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**FROM THE MOUTH OF A FISH: AN APPELLATE JUDGE  
REFLECTS ON ORAL ARGUMENT**

MICHAEL A. WOLFF\*

Sixty years ago, toward the end of a career that made him the top appellate lawyer of his day, John W. Davis (who also was the 1924 Democratic candidate for President) commented that any lecture on the subject of appellate argument should come from a judge rather than from a lawyer:

Supposing fishes have the gift of speech. Who would listen to a fisherman's weary discourse on fly casting, the shape and color of the fly, the size of the tackle, the length of the line, the merit of different rod makers, and all the other tiresome stuff that fishermen talk about, if the fish himself could be induced to give his views in the most effective methods of approach. For after all it is the fish that the angler is after . . . .

It is true, is it not, that in the argument of an appeal the advocate is angling, consciously and deliberately angling, for the judicial mind.<sup>1</sup>

Since I have been an appellate judge for only two and a half years, I draw upon cases and experiences from the previous twenty-eight years as a lawyer and law professor. Most of the cases that I have heard as a judge of the Supreme Court of Missouri are fairly recent, obviously, and some may not even be final. Hence, I will go back and look at cases that I argued as a lawyer through the lens of hindsight and from the perspective of a judge. When I taught trial advocacy, I would occasionally remind students that a trial lawyer learns a great deal from the cases that he or she loses, and very little from those the lawyer wins. If I won a case, I might mention it here. If I do not mention the outcome of a particular case, you may assume that I learned a great deal.

OUR SHRINKING ATTENTION SPAN

We are at a point in our history when oral argument in appellate courts has greatly shrunk. Just for context, I can tell you that when the great early twentieth century trial lawyer Clarence Darrow defended union activist Big Bill Haywood, in 1907, Darrow's final argument to the jury lasted for eleven

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\* Judge, Supreme Court of Missouri; former Professor of Law, Saint Louis University School of Law. The text is a lecture Judge Wolff delivered as the 2001 Adler Rosecan Jurist in Residence.

1. I am indebted to Seth Waxman, recent Solicitor General of the United States for that vignette. Seth P. Waxman, *In the Shadow of Daniel Webster*, 47 FED. LAW 48, 48-49 (2000).

hours and fifteen minutes and was preceded and followed by prosecution arguments that lasted nearly three days.<sup>2</sup> When I was last involved in the trial of lawsuits, in 1991, the attention span of jurors had shrunk substantially. I had one hour for summation. You may remember the popular television show of the time, *L.A. Law*. The lawyers on that show could deliver a pretty dramatic final argument in about ninety seconds. And those of us who wanted to talk for an hour or more in real courtrooms had to watch *L.A. Law* to know what jurors expected.

Similarly, the attention span of appellate judges has shrunk considerably. One of the great appellate lawyers of the nineteenth century was Daniel Webster, and one of his most famous appeals was *Trustees of Dartmouth College v. Woodward*.<sup>3</sup> There are quotations from Webster's argument that are legendary. But we should note that the argument in the *Dartmouth College* case spanned three days.<sup>4</sup> By contrast, most of the cases currently argued in the Missouri Supreme Court are allowed fifteen minutes per side.

So what to do with all that time? One word: focus.

The great majority of cases turn on a single issue. At most, perhaps two or three core questions. Almost invariably, the appellant or petitioner will raise a number of additional issues for the court to review and decide, but few of these "fringe" issues ever produce a reversal.<sup>5</sup>

#### DOES ORAL ARGUMENT MATTER?

How important is oral argument? As a lawyer barely over a year out of law school, I was co-counsel on a case that was a civil rights action against a local electric utility, a private company, that we alleged was acting under color of state law.<sup>6</sup> We had lost in the trial court, and after our brief was filed in the Eighth Circuit, we received a notice that the court had cancelled oral argument. I called an acquaintance who had finished a clerkship with an Eighth Circuit judge and asked what that meant. The court of appeals rarely reverses trial judges, he said, especially the one in our case. And the court certainly would

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2. J. ANTHONY LUCAS, *BIG TROUBLE: A MURDER IN A SMALL WESTERN TOWN SETS OFF A STRUGGLE FOR THE SOUL OF AMERICA* 707-21 (Simon & Schuster 1997).

3. 17 U.S. 518 (1819).

4. Waxman, *supra* note 1, at 50.

5. Judge Myron H. Bright of the U.S. Court of Appeals for the Eighth Circuit, a former visiting faculty member at Saint Louis University, once observed that in the 5,000 appeals he had heard in his thirty-five years on the federal bench, "[a]t most, perhaps two or three core questions are crucial. Yet almost invariably, the petitioner will raise a number of additional issues for the court to review and decide. Few of these fringe issues ever produce a reversal, and most of the time they should be considered secondary to the heartwood of the case." Myron H. Bright, *Focus on the Crucial Issue*, 1 J. APP. PRAC. & PROCESS 31, 32 (Winter 1999).

6. *Ihrke v. Northern State Power Co.*, 459 F.2d 566 (8th Cir. 1972), *vacated as moot*, 409 U.S. 815 (1972).

not reverse the trial judge without exploring the issues at oral argument. In short, he said, it's over.

Actually, as it turns out, we were lucky. The court of appeals reversed the district court and reinstated our claim. (The state action theory did not have a long life; the Supreme Court of the United States decided *Metropolitan Edison* two years later and said there was no state action by private utility companies.)<sup>7</sup> We were also lucky in the sense that, had we gone for oral argument, we might have talked ourselves out of an appellate victory.

In the 1980's, Judge Myron H. Bright and two of his Eighth Circuit colleagues kept track over a period of time of the number of cases in which oral argument had changed the judge's mind. In all of the cases, the judges had read the briefs prior to oral argument, had formed a tentative conclusion, and then noted at the end of oral argument whether their vote on the case was consistent with the opinion they held prior to oral argument. In Judge Bright's case he changed his mind thirty-one percent of the time, and the other two colleagues were at seventeen percent and thirteen percent.<sup>8</sup> When he first published these data in the mid-1980's, I was shocked. I could not imagine that a judge could be, well, frankly, so unprincipled as to change his mind that often. But in the two and a half years I have been a judge, I've come to have considerable empathy with such flip-floppery.

#### QUESTIONS FROM THE "HOT" BENCH

So what's the use of oral argument? It depends on the bench. There are some courts, and the court upon which I serve is *not* one of them, that are considered "cold" benches. That is, the judges sit there and ask few, if any, questions and the attorneys follow their prepared script. Ours, by contrast, is a "hot" bench, and the advocates in many cases have time for little else but answering our questions.

One question that advocates frequently ask is whether the judges read the briefs. Where the bench, or certain judges on the bench, are "hot," in that they ask a lot of questions, you can assume that they have read the briefs. If the court usually is one that does not ask questions, you may have to assume otherwise and at least give the judges a brief description of the factual context of the case and the issues raised before getting to the heart of your argument.

For example, in another of my earlier cases in the South Dakota Supreme Court, there were five judges—four "colds" and one "hot." I was defending a woman accused of neglecting her child. She was indeed a poor mother but mostly because she was simply poor. The facts of the case were not uplifting so, as a young lawyer, I decided to make a constitutional argument. My

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7. *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974).

8. Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35, 40 nn.32, 33 (1986).

contention was that the statute allowing the woman to lose her child as a result of “neglect” had no standards and thus allowed arbitrary enforcement and deprived her of her constitutional rights. Well, my theory was better than that, but I hope you get the picture. At oral argument, four of the judges did a rather nice impression of Mt. Rushmore, but the fifth judge badgered me with the most hostile questions I had ever experienced in any court. When I finished the argument I knew that this judge was the one who was really prepared on the case, had come to crucify me, and did. And I had no doubt that he would write the opinion in the case and that I would lose. I was correct. I lost. And my tormenter wrote an opinion—a dissent that accepted my theory.<sup>9</sup>

The point of this story is that a judge may ask what seems to be a hostile question or many hostile questions, but the judge may be probing what is troubling him or her. The judge may want to accept the theory you are espousing and takes oral argument as the opportunity to be the Devil’s advocate and to try to poke holes in your theory.

#### THE ADVOCATE AS A PARTICIPANT IN THE COURT’S CONFERENCE

I have given considerable thought to the questioning that comes from the bench. Let me make an overall comment from my brief experience peering down at the nervous advocates who appear in our court. If you listen to the lawyers’ arguments, interrupted by questions from the bench, you may at first blush get an impression of probing and badgering questions all directed at the hapless advocates.

But let me offer a more positive and accurate view: what you’re *really* hearing is a conference on the case, many times not very dissimilar from the conference that the judges have about the case after oral argument when a vote is taken to tentatively decide the case.

What the advocate is entitled to do in oral argument is to participate in a conversation with the judges who will be deciding the case and to act as a resource for the judges in clarifying questions that the judges may have after the briefs have been read.

This is a very collegial view of the lawyer’s role.

This collegial view acknowledges that the lawyers arguing the case are the lawyers in the room who know most about the case. They are the ones who know, or should know, the factual record.

I’m putting the oral argument in a very positive light and your role as lawyers in a central position—a teaching function if you will. This view of oral argument puts the judges’ questions at the center of this process. You may come to the courtroom with a beautifully organized outline, with all your arguments neatly arranged. And then you find, to your apparent frustration,

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9. In re D.K., 245 N.W.2d 644, 651 (S.D. 1976) (Winans, J., dissenting).

that you have hardly gotten to any of them in your fifteen minutes and your organizational precision has been shattered by all these “impertinent” questions. That’s the wrong attitude, and you should never appear frustrated or impatient with questions.

Early in my career, I argued in the Eighth Circuit Court of Appeals a legal aid case from South Dakota in which I had brought suit to force a county’s family planning program to allow minors access to birth control without parental consent. I had a constitutional theory that, simply stated, if a minor could consent to an abortion under the progeny of *Roe v. Wade*,<sup>10</sup> then certainly the minor should be able to give consent for the means to avoid a pregnancy in the first place. The trial judge was not sympathetic. He decided that the minor plaintiff, who was identified only by her initials, would have to have a guardian *ad litem* or next friend appointed by the court to represent her interest since she was a minor. And, before making such appointment, he intended to have a hearing and ordered us to notify her parents of the pendency of the hearing. Of course, parental notification, or lack thereof, was the point of the whole lawsuit. I decided to refuse the order, stand on our position that she either did not need a guardian *ad litem* or next friend for declaratory relief or at least could have one other than a parent, and refused to notify the parents.

The case was dismissed, and we took an appeal to the Eighth Circuit. I had three pages of carefully prepared and organized notes. I was ready to give a wonderful formal presentation. And after I had prepared these formal arguments, I had, sort of as an afterthought, sat by myself in a dark room, since I had no one with me in St. Louis to help prepare me for the argument, and I just sat there and thought about all of the ridiculous, weird, and tough questions that judges might ask. Those hours of introspection were actually the best preparation I had.

The next day, I started my argument as follows: “May it please the court. This is a case about whether a minor can obtain birth control services without parental consent . . . .”

At that point I was interrupted, sharply, by one of the judges who asked, “Counselor, isn’t this case really about Rule 17 and whether she is to have a guardian *ad litem* to protect her interests?”

“Of course,” I replied.

The twenty minutes allocated for oral argument stretched to over forty-five minutes as the judges peppered me with questions and bantered back and forth among each other over the points of law and the ramifications of the plaintiff’s position. Could a ten-year old bring such a lawsuit? I never once had the opportunity to look at those notes that I had so carefully prepared.

By the way, my client’s position prevailed. Judge William Webster (who later was director of the FBI and the CIA) wrote the majority opinion, and

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10. 410 U.S. 113 (1973).

there was a vigorous dissent condemning the desire for state supported extra-marital foolery, et cetera.<sup>11</sup>

#### THE IMPORTANCE OF “EARNEST CONVERSATION”

When the whole point of oral argument becomes an exercise in answering the judge’s questions, the role of rhetoric, of dramatic flourish that we all dream of as advocates, evaporates. Time has crunched us and taken away the opportunity for high suasion. Let us consider again, for a moment by contrast, Daniel Webster’s argument in the *Dartmouth College* case. Justice Joseph Story’s account of the argument noted that when Webster stopped speaking, it was some more minutes before anyone seemed inclined to break the silence and that the audience was greatly moved. When the transcript of his argument in the *Dartmouth College* case was published, Webster eliminated much of the rhetoric which he called “peroration” because it embarrassed him. However, one of those who attended the argument asserted that it was “pure reason” rather than eloquence that marked Webster’s argument, of “a tone of earnest conversation which ran throughout the great body of the speech.”<sup>12</sup> Here are Webster’s famous concluding remarks:

Sir, you may destroy this little institution; it is weak, it is in your hands. I know it is one of the lesser lights in the literary horizon of our country. You may put it out. But if you do, you must carry through your work. You must extinguish, one after another, all these great lights of science which for more than a century have thrown the radiance over our land. It is, sir, as I have said, a small college. And yet there are those who love it.<sup>13</sup>

That may strike you as an appeal simply to emotion, and one that you will probably never be able to have the luxury of delivering yourself in any case. But notice the reasoning that is embedded in Webster’s words. It is at the heart of many questions posed by appellate courts, particularly Supreme Courts: What is the effect of our decision? Beyond the parties, how does this affect the law, other institutions in society and the stability of our institutions?

To return to the subject of judges’ questions, there are many that take the form of “what if?” What if we decide your way, what effect will it have? Some judges like to ask hypothetical questions, posing a set of facts different from those of your case. The worst thing you can do is to tell the judge, “but that’s not this case.” The judge already knows that that’s not this case. He or she is probing to see what the implications are of the decision that you are urging upon the court, so have patience.

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11. *M.S. v. Wermers*, 557 F.2d 170 (8th Cir. 1977) (Henley, J., dissenting). Judge Henley’s dissent is perhaps more elegant than I give it credit for.

12. Waxman, *supra* note 1, at 49-50.

13. *Id.* at 50.

Questioning by judges does not normally include discussion of previous cases by name and detail. But judges are mindful of precedent, and you should be ready for such questions, especially if your position involves uncharted territory. One of my colleagues is fond of asking a question something like this: “What’s your closest case (meaning, closest Missouri case) supporting this position?” I’ve never taken that to be a “trick” question, but simply one that ascertains how well grounded in precedent the advocate’s position is. Another of my colleagues will occasionally ask as follows: “How would you write this opinion, if we were to rule in your favor on this point?” or some such variation of that. That question is about as close as you can get to telling you that you are in the room having a conference on the case.

#### CANDOR COUNTS

Answering judges’ questions requires absolute candor. If you do not know the answer to a question, say so. More importantly, if there is a precedent that is dead-on against you, deal with it. Don’t ignore it. Don’t hide it. Judges on the whole have rather poor memories for such things as cases they have already decided. But they have excellent memories for one thing—lawyers who try to fool them.

I have talked about two kinds of questions, primarily: (1) those that go to the heart of a case, where something is troubling an individual judge or judges, and (2) those that seek to explore the ramification of a particular decision, what does it mean, how does it affect the related areas of the law.

There are two more kinds of questions that I can touch on briefly: As I mentioned, you should imagine that you and the judges are having a conference about this case. In this group, of which you are a part, a question might be directed to you that is really addressing a concern that one judge knows that one or more of the judge’s colleagues have. So in a sense, with this kind of question, you may be getting the impression that the judges are talking to each other, and you are simply the conduit. You should be an active conduit. If the judge seems to be making a point, and the point is favorable to you, do your best to reinforce the point. If the point is unfavorable, this is your opportunity to address the judge’s concerns and to turn the point in your favor. Even if the question seems unfavorable, you should welcome the opportunity to address the point because if the judge does not ask the question, you have no such opportunity.

Finally, there is the kind of question that is intended to draw a concession. These can be traps for the unwary. But you will be so well prepared that you will not be unwary. An example: Some years ago, when I was in South Dakota, a lawyer of my acquaintance argued a case in the Eighth Circuit on behalf of a young schoolteacher in a small town in western South Dakota who had been fired for living in sin, as they say, with her boyfriend. The young lawyer took her case to the federal district court on constitutional “right of



privacy” theory, and he lost. But maybe this constitutional issue was not one that needed to be decided. The schoolteacher had in fact moved away, and so one of the judges asked an obvious question: “If we rule in her favor, will she move back to this small town and resume her teaching career?”

“No,” the lawyer replied. The schoolteacher had returned to New York and would not seek reinstatement. The court of appeals issued its decision declining to decide the “privacy” issue because the teacher no longer was in a position to get any relief.<sup>14</sup>

But making a concession in answer to a question is not always a bad thing. There are some recent criminal cases that come to mind involving the State of Missouri where the State conceded that the ruling of the trial court was wrong on a point of evidence, but then argued that the defendant was not prejudiced—that is, that the trial court’s error did not make any difference in the ultimate outcome of the trial. That kind of concession can be extremely useful because the court views the advocate as an honest broker of information.

Let me use the time remaining to highlight a few other matters that I think might be helpful.

#### PREPARATION AND “APPELLATE PLEADING”

I have already stressed preparation. Arguing an appeal is not a process divorced from the proceedings of the trial court. As you probably already know, if a point is to be raised on appeal it must have been presented first to the trial court. There are some rare exceptions. But in general, the trial court judge must have an opportunity to rule on the matter in the first instance or to correct his or her mistake before the issue is argued in the court of appeals or supreme court. So it is important, at the outset, to be familiar with the record in the court below. If the matter involved a trial, it is important that the issues that are to be presented on appeal have been raised in the motion for a new trial.

The briefs—sometimes I wonder how briefs got that name, especially after I read one that is substantially lengthy and raises many points. My colleagues who have been trial judges know, of course, that trial judges rarely make mistakes. On the other hand, my former Saint Louis University colleague, Charles Blackmar, who served on the Missouri Supreme Court until his retirement some ten years ago, was fond of saying that the role of the supreme court was to protect the public from bureaucrats and trial judges. In the trials in which I have been involved, I think even the best trial judges make errors at the rate of one or two a day in the course of a week-long trial—maybe more. But which of those errors really matters? If you look at the West key number

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14. *Sullivan v. Meade Indep. Sch. Dist.*, 530 F.2d 799, 808 (8th Cir. 1976).

system on evidence, you may note a very voluminous entry is “harmless error.”

When I was talking specifically about oral argument, I said your duty was to focus. The same duty exists when preparing the brief. What crucial error, I mean one, or two, or maybe three, will result in a reversal?

Next comes the challenge of how to frame the issues. In the federal system, the parties are simply required to state the issue. As those of you who have prepared briefs in Missouri appellate courts know, we have a particularized version called “points relied on.”<sup>15</sup> The issue, as you know it from the federal system, is embedded in our Missouri system in the point relied on, which requires the advocate to identify the ruling that is challenged, how it was wrong, and be rather specific about the matter.

In either system, one that requires a statement of the issues, or ours which requires “points relied on,” you might conceptualize this writing as a form of appellate pleading. In your Civil Procedure and pre-trial courses you learn that pleadings have traditionally been used to delineate an outline of contentions or factual propositions that are to be tried. Even though these appellate “pleadings” deal only with points of law—a fairly strict, pleading-oriented view of the “issues” or “points”—you will find judges asking whether or not you have preserved an issue and whether you have framed that issue of law so that an appellate court can address and decide it.

You should also pay specific attention to the “standard of review.” In fact, our rules now require an advocate in his or her brief to set forth the appropriate standard of review.<sup>16</sup> In other words, is the point presented an issue solely of law, which can be reviewed by the appellate court *de novo*? Or is the purported error a matter that is generally left to the trial court’s discretion? If

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15. See MO. SUP. CT. R. 84.04(d). Rule 84.04(d), in part, is as follows:

RULE 84.04 BRIEFS—CONTENTS

(d) Points Relied On.

(1) Where the appellate court reviews the decision of a trial court, each point shall:

(A) identify the trial court ruling or action that the appellant challenges;

(B) state concisely the legal reasons for the appellant’s claim of reversible error; and

(C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.

The point shall be in substantially the following form: “The trial court erred in [identify the challenged ruling or action], because [state the legal reasons for the claim of reversible error], in that [explain why the legal reasons, in the context of the case, support the claim of reversible error].”

...

(4) Abstract statements of law, standing alone, do not comply with this rule. Any reference to the record shall be limited to the ultimate facts necessary to inform the appellate court and the other parties of the issues. Detailed evidentiary facts shall not be included.

16. MO. SUP. CT. R. 84.04(e).

the latter, the burden on the appellant is to show that the trial judge abused his or her discretion.

Many cases involve the interpretation of a statute or a contractual provision or even a constitutional article. In your brief, make sure you prominently present to us the exact wording of the statute, contract or constitutional provision. In fact, I would recommend adding an appendix to your brief with the relevant statute, contract or constitutional provision set forth in full.

#### THE USE OF EXHIBITS

When you're in oral argument discussing a statutory provision, you might consider blowing up the language on a projector or a piece of foam board that you can put on an easel. But I must caution you: some of us have poor eyesight. I have seen, or more accurately not seen, quite a few exhibits with statutory language or contract provisions blown up so that the advocate and the judges could examine the language together. The only problem was that at a bench long enough for seven judges, the print is rarely big enough for all of us to see. So you can either give us an individual copy or refer to your appendix, to follow along, or you can let us sit there and be annoyed.

Seeing it and hearing at the same time really enhances our understanding. I argued a case in the Missouri Court of Appeals some years ago involving a jury instruction where I was complaining that the jury had been misinstructed by the use of the word "*a*" rather than the word "*the*." The case involved the sinking of a riverboat restaurant in downtown St. Louis, and the suit was against the insurance company for failure to pay a claim based upon loss of the vessel by "*the* perils of the inland waters." That was the phrase used in the insurance contract and in the main jury instruction. But the jury was conversely instructed—at the insurance company's request—that its verdict must be for the insurance company unless it found that the loss of the vessel had been occasioned by *a* peril of the inland waters. My argument was that the main instruction, and the contract itself, did not require us to show what particular peril caused the loss; but the converse instruction misled the jury into thinking that our side had to prove that *a* particular peril caused the loss.<sup>17</sup>

Now that I've thoroughly confused you about what I was trying to say, you can imagine that it was helpful that I put the two jury instructions up on an overhead projector and pointed to the words as I discussed them. That may sound a bit like a schoolteacher, but an appellate advocate will sometimes play that role. And I don't think I could have adequately explained the difference or won the appeal on that point without showing the actual words and pointing to them. That is the one time I think an exhibit can be helpful.

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17. *Wilmering v. Lexington Ins. Co.*, 678 S.W.2d 865 (Mo. Ct. App. 1984).

## WE'RE NOT JURORS

You can overdo exhibits. You've got to be careful not to treat the judges as though they were another jury. If you have gory pictures of the victim—either of a crime or of a personal injury—you might want to emote about them. Save yourself. Don't do it.

Some emotional content in your argument and certainly a sincere belief in what you are saying will help you to be persuasive. But don't treat us like jurors. Remember the style reported of Daniel Webster; use a "tone of earnest conversation."<sup>18</sup>

Along these same lines, I have pondered the wisdom of bringing one's client to the oral arguments. I personally do not care, but I know judges who do feel that it is not a good thing. Some judges believe the client has a right to be there because the client is paying for it. But the negative judicial outlook is that oral argument is a time for a reasoned exchange of views, not for rhetoric, as I have already emphasized.

I think the danger of having your client there is that if you do get a little carried away, rhetorically speaking, the judges may get the unfavorable impression that you are showboating for your client, rather than addressing the judges' needs for reasoned analysis and information. By the way, the arguments of the Missouri Supreme Court are now available live and in archived form at [www.missourinet.com](http://www.missourinet.com). So if you have a client who fervently wishes to hear your wondrous phrases, he or she can tune in on the computer, or even click on to it later, or over and over, and listen to how wonderful you were.

I also mention the Internet availability because it is a valuable resource for lawyers preparing for oral argument in the Missouri Supreme Court. Find a similar case, click on it and listen to the arguments. You can tell by the kinds of questions and by the tone of the questioning what you are likely to be in for. That, it seems to me, should be an essential part of the preparation process.

Well that's it from the mouth of a fish. I hope it will help you hook some. And unlike the anglers of yesteryear who could spend all day in the boat, you have fifteen minutes. So focus.

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18. Waxman, *supra* note 1, at 50.

