ferguson* – "infamous cases eventually consigned to the dust heap of history" – and claimed that they are more typical of "some third-world backwater with either no functioning legal system, like Somalia, or one that is inherently perverted, like North Korea." Another recent brief lectured the Court that judges who "proudly embrace the title of judicial conservative" should recognize the merits of its position. One wonders what advocacy goal was advanced by these shrill attacks. Neither of these advocates helped their clients by using a tone that denigrates or hectors the Court or its members.

- **Know and follow the rules of issue preservation.**

Do not raise issues for the first time on appeal,[2] and do not surreptitiously seek to expand the record on appeal and do not let your opponent do so either.[3] "Expanding the record" includes using evidence that either was never presented at all or was held to be inadmissible by the trial court (except, of course, to argue that the proposed evidence was improperly excluded). One very common mistake is to attach as exhibits to an appellate brief documents that were not included in the lower court file.

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[2] The rules for issue preservation are different in criminal cases. See *People v Carines*, 460 Mich 750 (1999), which outlines the standard by which the Court may grant relief notwithstanding a defendant's failure to raise an issue before the trial court.

[3] See MCR 7.210.

II. Advocacy in Your Brief

A. The Basics

- **The goal of all advocacy is successful persuasion: Never frustrate the persons you are trying to persuade.**

All else proceeds from this core premise of advocacy. Everything you write and orally argue should serve this goal, everything that might frustrate this goal should be eliminated.

- **Write clearly.**

Read *and use* your Strunk & White (or and equivalent work) to perfect basic principles of clear and effective writing. Avoid using needlessly complex jargon. While precise technical terms are often necessary to explain a complex case, your writing should eschew obfuscation and ostentatious sesquipedality.[4]

- **Proofread.**

Errors in your work product can raise questions regarding the substance of your work. The small things do matter—even the physical readability of the brief. (Recall the goal of advocacy.)

Proofreading includes more than merely ensuring that there are no spelling or grammatical errors: it includes making revisions to improve *clarity*.

- **Use a road map to guide the Court through your argument.**

A road map that outlines your argument helps the Court understand the big picture. Prepare an effective table of contents. Any introductory material should point the Court to where your argument is leading. Lay out your facts carefully and as simply as possible. Make the procedural history clear, and outline the relevant case law, statutes, and other authority so that even a new law school graduate unfamiliar with the area of law can grasp the core legal issues you are raising. Finally, place your case in a comprehensible legal and factual context and order your argument so each point flows naturally into the next.

[4] Literate writing is always a plus but if you use obscure language, you fail the primary task of advocacy: persuading your reader.

- **Get to the point!**

Be concise. Less *is* often more.[5] Chief Justice Roberts aptly remarked that he "ha[s] yet to put down a brief and say, 'I wish that had been longer.'"[6] Parties are entitled under the Michigan Court Rules to submit briefs of up to 50 pages. And although advocates should make sure that they fully articulate their positions in their briefs, if your appeal can be well presented in fewer pages, little is gained by making your reader slog through more than is required to make your point.

- **Guide the Court to all relevant source material.**

Since the Court is frequently operating under significant time pressures, having precise citations in a brief helps us to focus our background research on a case. When asserting a proposition of law, the most helpful briefs contain "jump cites" that refer to a specific page or pages in the case that support the underlying assertion. Similarly, effective advocates cite specific pages in the case record to support their particular factual claims. Because the Court *will* check the underpinnings of counsel's legal and factual assertions, the most helpful briefs will expedite our review by providing precise citations.

- **Recognize and apply the correct standard of review.**

Identify the correct standard of review for each claimed legal error. Appellants sometimes seem to think that the Court reviews every claimed legal error as one requiring review de novo. An argument founded on the incorrect standard of review is immeasurably weakened.

B. Write To Your Audience

- **The mission of the Michigan Supreme Court should influence advocacy strategy.**

How you frame your argument before the Michigan Supreme Court should be influenced by the Court's mission. I believe that the prime function of the Supreme Court is to manage the "fabric of the law" to ensure that the pattern is clear and evolves predictably. In the Michigan Supreme Court, the most important challenge for an advocate is to determine *how your case can be postured as one having jurisprudential significance.* The vast majority of applications for leave to appeal are denied in the Michigan Supreme Court because the issues presented simply have no or little jurisprudential significance.

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[5] Ludwig Mies van der Rohe

[6] Bryan Garner interview with Chief Justice Roberts, 13 Scribes Journal of Legal Writing 5, 35 (2010).

(By contrast, because the Court of Appeals is an error correcting court that *must* consider almost all timely filed appeals, the most important challenge for an advocate in that court is usually much more mundane: how to get the court to recognize and correct an error.)

- **Your Supreme Court audience consists of generalists.**

When writing a brief that is filed with the Michigan Supreme Court, your primary audience comprises seven Justices, law clerks, and the Supreme Court's staff attorneys. We are all generalists with varied degrees of previous practice experience. (Some, in what I am calling the "Supreme Court audience," will have only recently graduated from law school and others will not have actively practiced law in any field for many years.)

Many appellate advocates seem either to have forgotten or never realized that, once judges join the bench, (even those Justices who had robust practices) we soon lose a granular knowledge of specific areas of law. And none of us can be expert in all the areas of law represented in the cases that come before us, nor are we familiar with changes that inevitably occur in the actual practice of law after we left practice. More than we may like to acknowledge, our "antique" understanding of the practice of law can affect how we frame and understand issues.

Because we have such varied experiences, the best appellate advocates will not assume that any one of us has a particular degree of expertise in a highly technical area of law or a highly technical factual matter. This consideration is particularly important in cases involving complex, technical statutes. The best advocates will therefore provide adequate contextual background on the technical aspects of the relevant facts and law to assist the Supreme Court audience in understanding the specific issues that their case implicates.

- **Know the Court.**

Judicial philosophy matters. Knowing each Justice's judicial philosophy would seem to be an essential factor in determining how best to frame arguments before the Court. Yet I am surprised by how often lawyers fail to understand why judicial philosophy matters in how a judge approaches decision-making. I have a definite judicial philosophy,[7] as do each of my colleagues. The best advocates factor this consideration into how they frame and develop their arguments.

[7] Young, "A Judicial Traditionalist Confronts Justice Brennan's School of Judicial Philosophy," 33 OKLA. C. UNIV. L. R. 263 (2008).

C. Effective Brief Writing – The Application for Leave to Appeal

- **Know the statistics that you're up against.**

The Supreme Court receives approximately 2,000 applications for leave to appeal every year. We order peremptory action or remand the case to the Court of Appeals in a small number of instances, and we typically hear oral arguments on only 75 or fewer cases per year. As a result, the default position in applications for leave to appeal is an order of denial.

- **The application stage is most often an advocate's only shot at capturing the Court's attention.**

The advocate's job when petitioning the Supreme Court for relief is to explain why his case should be in that small minority of cases that we take up for closer review.

- **Think about and argue the jurisprudential significance of a case.**

The best appellate advocates will consider carefully why their case is representational of a class of cases in which the patterns of Michigan law have become disordered. As important, they also address *how* their arguments might affect the doctrinal patterns in closely related areas of law and describe why the relief that they seek in the Supreme Court will result in *less* disorder in our law.

- **Understand the broader area of law that your case represents.**

As stated, I believe that the Supreme Court's primary function is to manage the fabric of Michigan law. If we are doing our job well in selecting cases, we will be attempting to choose cases to ensure that the pattern of the law emerges predictably and with a discernable pattern. We should select cases in areas where the pattern of the legal fabric has become disordered, chaotic, or frayed.

For example, when I joined the Court in 1999, in many areas of the law, one could find a Michigan Supreme Court decision to support *any* position a litigant chose to make. In *Nawrocki v Macomb County Road Commission*, for instance, we considered whether the statutory "highway" exception to governmental immunity imposes a duty on state and county road commissions to protect pedestrians from dangerous or defective conditions on the improved portion of the highway designed for vehicular travel.[8] At the time we

[8] *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143 (2000).

considered the case, each party relied on Michigan Supreme Court precedent in support of its position—there were two divergent, and contradictory, strands of case law on the books. Our body of law was internally inconsistent, leading to wildly varying results from case to case.[9] In *Nawrocki*, we articulated a single rule of law that attempted to follow the actual statutory language of the highway exception.[10] Successful advocates identify such inconsistencies and provide guidance on how to resolve them.

- **Written appellate advocacy that examines its case with the fabric of Michigan law in mind benefits the Court and, ultimately, everyone in the State.**

At the application stage, the most important advocacy challenge is determining how the case can be best postured as having jurisprudential significance. As a clue to understanding what issues interest the Court, a good appellate advocate will peruse the Court's prior related decisions as well as orders granting leave to appeal, which often include specific issues that the Court requests the parties to brief.

- **Failure to advocate for a case's jurisprudential significance is almost always fatal.**

Many appellate attorneys are so focused on achieving a positive result for their clients that they neglect to think through the implications of the relief that they seek or why they should be entitled to particular relief. While good written advocacy at the application stage will not render a jurisprudentially *in*significant case significant, helping the Court to understand the importance of a particular case may sometimes make the difference between the Court accepting the application and the Court denying leave to appeal.

- **Jurisprudential significance does not always insulate your case from a denial order.**

There are myriad reasons why we might choose not to grant leave in any given case, even a jurisprudentially significant one. For example, our examination of the case may show that the factual record is insufficiently developed on the question that piques our interest. Or we might discover that another issue appears dispositive and resolves the dispute in a cleaner fashion and obviates the necessity of reaching the question of interest. Or we might conclude that the Court of Appeals decision is arguably correct and there is no clear need for the Supreme Court to add its imprimatur.

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[9] See *Nawrocki*, 463 Mich at 166 ("These conflicting decisions must be resolved, in a manner that faithfully interprets and applies the statutory language drafted by the Legislature and adheres to the narrow construction of the highway exception. . . .").
[10] *Id.* at 168.

Be mindful of impediments to reaching the issue you want the Court to reach and address them.

- **Sometimes a half loaf is better than none: Recognize and argue for relief short of a grant.**

Many advocates fail to recognize the availability of relief that does not necessitate a full grant. Where appropriate, we can resolve a case on order—short of full briefing and oral argument. The good appellate attorney will not be afraid to seek alternative forms of relief, such as a remand to a lower court for clarification on a controlling issue, a remand in light of more recent authority, or even a peremptory reversal when the claimed error and underlying law are clear. Indeed, because many cases are *not* jurisprudentially significant, they can be corrected in this way if the error is clear—but only if you ask for it.

D. Effective Brief Writing – The Oral Argument Brief

- **Pay attention to the language of grant orders.**

Often, the Court's orders granting leave to appeal (or scheduling oral arguments on the application) will specify issues that the Court requests the parties to brief. This gives the parties and amici an idea of the issues that captured the Court's interest in the case and offers them the opportunity to examine those issues more fully than they were examined at the application stage. **Be sure that you fully respond to those issues!** (This is a point I never thought that I would have to make, but experience shows that I do.)

- **Consider in advance of drafting your brief the obstacles you face that must be overcome in order to succeed.**

Is there adverse precedent? If so, how well reasoned is it, and has it been criticized? Have there been any recent legislative changes that might alter the legal environment since the question at hand was last examined by the Court? Does the language of a statute support or undermine your position? Outline and address the "problems" posed by your case.

- **Know and anticipate your adversary's arguments.**

The best appellate advocates will have already thought through the other side's strongest arguments. (In fact, at this level, you should know your case well enough to *make* the other side's arguments for her.) Do not ignore arguments that are unfavorable to your case; rather, by anticipating your adversary's strongest arguments, you should address squarely those arguments and explain why they are not fatal to your case. An attorney who

avoids his adversary's strongest arguments does so at his peril; we—his Supreme Court audience—*must* consider the weaknesses in his argument whenever deciding a case.

Consider one of the shortest published Court of Appeals decisions, which occupies exactly one page in the Michigan Appeals Reports. It states:

> The appellant has attempted to distinguish the factual situation in this case from that in *Renfroe v Higgins Rack Coating and Manufacturing Co. . . .* He didn't. We couldn't. Affirmed.[11]

Some cases are just that easy, especially when counsel does not do much to respond to the weaknesses in his argument.

III. The Art of Oral Advocacy

- **Oral argument is a unique and difficult advocacy art.**

It is an *art* because every oral argument should be a *uniquely crafted entity designed for a particular circumstance*. The sad fact is that my experience persuades me that the oral argument is one of the most poorly developed of advocacy skills that lawyers use. From my perspective, oral advocacy appears to be one of the great lost advocacy opportunities. I cannot offer a formulaic recipe for oral arguments, but I do think that there are some core precepts that an advocate ought understand and follow.

- **Do Oral Arguments Matter?**

The answer depends on whether the question is asking if oral arguments typically or frequently cause a Justice to change her mind or whether an oral argument otherwise makes an important contribution to the decision-making process. In my experience, the honest answer is that few oral arguments actually cause a Justice to radically alter his view of a case. However, effective oral arguments—on the margins—can cause a judge to rethink his views of the case.

I think the more important point is that oral arguments provide a judge with an opportunity to *challenge* his thinking about the legal questions at issue. Thus, for me, whether an oral argument—even a very effective one—causes me fundamentally to change my views is not as important as the opportunity it presents for me to work through the issues in a thorough fashion.

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[11] *Denny v Radar Industries, Inc*, 28 Mich App 294 (1970).

Surely, an effective oral argument can provide a margin of success in a close case. But it would be hard to imagine how even the most brilliantly conceived oral argument could overcome serious substantive legal weaknesses in a case. It is important for you as practitioners to understand that the converse is not true: poor advocacy, including oral advocacy, *can* sunder a case of real merit.

A. The Basics

- **Know the rules of oral argument.**

The current Michigan Supreme Court is a "hot court" – the Justices are engaged and ask a lot of questions. For that reason, the Justices have agreed to withhold questioning of the advocate during the first five minutes of argument. The Justices have read your briefs. This "cease fire" period may be the only time you have to make a coherent exposition of your argument. Do not waste this time with precatory throat clearing. Use this cease fire time to introduce your main points and, most important, explain what you want the Court to do in its opinion. In short, this is the time to frame what you want the Court to do and how we should accomplish that.

Reserve rebuttal time (if you want it). The appellant is entitled to reserve rebuttal time to respond to points that the appellee makes during his argument. Be sure to reserve this time at the outset of your oral argument, or you risk not having any time to respond to the appellee's argument. During your rebuttal period, do not simply rehash the points that you make during your main argument. Pay attention to the questions posed to your adversary and the answers given, and incorporate appropriate responsive positions into your rebuttal.

- **Observe basic hygiene: Avoid distractions that may divert attention from your argument.**

Because an advocate wants the Court to focus on the points being made, the advocate must pay attention to the essential "hygiene" that the occasion requires. One wants the judges' attention riveted to the argument, not the attorney's personal idiosyncrasies of delivery. Odd personal mannerisms—such as fidgeting, waltzing around the podium, speaking in a low or monotone voice—can be very distracting. The best advocates understand that they need to master nerves and work on techniques to reduce the extent to which nervous tics are on display during argument. Practice your arguments before others or record them in order to become more aware of how you look when presenting an argument.

Oral argument is probably not an occasion to make a bold fashion statement. Men should wear a well-pressed suit (or jacket and slacks) and a tie. Women should wear the equivalent. When in doubt about what to wear, opt for more conservative clothes. For good or ill, *how* you present yourself can affect the way that people judge the credibility of

what you say. Making an oral argument in an appellate court is an occasion to display the utmost professionalism; your personal demeanor should suit the occasion.

- **Know the *purpose* of oral argument.**

If an appellate brief provides an advocate the opportunity comprehensively to lay out her argument, an oral argument provides her an opportunity to present the Court with a focused, *highly tactical* presentation on the outcome determinative issues that require resolution favorable to the advocate.

Stated somewhat differently, an effective oral argument should be a distillation of the most critical issues in the case that should drive the Court's decision in the advocate's favor. *A good oral argument should be arresting, have an inexorable focus on the critical issues, and supply the most compelling reasons why the case should be resolved favorably to the advocate.*

- **Preparation is *vital*: BE OVER-PREPARED.**

No Justice should have a better understanding of the record than the advocate but this is a surprisingly frequent occurrence. Know your case *cold*, including the factual record *and* relevant law. Few things are as deflating as having to admit during argument to ignorance of key facts, trial rulings, or controlling authority. Have case citations and record references handy during argument.

I STRONGLY recommend that advocates practice their argument in a moot court exercise. This is an excellent way to "pretest" the core strategy of the argument.

- **Research the Justices' positions in cases involving similar issues.**

The best advocates are always aware whether members of the Court have previously decided issues similar to those involved in the case at hand. As appropriate during argument, refer to any opinions members of the Court have authored (or participated in) that have any bearing on your case. *Be prepared to use a favorable decision or address the problem created by an unfavorable decision.*

- **Briefly frame each major issue before beginning your discussion of it.**

This technique will help the Court better understand the structure of the argument an advocate is making. This is the verbal equivalent of using headings in a brief.

- **Argue only your strongest issues—start with the best.**

At oral argument, you need present a laser-like focus on the *outcome determinative* issues. A shotgun approach only suggests that an advocate has no idea which of his arguments have merit. So advocates should avoid a shotgun approach to covering arguments that will diffuse the impact of the essential points. Rely on your brief for the remaining (weaker) arguments and tell the Court that you are doing so.

B. What to Expect at Oral Argument

- **This is a *conversation* with the Court, not a recital.**

Many advocates approach oral argument as though it were a recital rather than a substantive conversation with the Court. Those who attempt a "recital" tend to flounder.

Oral argument should be considered an opportunity to educate the Justices.

Look at and speak to the Justices, and use an outline, not a script. Advocates bound to their "script" are frequently unable to respond as effectively to the give and take inherent in appellate oral argument. Consequently, *listen to* and *answer* the questions that the Justices ask.

- **Stay calm.**

Avoid pitched arguments with the Justices, but hold your ground if you are being pushed unfairly off of your position. Again, a vigorous moot court exercise is an excellent way to become accustomed to pointed questioning that you may face in Court.

- **Listen closely to the questions asked and address them as directly as possible.**

If you are the appellee, listen carefully to the questions posed to your adversary and incorporate appropriate responsive positions into your argument. But if you are ahead, *don't overreach!*

- **Know your speaking points and stay "on message."**

After answering a Justice's question, return to your point. When he was preparing for oral argument before the U.S. Supreme Court, Chief Justice Roberts would label index cards with each of his main points and then practice transitions by shuffling the cards and transitioning from one random card to the next. Doing so not only helped him to understand how each of his points related to the other, but it also helped him ensure that he could quickly pivot from one point to another during the heat of questioning.[12]

Having a moot court practice can help advocates develop comfort in responding to questioning and discover weaknesses that need to be strengthened.

- **Do not assume that questions are an indication of hostility.**

Most Justices want to find the "right" answer and want to make sure that they understand the relevant issues. Questioning counsel is one of the best ways for a Justice to verify his or her understanding of the case. Be aware that the questions posed by one Justice may be asked for the benefit of another who may be laying quietly in the weeds.

- **Admit that the sky is blue.**

Failure to acknowledge controlling authority and the like simply results in a loss of the advocate's credibility.

- **Deal candidly with surprise.**

If, notwithstanding all of your preparation, you are surprised by an issue raised during argument, ask for the opportunity to file a *short* supplemental brief on the limited topic raised.

C. What to Avoid at Oral Argument

- **Do *not* recite your brief.**

One of the most obvious problems that lawyers have with oral arguments is that they misperceive its function and their own role in the process. Too frequently, counsel seek to

[12] Bryan Garner interview with Chief Justice Roberts, 13 Scribes Journal of Legal Writing 5, 23-24 (2010).

recapitulate what they have already presented – at length – in their briefs. Regurgitation of a brief is a futile exercise. When the advocate has, at most, 30 minutes to address the critical issues the Court ought to consider, oral argument should be extremely focused and *tactical*.

- **Don't dwell on detailed background facts supplied in your brief.**

At the time of argument, the Justices will have read your briefs *and* probably have a legal memorandum assessing the case. There are better ways of spending your limited time than making an extensive recitation of facts. However, be sure to provide enough facts to assist the Justices to remember the specifics of your case and to marshal those facts appropriately when arguing your main points.

- **You are addressing *judges*, not a jury.**

While passionate advocacy can be effective, *histrionics* directed to the Justices usually are not. Cheap emotional appeals having little to do with the law at issue usually are off-putting and ineffective. One example of this is a recent advocate who urged the Court to "judge up" and avoid caving into "political pressures" in deciding the case.

D. What the Justices Are Thinking

- **It is *not* about your case.**

I know you and your client want to win *your* case, but the Supreme Court's job is to interpret an *area* of the law, not one particular case. Your job is to present a rule of law not just for *your* case, but for the *next hundred cases* like it. Thus, we are thinking about how your case affects other cases, *past and future*.

Many appellate practitioners do not understand that, particularly at the Supreme Court level, the Court cannot resolve the case at hand without addressing broader ambient legal doctrines in which the case arises. Consequently, such appellants tend to argue that their case should be decided on its unique characteristics, oblivious to the fact that, if the case had *no* broader doctrinal implications, it is unlikely the Court would have granted leave in the first instance.

- **Many lawyers tend to ignore doctrinal issues and are blindsided by questions from the Justices that focus on them.**

We are always seeking to understand what a party is asking us to do – either explicitly or implicitly.

> *An appellate advocate must ask two questions: "What rule of law am I asking the Court to apply?" and "Does this rule require a modification of existing law?"* If the answer to the second question is "yes," then the advocate is obligated fully to explore the implications of that change.

I am stunned by the number of times at oral argument an advocate is unable to provide the thesis statement for the rule of law it wishes the Court to adopt. This may be because the advocate has not understood what doctrinal foundations are implicated in the relief they seek or their belief that it is the Court's job to formulate the rule of decision.

It is the *advocate's* job to provide the Court with the rule of law it wishes the Court to adopt in resolving the case. Too many advocates follow what I call the "dead mouse" theory of advocacy: like a housecat bringing a mouse to its owner, they will lay the result they want at your feet and then look at you to figure out what to do with it. Avoid this temptation and explain not only *how* the Court should get to the outcome you seek but also *what* the consequences of our decision will be.

- **The hypothetical question is one of the primary means for testing whether the legal principle urged is logically applicable in the next series of related cases.**

Many lawyers "decline" to answer hypothetical questions on the ground that such questions contain facts or issues that differ from those in their own case. While it is perfectly appropriate to point out the assumptions or facts that make proposed hypothetical questions inapposite, dodging hypothetical questions as "different from my case" frustrates a Justice's ability fully to assess the legal principle at issue. *In my view, generally, a refusal to respond to hypothetical questions suggests that the lawyer simply is afraid to engage in the intellectual exchange that should inform an oral argument.*