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## The Advocate: Should He Speak or Write?

The Rt. Hon. Lord Mackay

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## ESSAY

### THE ADVOCATE: SHOULD HE SPEAK OR WRITE?

*THE RT. HON. LORD MACKAY\**

President, Dean, Boris Koztclenatz—a working lawyer—Distinguished Guests, Ladies and Gentlemen. I am both pleased and honored to be here in New York tonight to give the Twentieth Annual John F. Sonnett Lecture at Fordham University's School of Law. The list of previous lecturers is indeed a distinguished one, including: former Chief Justices of Ireland and England, your own Chief Justice of the Supreme Court, Warren E. Burger, and other distinguished American judges and lawyers.

John F. Sonnett, as most of you here will know better than I, had a distinguished career in the law, both in public and private service. He served as an Assistant Attorney General and Chief of the Antitrust Division of the United States Department of Justice before returning to private practice and establishing an international reputation for trial and appellate advocacy. He was a graduate of the School of Law at Fordham University. The University itself was founded in 1841, and thus celebrates its One Hundred and Fiftieth Anniversary this year. The Law School is, however, a little younger, having been founded in 1905. It has developed to provide a wide-ranging curriculum and has produced a number of distinguished graduates.

When I received the invitation to give this lecture, the only indication I received as to its subject was that it should be "advocacy-related." After some reflection, I have chosen the title "The Advocate: Should He Speak or Write?" My choice of subject owes much to Professor Robert Martineau of the University of Cincinnati, Professor Michael Zander of the London School of Economics, and to the heavy snow we experienced in London earlier this year. The connections between the three, I am sure, will not be immediately obvious to you.

Owing to the very heavy snow, I spent a rather long time one Friday

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\* This speech was given by The Rt. Hon. Lord Mackay on April 3, 1991, at Fordham University's School of Law as The John F. Sonnet Memorial Lecture. The Rt. Hon. Lord Mackay is the Lord Chancellor of the United Kingdom. As Lord Chancellor, he serves in all three branches of government: as a member of the Prime Minister's cabinet, in which he has the primary responsibility for the appointment of judges; as president of the House of Lords; and as head of the judiciary.

The Rt. Hon. Lord Mackay received both a Master of Arts with Honors in mathematics and natural philosophy and a Bachelor of Laws degree with distinction from Edinburgh University. Prior to his appointment as Lord Chancellor in 1987, he was Lord Advocate of Scotland from 1979 to 1984 and was a Lord of Appeal in Ordinary from 1985 to 1987.

sitting in the airport lounge and on board a plane, waiting for takeoff. This provided the opportunity for a more thorough perusal of the daily press than time usually permits. One of the articles I read with great interest was a review by Michael Zander of a book by Professor Martineau called "Appellate Justice in England and the United States: A Comparative Analysis."<sup>1</sup> Professor Zander wrote of Professor Martineau's conclusion that the problems of dealing with high workloads and growing backlog experienced by appellate courts in England, Wales, and the United States were more easily tackled in the United States because of the use of written briefs supplemented by minimal oral advocacy.<sup>2</sup> This made me think about the use of oral or written advocacy in all our courts and if there were conclusive reasons for adopting one rather than the other. I decided to examine this by using examples from England and Wales, Scotland, and the United States.

A number of people have helped me with this lecture. I have already mentioned the indirect help of Professor Martineau and I have had the opportunity of discussing with Professor Zander his article. I am also indebted to Lord Griffiths; Lord Donaldson, Master of the Rolls; Professor Ian Scott of the University of Birmingham; James Wolffe, the Legal Assistant to the Lord President of the Court of Session; and, above all, to my Private Secretary, Jenny Rowe. Responsibility for any errors or weaknesses in the lecture is, however, entirely mine.

It was Francis Bacon who said "Reading maketh a full man; conference a ready man; and writing an *exact* man." The English tradition, however, is one of predominantly oral advocacy, although the English dictionary to which I referred defined an advocate as a person who pleads on behalf of another, especially in a court of law—a person who *speaks or writes* in support of some cause, argument, or proposal.<sup>3</sup>

Although the dictionary definition allows for advocacy to be either written or spoken, few people in the English tradition, until comparatively recently, would have laid much emphasis on the art of written advocacy. Lord Birkett, in his Presidential Address to the Holdsworth Club in the University of Birmingham in 1956, defined the advocate's art in a way that clearly assumed an advocacy that was exclusively oral:

It is clear that advocacy is made up of many elements. There is first of all, [I repeat], the importance of the advocate himself. He should count himself exceedingly fortunate if he has been endowed with a good voice. But he must use it. He must speak so that he can be heard, and he must articulate clearly. He must try to acquire tone and modulation, so that his every sentence is pleasant to the ear. To the advocate, the spoken word is the breath of his life, and it is quite astonishing to me that so little thought is given to it . . . A commanding

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1. Zander, *Kindly Get To The Point, My Learned Friend*, *The Independent*, Feb. 8, 1991, at 19.

2. *See id.*

3. *See* The Random House Dictionary of the English Language (2d ed.).

presence is a great asset, but if nature has been careless about this, the advocate must do the best he can by making up for it in other directions. . . . It is well if the advocate is possessed of a quick mind, alert to seize the unexpected opportunity, to adapt himself to the sudden changes which occur in the conduct of a case, and to be ready to deal with any interventions from the Bench, whether they be disconcerting or helpful. But more important than the quick mind is the understanding heart, the insight into human nature, the natural sympathy with all sorts and conditions of men, the intuitive recognition of what the particular situation demands. . . . But whether the advocate possesses all or any of these qualities, there are certain desirable things which it is in the power of all advocates to do. . . . In the conduct of any case the advocate must have made himself master of all the facts; he must have a thorough understanding of the principles and rules of law which are applicable to the case and the ability to apply them on the instant; he must gauge with accuracy the atmosphere of the court in which he pleads and adapt himself accordingly; he must be able to reason from the facts and the law to achieve the end he desires, and he must above all have mastered the art of expressing himself clearly and persuasively in acceptable English.<sup>4</sup>

I learned my advocacy principally at the Scottish Bar. In my view, the best training for oral advocacy is to appear before a really good, well-controlled court, presided over by judges of high calibre. I was very fortunate in this respect; when I went to the Bar, there was a great deal of rating work available. It was conducted, at first instance, before local committees of laymen and there was an appeal from these local committees to the Lands Valuation Appeal Court. This court consisted of three Judges, two from the Inner House of the Court of Session, which as I shall explain later is the appellate part of that Court, and the third the senior Judge of the Outer House, the first instance section of the Court. All three were Judges of acute mind, rigorous legal intellect, and a courtesy that was most encouraging to those who were prepared and devastating to the unprepared. Because of their intellectual rigor, their judgments were highly consistent and it was, therefore, possible for a young advocate, as I was, to forecast with remarkable precision what the result of any particular appeal would be. This gave one reputation and confidence. I found myself appearing before them a great deal and I believe their testing of my preparation and of the logic of my argument helped me greatly to develop a style, at least for appellate work, which was much better than I could have attained without their help.

But it is also possible to learn about advocacy from the written experience and analysis of others. In order to prepare this lecture I tried to remember how I prepared myself to advocate. I am greatly indebted to two notable practitioners of the art of advocacy: Frederic Wrottesley, latterly a Lord Justice of Appeal, in his book *The Examination of Wit-*

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4. Lord Birkett, Presidential Address to the Holdsworth Club at the University of Birmingham (1956) (source available at *Fordham Law Review*).

nesses in Court,<sup>5</sup> and Munkman, in his book *The Technique of Advocacy*.<sup>6</sup>

It says something about how old I am that I had great difficulty in getting my hands on copies of these books. Both are books to which I referred frequently during my early time at the Bar, and they are still valuable guides to any advocate. Munkman takes a similar line to Birckett. Wrottesley writes from the point of view of a specialist in civil rather than criminal matters during the first quarter of this Century, when most civil trials in England still took place before a jury. Some of his comments may, therefore, with due allowance for passage of time, be particularly relevant to an American audience where the jury still plays such an important part in civil as well as criminal cases. Wrottesley makes his own personal view of the strengths of oral advocacy very plain at an early stage:

No better mode of ascertaining the truth of a past transaction will probably ever be devised by human ingenuity than the present method of *viva voce* examination of witnesses, conducted as it is in open court, in the sight of the public and in the presence of the parties, their counsel, and of the judge and jury, who all have an opportunity of observing the intelligence, demeanor, inclination, bias or prejudice of the witnesses. In this way every man is given a fair and impartial trial, and his rights cannot be abridged, nor can he be deprived of the inestimable blessings of life, liberty, or property, without the concurrence of judge and jury.<sup>7</sup>

Wrottesley then goes on to set out what might be described as a plan of attack for the advocate, which is very similar to the technique propounded by Munkman. Counsel must first take great care in the introduction of his evidence, ensuring that any documentary evidence is proved and that he takes every lawful advantage of his adversary to ensure that documents are disclosed.<sup>8</sup>

Turning to the actual examination of his witnesses the advocate should, in nearly every case, put his most intelligent and honest witness in the box first.<sup>9</sup> This allows him to make as good an impression as possible upon the Court and jury at the earliest possible moment. Furthermore, because that witness is likely to have to undergo the sharpest cross-examination, it is important that he be well able to cope with it. If the first witness is weak, he may do incalculable harm to the advocate's client. Witnesses should then be introduced in a logical and sequential manner, so that evidence on a particular subject is introduced as a whole,

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5. Sir F.J. Wrottesley, *The Examination of Witnesses in Court* (1910) [hereinafter Wrottesley].

6. J.H. Munkman, *The Technique of Advocacy*, (3d ed. 1951) [hereinafter Munkman].

7. Wrottesley, *supra* note 5, at 16.

8. *See id.* at 12-13.

9. *See id.* at 13.

rather than in a fragmented fashion.<sup>10</sup> It is also suggested that a strong witness be retained until the end of the case, once again to increase the impact upon the court and jury. While the theory is sensible, this does assume you have sufficient witnesses to organize them in this way.

Wrottesley states what may be a self-evident truth, certainly for oral advocacy, that “[n]o lawyer can be successful in the highest sense of the term unless he is a master of the difficult art of examining witnesses. It requires a greater combination of qualities than almost any other branch of advocacy, the most important of which are patience, coolness, courage, and tact.”<sup>11</sup> He goes on to say that it is difficult to lay down any rules that would govern this, but that certain precepts can be gained from the writings of others on this subject.<sup>12</sup> Wrottesley gives in full the eleven golden rules set out by the American attorney, David Paul Brown. I think I can do no better than he by quoting those rules in full.

*First.* If your own witnesses are bold, and may injure your cause by pertness or forwardness, observe a ceremony and gravity of manner towards them which may be calculated to repress their assurance.

*Second.* If they are alarmed or diffident and their thoughts are evidently scattered, commence your examination with matters of a familiar character, remotely connected with the subject of their alarm, or the matter in issue, as for instance: “Where do you live?” “Do you know the parties?” “How long have you known them?” and the like. When you have restored them to composure, and the mind has gained its equilibrium, proceed to the most essential features of the cause being careful to be mild and distinct in your approaches, lest you may trouble the fountain again from which you are to drink.

*Third.* If the evidence of your own witnesses be unfavorable to you—which should always be guarded against—exhibit no want of composure: for there are many minds that form opinions of the nature or character of testimony chiefly from the effect which it may appear to produce upon the counsel.

*Fourth.* If you see that the mind of the witness is imbued with prejudices against your client, hope but little from such a quarter—unless there be some facts which are essential to your client’s protection, and which that witness alone can prove; either do not call him, or get rid of him as soon as possible. If the opposite counsel see the bias to which I referred he may employ it to your own ruin. In judicial inquiries, of all possible evils the worst and the hardest to resist is an enemy in the disguise of a friend. You cannot impeach him—you cannot disarm him; you cannot even indirectly assail him; and if you exercise the only privilege that is left to you, and call other witnesses for the purpose of an explanation, you must bear in mind that instead of carrying the war into the enemy’s country, the struggle is between sections of your own forces, and in the very heart, perhaps, of your own camp. Avoid this by all means.

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10. See *id.* at 14.

11. Wrottesley, *supra* note 5, at 35.

12. See *id.*

*Fifth.* Never call a witness whom your adversary will be compelled to call. This will afford you the privilege of cross-examination. Take from your opponent the small privilege it thus gives you, and, in addition thereto, not only render everything unfavorable said by the witness doubly operative against the party calling him, but also deprive that party of the power of counteracting the effect of the testimony.

*Sixth.* Never ask a question without an object—nor without being able to connect that object with the case if objected to as irrelevant.

*Seventh.* Be careful not to put your questions in such form that, if opposed for informality, you cannot sustain it, or at least produce strong reasons in its support. Frequently failures in the discussion of points of evidence enfeeble your strength in the estimation of the jury, and greatly impair your hopes in the final result.

*Eighth.* Never object to a question put by your adversary without being able and disposed to enforce the objection. Nothing is so monstrous as to be constantly making and withdrawing objections; it indicates either a want of correct perception in making them, or a deficiency of reason, or of moral courage in not making them good.

*Ninth.* Speak to your witness clearly and distinctly, as if you were awake, and engage in a matter of interest, and make him, also, speak distinctly and to your question. How can it be supposed that the Court and jury will be inclined to listen, when the only struggle seems to be whether the counsel or the witness shall first go to sleep?

*Tenth.* Modulate your voice as circumstances may direct. "Inspire the fearful and repress the bold."

*Eleventh.* Never begin before you are ready, and always finish when you have done. In other words, do not question for question's sake—but for an answer.<sup>13</sup>

I see no reason to dissent from any of these rules except for the fifth. In my time as an advocate, I have disobeyed that rule, so as to give myself two opportunities to question a witness. The initial examination of an unsuspecting witness can prove an invaluable means of eliciting information the witness may be reluctant to give, leaving the jury to draw its own conclusion.

The sixth rule, "never ask a question without an object," is of absolutely vital importance. This includes care in choosing the right words and the emphasis you give to the words you have chosen, so that the answers you receive do little damage, and as much good, as possible to the case you are presenting. Munkman takes two admirable examples from the Arran murder case where Graham Murray (later Viscount Dunedin) was examining for the prosecution.

The body of a man had been found on a mountainside on the beautiful Island of Arran—I know of no better viewpoint, if I may insert a tourist plug. His companion was charged with murdering him. The defense was suggesting (among other things) that the place was dangerous and death might have been caused by an accidental fall.

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13. *Id.* at 38-39.

Murray: "Was there anything in the character of the ground which would make it *especially* dangerous?"

Witness: "No."<sup>14</sup>

Later in the same case it appeared that the police, for some mysterious reason, had not kept the boots of the dead man, and the defense used this to raise vague suspicions. Graham Murray, examining a police witness, asked him:

Murray: "It *seems* that you afterwards buried a pair of boots that were on the body?"

Witness: "Yes, on the seashore at Corrie."<sup>15</sup>

In each case the introduction of a single word, *especially* and *seems*, has a very important effect. Without *especially*, the answer received would have been completely the opposite. The introduction of the word *seems* in the second example tended to undermine the idea that it was a deliberate action.

Of course, while the skilled advocate is putting all of these principles into practice, his opponent should not be idle. He should pay close attention to the questions put by his opponent and the answers they elicit. He should ensure that each question is properly put, according to the rules of evidence, and also endeavor to see what its bearing is on the case and the unfolding plan of his opponent. He is well advised, as we have seen in the eleven golden rules, against the making of unnecessary interventions and objections during examination in chief. But an objection in the right place can seriously weaken your opponent's case, as Wrottesley says:

If you watch closely the examination of witnesses, in a trial where an experienced advocate is on the one side and an inexperienced one on the other, you will see the practiced man putting question after question and eliciting facts most damaging to the other side which his adversary might have shut out by a prompt objection to them, but which he permits to pass without protest.<sup>16</sup>

Does the technique vary on cross-examination? Sir James Scarlet once said of a Mr. Topping, an eminent leader on his Circuit, that his idea of cross-examination was putting over again every question asked in chief in a very angry tone.<sup>17</sup> That is, perhaps, a fault from which advocates are not entirely free even today. Courts and juries may be apt to give credit to an advocate for delicacy of feeling in cross-examination; a jury is apt to sympathize with a witness who is unjustly attacked and their verdict may unconsciously be influenced by the impression gained.

There are four aims for cross-examination: the first is to obtain some new information which will be helpful to the party cross-examining; the

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14. Munkman, *supra* note 6, at 46.

15. *Id.* at 47.

16. Wrottesley, *supra* note 5, 42.

17. *See id.* at 64.



second is to destroy the material parts of the evidence in chief; the third is to weaken the evidence, where it cannot be destroyed; and the fourth is to undermine the witness or shake his credit by showing that he cannot be trusted to tell the truth or that he is speaking of matters of which he has no real knowledge. Wrottesley further suggests that the advocate has two courses open to him in cross-examining a witness. He may demonstrate his distrust of the witness by his manner, look, or tone of voice; or he may examine him as though he thought him an honest witness.<sup>18</sup> Both courses have their advantages in different circumstances, and whichever is adopted may very well depend upon the circumstances of the case. The witness who is patently not believed by counsel may well lose credit with the judge or jury, while the witness who thinks that he has been believed may well become careless and reveal inconsistencies in his testimony. I always found the most sensible course was not to betray to the witness anything about my own feelings. The experienced cross-examiner should not take the statements of honest witnesses for granted, but should investigate them thoroughly and endeavor to show that they are mistaken as to what they think they heard or saw and seek to show that the witness who is genuinely saying what he believes he saw or heard cannot be relied upon because of the surrounding testimony or the inherent unreasonableness of his story. The simple fact that a witness is honest does not mean that you cannot qualify his evidence.

A young advocate, wishing to learn about cross-examination, can do little better than look at examples such as the cross-examination of Oscar Wilde by Sir Edward Carson. It is so short and yet so effective that it is worth reminding ourselves of it.

Carson had evidence of Wilde's books, some of which might convey immoral implications; personal letters; and actual association with a series of young men for immoral purposes. He set out his facts in that order but by way of an opening gambit confronted Wilde with facts that proved him to be a liar at the very start.<sup>19</sup>

Carson: "You stated that your age was thirty-nine. I think you are over forty. You were born on 16 October 1854?"

Wilde: "I have no wish to pose as being young. I am thirty-nine or forty. You have my certificate and that settles the matter."

Carson: "But being born in 1854 makes you more than forty?"

Wilde: "Ah! very well."<sup>20</sup>

Carson then went on to examine specific passages from several of Wilde's works. Wilde defended himself by stating that none of the passages had a personal relevance.<sup>21</sup> Carson then brought to bear private letters addressed to Lord Alfred Douglas that expressed sentiments of

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18. *See id.* at 71.

19. *See Munkman, supra* note 6, at 71.

20. *Id.* at 71-2.

21. *See id.* at 72.

great affection.<sup>22</sup> Wilde was forced to admit that this represented "a tender expression of my great admiration for Lord Alfred Douglas. It was not, like the other, a prose poem."<sup>23</sup> Having gradually backed Wilde away from his originally detached position, Carson then delivered the final blow questioning Wilde about this relationship with a young man called Walter Grainger:

Carson: "Did you ever kiss him?"

Wilde: "Oh, dear no . . . . He was, unfortunately, extremely ugly."

Carson: "Was that the reason why you did not kiss him?"

Wilde: "Oh, Mr Carson, you are pertinently insolent."

Carson: "Did you say that in support of your statement that you never kissed him?"

Wilde: "No. It is a childish question."

Carson: "Why did you mention his ugliness?"

Wilde: "It is ridiculous to imagine that any such thing could have occurred under any circumstances."

Carson: "Then why did you mention his ugliness, I ask you?"

Wilde: "Perhaps because you insulted me by an insulting question."

Carson: "Was that a reason why you should say the boy was ugly?"<sup>24</sup>

At this point Wilde became inarticulate and unable to answer.<sup>25</sup>

This was a classic example of a confrontational technique of cross-examination destroying both the opposing side's case and the witness's credibility. Nevertheless, an advocate should never become an instrument of vengeance at the hands of his client. An injudicious attack upon a witness may well harm an advocate's case. Understatement is a wise thing. If the advocate allows his professional judgment to be overruled by that of his client then he will lose the power to direct both the cross-examination and the case in the most suitable way.

There is, however, perhaps more difficulty in deciding whether or not the character or past history of a witness should be attacked. Wrottesley strongly advises against this, saying that someone who is trying to live an honest life now should not have their offenses brought back to them,<sup>26</sup> but I am sure that many of you will recall cases where the strongest point of your own argument has been the unreliability of a hostile witness, as demonstrated by his past history.

Slightly different considerations may come into play when cross-examining an expert witness. In the Arran murder case we can find a very good example of a so-called expert witness being readily discredited. Cosimo Latona had stated that he was a "guide" in the Arran mountains and that the place where the body was found was a dangerous one. This

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22. See *id.* at 73.

23. *Id.*

24. *Id.* at 74.

25. See *id.*

26. See Wrottesley, *supra* note 5, at 81-83.

was to support the defense's theory that the dead man might have slipped accidentally. Graham Murray asked the following questions:

Murray: "How long have you been in Arran?"

Latona: "About three years."

Murray: "Are you a fisherman by trade?"

Latona: "Yes, a fisherman in the winter."

Murray: "How many times have you guided people over the hills in Arran?"

Latona: "I did not guide any people until the body of Rose was found."

Murray: "Had you ever been in Glen Sannox at all before Rose's body was found?"

Latona: "No."<sup>27</sup>

Today, such a witness is likely to be more than well-qualified and to be fully in control of the evidence he presents.

The examples I have used so far suggest that advocacy should always be spoken. It would not, however, be correct to assume the answer to my question is clear. It is true that I have spent my career working with two traditions of predominantly oral advocacy: the Scottish tradition as well as the English tradition. Two points are, however, particularly noteworthy. One is that the Scottish tradition of oral advocacy is rather more recent than you might think. The other is that in England and Wales, much greater use has been made of written advocacy in a variety of different courts in recent years.

For part of the nineteenth century, written arguments, known as cases or minutes of debate, were extensively used in the Scottish Courts. For Court of Session actions, prior to 1825, parties supported their cases by extensive written memorials on both fact and law. It was open to parties at anytime in the progress of a case to introduce new issues of fact or law. A description of this practice appears in Lord Cockburn's journal for 26 May 1846 :

No modern can comprehend the lives of the well-employed "writing counsel" of the last generation, when every statement, every argument, every application, every motion was made in writing, and every party was always entitled to give in a written answer; eight out of every twelve hours of the lives of these men were spent over ink-stands. What tons of discussion—especially as no case in those days was ever done. Everything could be stated and re-stated 'til the client was fairly bankrupt or dead. There was always one excellent stock paper on each side, composed or revised by the best hand engaged. It was to this practice of good professional composition that the literature which has ever distinguished the law of Scotland was very much owing. Indeed, it has been thought that our old practice made better lawyers than can ever be made by oral discussion. When well done, writing seems to have the advantage of inducing greater care. Men don't boggle at

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27. Munkman, *supra* note 5, at 107.

speaking nonsense which they would hesitate to put permanently down upon paper. But spoken words are shorter, and the judges cannot escape from hearing them.<sup>28</sup>

You might care to reflect on this quotation in the light of the words I quoted earlier from Francis Bacon.

The Judicature Act of 1825<sup>29</sup> changed the form of pleading, by requiring parties to distinguish statements of fact from pleas in law and to bind the parties to a particular statement of facts. The Act also sought to substitute, so far as possible, oral for written argument. Some written argument was, however, retained. It was possible to prepare "cases in writing" consisting of a copy of the record, and a separate argument in respect of each plea in law. Such "cases" could be required at a number of stages in an action:

- (a) by the Lord Ordinary before deciding a question of relevancy before or after a proof or jury trial,<sup>30</sup>
- (b) by the Lord Ordinary on reporting a case to the Inner House;<sup>31</sup> or
- (c) by the Inner House itself.<sup>32</sup>

The effect of the changes from written to oral pleadings on Outer House and Inner House seems to have differed. Before I proceed to outline this, it might be helpful if I explain a little about the Outer and Inner House. The Court of Session is a Collegiate Court, where cases at first instance are heard by a single judge in the Outer House, so called because of its physical position. An appeal, described as "a reclaiming motion," went to the Inner House, who either "adhered to" or "departed from" the original judgment.

In the Outer House, although it appears that cases<sup>33</sup> were usually ordered in all matters of "intricacy or difficulty," the Lord Ordinary would nonetheless hear a full oral debate in addition. In the Inner House, by contrast, full "hearings in presence"<sup>34</sup> were apparently relatively rare, and discussion was limited to "a few minutes" based on the assumption that the judges had read the written arguments. Indeed, when a Parliamentary Select Committee reported on the Scottish Supreme Courts in 1840, it found that the judges of the Inner House sat in court for only approximately two hours each day, spending the remainder of the time (presumably) reading and writing.

As an alternative to ordering cases, the Inner House apparently, where points of difficulty were raised in argument, would sometimes appoint

28. Lord Cockburn, *Journal* (1874).

29. 6 Geo 4 c. 120 (1825).

30. 6 Geo. 4 c. 1920, ¶ 10 (1825).

31. 6 Geo. 4 c. 120 ¶ 19 (1825).

32. 6 Geo. 4 c. 120 ¶ 21 (1825).

33. See R. Bell, *A Dictionary of the Law of Scotland: Intended for the Use of the Public at Large, as Well as of the Profession* (1838).

34. See *id.*

parties to prepare and lodge "minutes of debate,"<sup>35</sup> containing arguments on the point in dispute.

The use of written debate was not confined to the Court of Session. For a short period in the nineteenth century, when in a Sheriff Court (the lower court in Scotland) proof was concluded, the Sheriff could order minutes of debate or memorials on the proof or on the whole case before giving his decisions. This power, however, was subsequently removed.

During the course of the nineteenth century, various attacks were made on the use of written argument so that it fell largely into desuetude before formal repeal. It does seem very clear that the move from a system based on written pleadings in the eighteenth century to a system based on oral pleadings by the close of the nineteenth century was consciously modelled on procedure in the English courts.

In England and Wales, the most significant moves have been made towards the use of written advocacy in the field of civil appeals. This was largely in response to an ever-increasing workload, with the consequential problem of delay and growing backlogs. The current Master of the Rolls, Lord Donaldson, has since 1982 introduced a number of changes to the handling of appeals. These include the reading of appeal papers by judges in advance of a hearing, the filing of skeleton arguments, and the filing of a chronology of events setting out the basic facts of a case. This enables the advocate in a civil appeal to dispense with a recitation of facts and move straight to the ground of appeal.

The Commercial Court has been able to reduce delays in hearing cases, partly as a result of an additional judge and partly through a new and more flexible approach to listing procedures. In March 1990, the third edition of *The Practice and Procedure of the Commercial Court* was published.<sup>36</sup> The Introduction to the Guide to Commercial Court Practice states: "it is the policy of the Court that in principle the trial or other hearing should take place at the earliest date that the parties can be ready."<sup>37</sup> The essence of this new approach is to ensure that the parties and the court are as fully informed as possible at the summons-for-directions stage about what is involved in a particular case with the aim that no dispute should be delayed in its resolution by reasons over which the court has control. This involves the early exchange of written information and the development of skeleton arguments. The overall result has been a significant reduction in the length of trials so that during the Whitsun and Trinity terms 1990 over fifty percent of cases lasted between one and two days and over eighty-six percent were completed in less than eight days.

In the English courts, both civil and criminal, first instance and appellate, the oral tradition has remained strong. Notwithstanding, much use

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35. *See id.*

36. A. Colman, *The Practice and Procedure of the Commercial Court*, (3rd ed. 1990).

37. *Id.* at 207.

has been made in the English courts of affidavit evidence. The Chancery Division has always used it extensively, and the great reduction in jury trials in recent years has made its use more frequent in the Queen's Bench Division. For example, in judicial review proceedings, the Divisional Court usually relies entirely on the affidavit evidence.

Although the oral tradition is still preferred in England, written advocacy has been more warmly received in recent years. My distinguished predecessor, Lord Hailsham, set in hand a review of civil justice in response to the growing complexity and cost of the civil justice system in England and Wales. Among the recommendations of this review, which I will be introducing to the county courts in July, is the pre-trial exchange of witness statements. The aim is to provide a sound basis for earlier, better informed settlements in appropriate cases, to improve pre-trial preparation and shorten trials by helping to identify issues, and to reduce the need for lengthy oral evidence. This procedure was introduced into some parts of the High Court in 1986 and extended to the remainder in 1988.

I have, so far, looked at those systems of which I have direct personal experience, with the exception of the Scottish system in the early nineteenth century. It is, however, timely to look at the American system and in particular the system of civil appeals. Many aspects of the American system differ from that in England, Wales, and Scotland, despite the English heritage of the American legal system, including, for example, the use of law clerks and central staff attorneys.

As early as the mid-nineteenth century, time limits were imposed on oral argument in the Supreme Court, the first time limit being two-and-one-half hours per side. Since then, a number of steps have been taken to limit further all argument and to shorten the written briefs that are also provided. This has, I believe, led judges to rely primarily on the briefs with oral argument as a supplement. The brief follows a format specified in appellate rules and is limited in length, usually I understand to about fifty pages. It consists of five major sections: a statement of issues, a statement of the case, a statement of facts, argument and conclusion. It is interesting to note that courts have felt it necessary to try and regulate the length of briefs submitted to them. The use of the word *brief* in this context implies a certain conciseness. I have evidence that this is not always the case, from a footnote to a 1980 Wisconsin district court case where the judge said:

[t]he story of the creation of the world is told in the book of Genesis in 400 words; the world's greatest moral code, the Ten Commandments, contains only 279 words; Lincoln's Immortal Gettysburg address is but 266 words in length; the Declaration of Independence required only 1321 words to establish for the world a new concept of freedom. Together the four contain a mere 2266 words. On this routine motion to amend a civil complaint, [Counsel] has filed a brief (not the primary one, just a reply brief) that contains approximately 41596 words spread

over an agonizing 124 pages. In this case, the term reply "brief" is obviously a misnomer. Rather than impressive, the *brief* is oppressive. It points to the need for considering the adoption of a local rule limiting the number of pages Counsel may fill with written argument on pre-trial motions.<sup>38</sup>

I would not like to finish this necessarily brief summary of the use of written advocacy without referring in passing to the one instance I know of in which a written brief in the American style was used in England. This was the case of *Rondel v. Worsley*, in which Professor Michael Zander played a significant part. He acted for Rondel and, as a solicitor with no rights of audience in the higher courts, produced a written brief in the American style. This was reluctantly accepted by the Presiding Judge but not regarded as a precedent for future cases.

Despite what I have said above about the use of written advocacy, oral advocacy remains a strong and essential part of the systems of criminal and civil justice in all the jurisdictions to which I have referred. Clearly this is more so in England, Wales, and Scotland than in the United States, but I do not think anyone would deny the potential significance of oral argument as a supplement to written briefs, as much as of incisive and powerful oral argument on its own. In the English and Scottish courts, both criminal and civil, first instance and appeal, the success or failure of a case depends largely on the strength of the advocacy presented. Indeed, in some continental systems, steps have been taken to reintroduce oral argument, in recognition of its utility in questioning the substance of a case and testing the arguments.

Well, Ladies and Gentlemen, I have set before you a summary of the facts. But is it possible to judge from this which of the two styles of advocacy is best? Best for what and against what criteria can we judge? I suspect a survey here might well come up with at least as many shades of opinion as I came across in my research for this lecture. Clearly, the experiences of our two jurisdictions are different, but there is no clear uniformity of opinion within either. Certainly, pressures of time and resources have made us all consider carefully how we manage the work of our courts, and I see little prospect of such pressure abating.

My own most recent experience as a Judge lies in the House of Lords, the highest Appeal Court in our legal system. Again, there is no clear uniformity of opinion, but a number of my colleagues have come to the conclusion that our appellate oral advocacy, at least, is too lengthy and too diffuse. Some of the fault here may lie with the judges. It is sometimes difficult for a judge to resist the temptation to intervene during the course of the oral argument. There is also a tendency among some counsel to take an insufficiently disciplined approach and to take up a number of points of little apparent relevance to their arguments.

As a result of these concerns we are in the process of consulting those

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38. *Marson v. Jones & Laughlin Steel Corp.*, 87 F.R.D. 151, 152 (E.D. Wis. 1980).

most closely involved on possible changes to procedure. These include replacing the appellant's and respondent's cases with a single Statement of Facts and Issues and setting down the appeal when the Statement is lodged. Perhaps most important, however, is the requirement that within seven days of the setting down of the appeal, each side will notify the Judicial Office of the time, in hours, that counsel consider necessary for each address that it is proposed should be made on behalf of the party. In normal circumstances, counsel will be expected to confine the length of the submissions to the time indicated in the estimates. Hopefully, this will have the desired effect, and my noble colleague Lord Templeman will not have cause to repeat his remarks, which could apply either to oral or written advocacy, in *Banque Keyser Ullman S.A. v. Skandiae (UK) Insurance Co.*<sup>39</sup> in August 1990. He said:

Before parting with this appeal I draw attention again to the length and complexity of the proceedings as they appear from the chronological account given earlier in this speech. As early as 1961 in an appeal which lasted 16 days Donovan L.J. recorded "That the questions in this case, one of fact, and four of the construction of the contract, have been resolved with the aid of only 55 authorities;" *Reardon Smith Line Ltd v. Ministry of Agriculture, Fisheries and Food* [1962] 1 Q.B. 42, 131. In *J H Rayner (Mincing Lane) Ltd v. Department of Trade and Industry* [1989] 3 W.L.R. 969, 986, I complained of an appeal to this House which occupied 26 days and for which copies of 200 authorities were available. I commented that the vast amount of written and oral material tended to obscure three fundamental principles decisive of the International Tin Council litigation. Proceedings in which all or some of the litigants indulge in over-elaboration cause difficulties to judges at all levels in the achievement of a just result. Such proceedings obstruct the hearing of other litigation. A litigant faced with expense and delay on the part of his opponent which threatened to rival the excesses of *Jarndyce v. Jarndyce* must perforce compromise or withdraw with a real grievance. In the present case the burdens placed on Steyn J. and the Court of Appeal were very great. The problems were complex but the resolution of these problems was not assisted by the length of the hearing or the complexity of the oral evidence and oral argument. The costs must be formidable. I have no doubt that every effort was made in the courts below to alleviate the ordeal but the history of these proceedings is disquieting. The present practice is to allow every litigant unlimited time and unlimited scope so that the litigant and his advisers are able to conduct their case in all respects in the way which seems best to them. The results not infrequently are torrents of words, written and oral, which are oppressive and which the judge must examine in an attempt to eliminate everything which is not relevant, helpful and persuasive. The remedy lies in the judge taking time to read in advance pleadings, documents certified by counsel to be necessary, proofs of witnesses certified by counsel to be necessary, and short skeleton arguments of counsel, and for the judge then, after a short discussion

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39. 3 W.L.R. 364 (1990).



in open court, to limit the time and scope of oral evidence and the time and scope of oral argument. The appellate courts should be unwilling to entertain complaints concerning the results of this practice.<sup>40</sup>

As an advocate, I had the personal experience of appearing before a Court that discouraged lengthy oral argument: the European Court of Justice in Luxembourg. I know that the nineteenth John F. Sonnett lecture was given by the President of that Court, Ole Due, and you may therefore already be familiar with its practices and procedures. The usual practice is for the court to invite the advocates appearing before it to indicate the length of time they will require to present their case. On one occasion when I appeared before the court representing Her Majesty's Government, my opponent was asked how long he would take. His reply of one-and-one-half-hours caused the court visible surprise. In the event, and no doubt discouraged by the court's courteous but firm reaction to which I have referred, he easily accomplished his task in twenty minutes. Certainly, I am not aware that the generality of the advocates appearing before that Court find the time limits inadequate, particularly as the time limits are not fixed by any general rule but in an informal discussion before the oral hearing begins. The limits thus agreed upon are for the advocates' speeches and further time is often taken up by the judges' questions.

I do not think, however, that there would be a great deal of enthusiasm among my British colleagues for moving to your system in the appellate courts of restricting oral argument to fifteen to thirty minutes. The restriction can only work if judges devote a considerable amount of time to pre-reading material in advance of hearing a case: oral argument should undertake to emphasize and clarify the written argument appearing in the briefs theretofore filed.

Certainly, this is not universally welcomed in other jurisdictions where it has been introduced. Professor Ian Scott has told me that when he was doing some work for the Family Court of Australia, some of the judges told him that they resented having to pre-read vast amounts of material relating to listed cases when, in the event, the majority of them would settle. They also felt that, because they were dealing with a number of rather similar family disputes, pre-reading increased the danger that they would start to get the issues of one case confused with another.

Such reservations are, I am sure, not confined to the Australians. Indeed, during the preparation of this lecture, my attention was drawn to a book called *Justice on Appeal* by Carrington, Meador, and Rosenberg.<sup>41</sup> In a section on improving the efficiency of the American appellate courts, they regret the restriction of oral argument. I quote:

Oral argument gives important service to the imperative of appellate justice. Specifically, it heightens the judges' sense of personal responsi-

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40. *Id.* at 381.

41. P. Carrington, D. Meador & M. Rosenberg, *Justice on Appeal* (West 1976).

bility. It provides them with an opportunity to test their own thinking in a direct way with counsel available to correct error. Some judges assimilate ideas more readily by oral than by written transmission; and some ideas are more readily transmitted by oral means. Thus, the quality of decisions is likely to be enhanced.<sup>42</sup>

The authors do recognize that listening to oral argument can be time-consuming, but they do not regard such time as wasted. They go on to suggest that parties should perhaps be given the opportunity of waiving the right to oral argument in certain circumstances. This might save genuinely wasted time. Indeed, I think, it is important to recognize that time can be wasted in any form of advocacy. The substance of the case should be the indicator, and arbitrary time limits of any kind may not be wise.

The question I posed to myself at the beginning of this lecture was "The Advocate: Should He Speak or Write?" It will perhaps not surprise you if I say that my conclusion is that I, at least, cannot arrive at a universal answer to this question. I believe that the increase in the workload of all our courts is unlikely to diminish, and that against a background of finite resources, we must continually reexamine the way in which our systems operate with a view to securing greater efficiency and effectiveness, while maintaining or improving the quality of decisionmaking. Indeed, we can learn something from the observation of systems other than our own. I know that the regular Anglo-American exchanges have provided a useful source of ideas for some of the changes we have implemented. This may well accentuate the trend toward wider use of written material in England and Wales, but I am sure that it will not, and should not, lead to the exclusion of oral advocacy. I believe that each has an important role to play in any system. And, certainly for the systems with which I am most familiar, I would not like to see the introduction of fixed time limits for oral advocacy. Any limit should be adjusted to the circumstances of the particular case. Obviously, in a system that at first instance uses the jury trial system of judgment, oral testimony and argument must continue to have a firm place, but even when the first instance trial is before a judge or judges it may be difficult to decide in a conflict of testimony without oral evidence. The exact balance between oral and written advocacy will depend on many factors: the nature of the system, its historical development; its rules; the nature of the proceedings in question; and the training and experience of the advocate himself. On the last matter, if a system has advocates who specialize in appellate work, this may lead to a greater distinction between the methods of presentation at first instance work and on appeal. Although Chief Justice Warren Burger advocated specialization in appellate advocacy to the Royal Commission in England and Wales in the late 1970s, there has been no general distinction between first instance and appellate advocates

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42. *Id.* at 17.

in England and Wales. Remember, variety is the spice of life that gives it all its flavor. While proceedings in our courts are not dull, too-rigid proscription of styles of advocacy might cause them to become so. So, I answer my question by saying the advocate should both speak and write: the extent to which he does either should be determined in the light of the great variety of circumstances that can obtain in litigation, some of which I have mentioned.