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Lost in Translation: Oral Advocacy in a Land Without Binding Precedent

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LOST IN TRANSLATION: ORAL ADVOCACY IN A LAND WITHOUT BINDING PRECEDENT.

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Abstract

Robert Frost first famously penned "Poetry is what gets lost in translation." In the world of advocacy, persuasion is what gets lost in translation. This article examines the distinctions in the common law and civil law methods of legal reasoning. It analyzes why, in form and substance, the traditional common law oral argument methods are neither effective nor persuasive when presented in a civil law jurisdiction. Although the common law and civil law legal traditions share similar social objectives, arguing based on *stare decisis* is incompatible with the Code-based method applied by civil law courts. This article explores how to transfer common law advocacy skills to create an effective civil law oral argument. By making this transition, a common law advocate will be able garner a greater awareness for the civil law system, including an understanding of the rules that govern the court or tribunal that will be hearing the argument, an appreciation for the role of the judge hearing the argument, and an appreciation for the role of scholars in the civil law system. As a result, common law practitioners can hone their ability to effectively craft a persuasive civil law argument.

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LOST IN TRANSLATION: ORAL ADVOCACY IN A LAND WITHOUT BINDING PRECEDENT.

Be clear, so the audience understands what is being said.

Be interesting, so the audience will want to listen to what is being said.

Be persuasive, so the audience will agree with what is being said.[1]

Introduction

Students and practitioners trained in common law systems often present their oral arguments, in form and substance, in an identical fashion in both common law and civil law courts.[2] In part, this is because most law students in common law jurisdictions learn solely common law legal reasoning. From the first day students are expected to brief cases and discuss judicial opinions.[3] Professors direct students to read series of cases to provide them with the data they are to use to deduce the governing legal norms. The focus on cases in a common law jurisdiction is designed to allow the judges in that system to be the primary lawmakers with previously decided cases as their source of law.[4] This "case book" method of teaching has an effect on

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[1] Nicholas M. Cripe, *Fundamentals of Persuasive Oral Argument*, 20 FORUM 342, 357 (1984) (quoting Cicero).

[2] There are at least 37 International Moot Court competitions where students, who study in common law jurisdictions, are judged on their ability to persuasive advocate before a court or arbitral tribunal where precedent has no binding authority. http://www.ilsa.org/listings/intlmoots.php

[3] WILSON HUHN, THE FIVE TYPES OF LEGAL ARGUMENT 41 (2d ed. 2008). Remembering his first day of law school, Judge Posner stated: "[W]e were asked to read for each course not an overview or theoretical treatment of the field but a case — a case, moreover, lying in the middle rather than at the historical or logical beginning of the field." RICHARD A. POSNER, OVERCOMING LAW 90, 173-74 (1995).

[4] James L. Dennis, *Interpretation And Application Of The Civil Code And The Evaluation Of Judicial Precedent*, 54 LA. L. REV. 1, 5 (1993).

how students develop their advocacy skills in law school and how they ultimately argue before appellate bodies as practitioners. The concepts of statutory interpretation and precedent are central to the very meaning and concept of the law in the common law legal system.[5] Conversely, the language of the Code and the writings of scholars comprise the core of the civil law legal system.[6] Although the common-law and civil law legal traditions share similar social objectives, including individualism, liberalism, and personal rights; the common-law theory of precedent, is incompatible in many ways with the legal method used to decide cases in civil law courts.[7] The traditional common law oral advocacy style, then, is

[5] *See infra* Part I and accompanying text (discussing the common law as judge made law and the central role of *stare decisis*). *See also* Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity And The Homogenization Of The European Union*, 7 COLUM. J. EUR. L. 63, 77 (2001).

[6] *See infra* Part II and accompanying text (discussing the central role of the Code and scholarly doctrine in civil law jurisdictions).

[7] *See* William Tetley, *Mixed Jurisdictions: Common Law vs. Civil Law (Codified v. Uncodified)*, 60 La. L. Rev. 677, 701 (2000); *see also supra* note 2. Some of these competitions apply the rules of the International Court of Justice (ICJ). Article 38 states, in pertinent part:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Moreover, Article 59 specifically states, the decision of the Court has no binding force except between the parties and in respect of that particular case.

not suitable for a civil law argument.[8]

This article examines the distinctions in the common-law and civil law methods of legal reasoning. It then addresses why the form and substance of a common law oral argument is neither effective nor persuasive when presented in a civil law jurisdiction. It concludes with some advice on transferring the advocacy skills taught in common law jurisdictions to be effective in crafting a sound oral argument in civil law jurisdictions. Part I of this article discusses the origins of common law and the central role of the doctrine of stare decisis.[9] Part II discusses the origins of civil law and the central role of the Code.[10] Part III discussed the four part structure of a traditional oral argument focusing on the differing style and substance that comprise the civil law and common law body of the argument.[11] Part IV concludes the article with advice on transforming the basic components of the body of a common law oral argument to be effective in a civil law jurisdiction.[12]

I. Common Law Origins

[8] *See id.* at 14.

[9] *See infra* Part I (discussing the common law as judge made law and the central role of binding precedent).

[10] *See infra* Part II (discussing the central role of the Code and scholarly doctrine in civil law jurisdictions).

[11] *See infra* Part III (discussing the traditional structure of an appellate or argument and the difference in structure between a common law and civil law argument with particular focus on the body of the argument).

[12] *See infra* Part IV (discussing how to transfer common law advocacy skills to create an effective civil law oral argument).

The common law legal tradition evolved in England beginning in the Eleventh century and traveled through conquests and colonization to forty-nine of the United States,[13] Australia, Canada and many countries in Africa and Asia.[14] In its most basic form the common law is a body of law comprised of precedent.[15] "Precedent" as used in this article means a prior

[13] For purposes of this article, I will be referring to the United States common law system.

[14] *See* Edward L. Glaeser & Andrei Shleifer, Legal Origins, 117 Q. J. ECON. 1193 (Nov. 2002); *see also* Tetley, *supra* note 7 at 684 (stating most countries which first received the law as colonies of the British Empire, in most cases have preserved it as independent states); ELLEN S. PODGOR & JOHN F. COOPER, OVERVIEW OF U.S. LAW 3 (2009). The common law is a body of court decisions that has developed over centuries and spans many traditional legal topics. PODGOR & COOPER, *supra at* 3, 7.

> In time, rules created case-by-case by the king's counselors, and then by a new set of officials, the judges, replaced the jumble of local rules and courts. The result was England's common law." Rather than appeal to large bodies of codified rules, the fundamental preference apparent in the common law was "to apply royal decrees and the decisions of their predecessors, adapting these to novel cases through reasoning by analogy rather than by applying abstract rules."

Robert Christensen, *Getting To Peace By Reconciling Notions Of Justice: The Importance Of Considering Discrepancies Between Civil And Common Legal Systems In The Formation Of The International Criminal Court*, 6 UCLA J. INT'L L. & FOREIGN AFF. 391, 399-400 (2001) (quoting *Democrat? Freedom? Justice? Law? What's all this?*, THE ECONOMIST, Dec. 31, 1999, at 29).

[15] EVA A. HANKS ET AL., ELEMENTS OF LAW 164 (2nd ed. 2008). The common law is that law that is expressed in judicial opinions. It is the law that has accumulated over centuries in hundreds of thousands of cases decided by the courts. HUHN, *supra* note 3 at 18.

> The common law is a law defined in terms of past judicial decisions. The resulting methodology is such that the common law perpetually is in flux, always in a process of further becoming, developing, and transforming, as it cloaks itself with the habits of past decisions, tailored to the lines of the pending situation. The common law evolves with the ongoing derivation of legal standards from prior judicial

decision, or a consistent group of decisions which represent a model to be followed by subsequent decisions.[16] More precisely, "precedent" refers to the binding decisions of higher courts of the same jurisdiction.[17]

In the United States, a hierarchical relationship exists among the courts.[18] This structure--along with other features[19]--created the basis for precedent and its binding value.[20] A common-law court is formally bound by prior reported rulings on specific disputes, decided by the United States

> decisions, but it is defined by continuous motion. This means that the common law is that which cannot be crystallized, frozen or ever entirely captured. It is fluid, with a suppleness that resides in its inseparability from each discrete, concrete set of facts, the facts of the lived experiences which formed the basis of the litigation that led to the prior relevant court adjudications.

Curran, *supra* note 5 at 75.

[16] Francesco G. Mazzotta, *Precedents In Italian Law*, 9 MSU-DCL J. INT'L L. 121, 122 (2000). Precedents are prior decisions that function as models for later decisions. ." D. Neil MacCormick & Robert S. Summer, *Introduction*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 1 (D. Neil MacCormick & Robert S. Summers eds., 1997). The doctrine of common-law precedent has been aptly described as "a process . . . in which a proposition descriptive of the first case is made into a rule of law and then applied to a . . . similar situation." EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (1951).

[17] LEVI, *supra* note 16 at 1. Stare decisis plays a significant role in the orderly administration of justice by assuring consistent, predictable, and balanced application of legal principles. Once a court of last resort has established a precedent--after full deliberation upon the issue by the court--the precedent will not be treated lightly or ignored, in the absence of flagrant error or mistake. Selected Risks Ins. Co. v. Dean, 233 Va. 260, 265 (1987).

[18] Mazzotta, *supra* note 16 at 131.

[19] *See infra* notes 31 through 37 discussing the role of statutory interpretation and role of judges in the common law.

[20] Michele Taruffo & Massimo La Torre, *Precedent in Italy*, *in* INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 131 (D. Neil MacCormick & Robert S. Summers eds., 1997). Common law legal systems such as the majority of the United States give great weight to prior judicial pronouncements on the meaning of the law which are often binding on other courts addressing a similar issue within the same state or jurisdiction. HUHN, *supra* note 3 at 41.

Supreme Court or higher courts within the state or federal jurisdiction.[21]

As the common law system grew and evolved it needed legitimacy, predictability, and consistency in its decision making.[22] From this need arose the cornerstone of the common law legal systems: the doctrine of "stare decisis et quieta non movere"--that is "to stand by things decided and not disturb settled law."[23] Stare decisis--as it is more commonly known--

[21] *See* HANKS ET AL, *supra* note 14 at 164; TETLEY, *supra* note 7 at 684. The common law is that law that is expressed in judicial opinions. It is the law that has accumulated over centuries in hundreds of thousands of cases decided by the courts. HUHN, *supra* note 3 at 18.

[22] PODGOR & COOPER, *supra* note 14 at 8. The interest in stability is not the only interest stare decisis serves in common law cases.

> There are other concerns relating to the manner in which appellate judges decide cases. For example, "respect for precedent encourages the Court to be fair by reminding the Justices to treat like cases alike." Moreover, "respect for precedent helps promote public confidence in the law." If an appellate court does not respect its own precedent, then the public, the bench, and the bar are less likely to have confidence in the decisions that are made. Furthermore, employing the doctrine of stare decisis assures the public that an appellate court's judgments are not arbitrary and that the court is controlled by precedent that is binding without regard to the personal views of its members.

Newman v. Erie Ins. Exchange, 256 Va. 501, 507 S.E.2d 348 (1998) (Compton, J. dissenting)

[23] BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 827 (2d ed. 1995). As the Supreme Court has stated, "[l]iberty finds no refuge in a jurisprudence of doubt." Planned Parenthood v. Casey, 505 U.S. 833, 844 (1992). The doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of the law. *Id.*

> Established precedents ought not to vary with every change in the appellate court's personnel. Frequent overruling of an appellate court's decisions tends to bring adjudications of the tribunal "into the same class as a restricted railroad ticket, good for this day and train only." Responsible decision-making leaves no room for "jurisprudence of doubt."

commands judges to apply the law as it has been set out in a prior case when a higher, or sometimes equal, court made the prior decision.[24] Stare decisis requires that the new case be the same or substantially the same as the precedent.[25]A decision has a stare decisis effect with regard to a later case only if the question on which the decision in both cases rests is the same, or substantially the same.[26] To determine whether the legal questions are the same or substantially so, the court must consider the prior decision in the context of the facts and issues in existence at the time the decision was rendered.[27] Generally, where the facts between the case to be decided and that to be applied as stare decisis are essentially different, the doctrine will not apply.[28] A court may only avoid perceived unfavorable precedent by distinguishing either the material facts or the underlying rationale.[29] At

Newman v. Erie Ins. Exchange, 256 Va. 501, 510 (1998) (Compton, J. dissenting) (internal citations omitted)

[24] Dennis, *supra* note 4 at 4-5. Stare decisis encourages courts to follow their own prior decisions, and it requires lower courts to follow decisions of higher courts in the same jurisdiction. HUHN, *supra* note 3 at 42. Courts have recognized reasons for following precedent, including: a necessity "to preserve the certainty, stability and symmetry of our jurisprudence," and to satisfy "social congruence, systemic consistency, and doctrinal stability." Mazzotta, *supra* note 16 at 122 (internal citations omitted); *see also* 20 AM. JUR. 2D Courts § 147 (1999).

[25] Mazzotta, *supra* note 16 at 125.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] However, there is also authority for the view that in the consideration of precedents, courts do not look so much for identity of facts as for statements of applicable principles, and that conclusion of the court may be supported by earlier cases, although the fact situations may not be the same. *See* Mazzotta, *supra* note 16 at 126 (citing 20 AM. JUR.

times, these distinctions lead to further development of the original rule through creation of new rules.[30]

Present day common law systems rely on stare decisis to maintain consistency when judges are filling in gaps in the law.[31] Ambiguity in one court's decision, as to case law or statutory interpretation, may be cleared up when that same court, or another court within that jurisdiction decides another case on different facts while addressing similar issues.[32] The common law allows a court to exercise a great deal of flexibility when deciding which earlier cases are sufficiently similar to be given precedential value and formulating rules based on the facts of the case before it.[33] As a result, the examination--and interpretation--of cases and legal text by courts is of critical importance in common law systems, because it is the judges' role to make laws.[34]

In recognition of this judicial function, to many the common law means

2D Courts § 155 (1999)).

[30] TARUFFO & LA TORRE, *supra* note 20 at 139.

[31] *See* Catherine Valcke, *Quebec Civil Law and Canadian Federalism*, 21 YALE J. INT'L L. 67, 78, 82, 83-85 & n.106 (1996).

[32] Charles R. Calleros, *Introducing Civil Law Students to Common Law Legal Method Through Contract Law*, 60 J. LEGAL STUD. 641, 646 (2011).

[33] *See* Dennis, *supra* note 4 at 4; *see also* Mazzotta, *supra* note 16 at 123 ("In those rare instances when a court can find no applicable precedent, it usually declares the case to be one of first impression").

[34] *See* HUHN, *supra* note 3 at 19; *see also* Valcke, *supra* note 31 at 85 & n.106. Judges consider not only the facts as the parties before them have recited but also how prior courts have interpreted similar texts and resolved similar disputes. Implicit in the doctrine of stare decisis was the need for a judge who could understand prior court decisions and discern how to apply those decisions to the facts of the dispute before him. PODGOR & COOPER, *supra* note 14 at 8.

the law created and molded by judges with legislation serving a supplementary function.[35] In common law jurisdictions, the names of judges such as Marshall, Holmes, Brandeis, and Cardozo, are household words and cultural heroes.[36] The common law has grown and developed in the hands of judges, who reason closely from case to case and, thereby, build a body of law binding subsequent judges.[37]

Even though statutes and regulations increasingly shape the United States legal landscape, court decisions still play a significant role in traditional common law areas, such as torts and property, in understanding how statutes should be understood and applied.[38] As has often been repeated, "[s]tatutes in derogation of the common law are strictly construed."[39] That is to say, where some statutory provisions appear to be in

[35] *See* JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 34 (2d ed. 1985); *see also* PODGOR & COOPER, *supra* note 14 at 4. In the common law legal scholars texts are persuasive to the court but lack the compelling force of doctrine as seen in the civil law – they are primarily used as research and reference tools.

[36] *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 35 at 34. In part this is based on the judges' backgrounds; they attend law school, enjoy a successful career in private practice or government, and then are elected or appointed to their judicial positions.

[37] *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 35 at 34. Although the influence of law professors and legal scholarship may be growing in the US, judges still exercise the most important influence in shaping the growth and development of the American legal system. The common law remains a law of judges. *Id*. at 57.

[38] PODGOR & COOPER, *supra* note 14 at 23. *See also* MERRYMAN & PÉREZ-PERDOMO, *supra* note 35 at 26. In formal terms, the relative authority of statutes, regulations, and judicial decisions might run in roughly that order, but in practice such formulations tend to lose their neatness and their importance.

[39] Brown v. Barry, 3 U.S. 365 (1797). *See* United States v. Texas, 507 U.S. 529, 534 (1993).

conflict with a deeply rooted rule of the common law, the tendency will be to interpret the provision in such a way as to evade the conflict.[40] When a court interprets or applies a statute to a dispute, the court's decision becomes part of the body of law on the topic the statute addresses.[41] Therefore in order to understand what the statute means a lawyer must read the precedent that has interpreted and applied that statutory provision.[42]

II. Civil Law Origins

Civil law is a legal tradition originating in Roman law, as codified in the Corpus Juris Civilis of Justinian, and subsequently developing on continental Europe.[43] In the nineteenth century, the principal states of

[40] *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 35 at 33, 34. Those in the common law are accustomed to judicial review of administrative action, and in the US the power of judges to hold legislation invalid if unconstitutional is accepted without serious question. Judges exercise very broad interpretive powers, even where the applicable statute or administrative action is found to be legally valid.

[41] *See* PODGOR & COOPER, *supra* note 14 at 21-22.

[42] *See id*. at 22.

[43] *See* TETLEY, *supra* note 6 AT 683; *see also* MERRYMAN & PÉREZ-PERDOMO, *supra* note 35 at 7. On publication of the *Corpus Juris Civilis*, the Roman emperor Justinian forbade any further reference to the works of these scholars, as well as the preparation of any commentaries on the compilation – he sought to abolish all prior law except that included in the *Corpus Juris Civilis*. Justinian believed that what was in his compilation would be adequate for the solution of legal problems without the aid of further interpretation or commentaries by legal scholars. *See* TETLEY, *supra* note 7 at 687. Continental Europe adopted civil law from its roots in ancient Rome, and then further retained it by codification. Napoleon imposed this codification for the most part through his battlefield conquests; later on, the civil law was more fully adopted through the examples and great influence of the French Civil Code of 1804. Black's Law Dictionary defines "civil law" as "[o]ne of the two prominent legal systems in the Western world, originally administered in the Roman Empire." BRYAN A. GARNER, BLACK'S LAW DICTIONARY, 280 (9th ed. 2009).

Western Europe adopted civil codes.[44] Today, it is the dominant legal tradition in the greater part of Western Europe, Central and South America, Asia and Africa, and even a few parts of what is generally considered the common law world (Louisiana, Quebec, and Puerto Rico).[45]

Generally, the exclusive sources of law in civil law jurisdictions are written constitutions, codes, specific statutes or decrees, and international treaties. [46] Civil law is highly systematized and structured.[47] It relies on declarations of broad, general principles and often ignores details.[48] There are five basic codes typically found in a civil law jurisdiction: the civil code, the commercial code, the code of civil procedure, the penal code, and the code of criminal procedure.[49] Civil law codes, as they have evolved

[44] *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 35 at 10. The French Code Napoleon of 1804 is the archetype for these codes. The subject matter of each civil code was almost identical to the subject matter of the first three books of the Institutes of Justinian and the Roman civil law component of the *jus commune* of medieval Europe.

> Although the rules in force have changed since 533, the first three books of the Institutes of Justinian (Of persons, Of Things, Of Obligations) and the major nineteenth-century civil codes all deal with substantially the same sets of problems and relationships, and the substantive areas they cover is what a civil lawyer calls "civil law."

See id. at 6.

[45] *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 35 at 2-3.

[46] *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 35 at 24; *see also* PODGOR & COOPER, *supra* note 14 at 4. In civil law-based systems, all jurisdictions have a Code, a systematic and comprehensive statement of the whole field of law that is typically drafted in a single event with addition enacted as needed.

[47] Tetley, *supra* note 7 at 683.

[48] *Id.*

[49] *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 35 at 14.

from the *Corpus Juris Civilis*, provide the core of the law.[50] General principles are systematically and exhaustively exposed in the codes while particular statutes complete them.[51] But civil law statutes do not provide specific definitions; instead, they state principles in broad, general phrases.[52] Code principles are not explained precisely. Rather, they are stated concisely so that they may be exhaustive.[53]

This structure is in part the result of a desire for a legal system that was simple, nontechnical, and straightforward–one in which the professionalism and the tendency towards technicality and complication commonly blamed on lawyers would/could be avoided.[54] One way to accomplish this was by stating the law clearly and in a straightforward fashion so ordinary citizens could read it and understand their rights and obligations without having to consult lawyers or go to court.[55]

A civil law judge applies the law; he does not create it.[56] In part this is due to the function of a civil law judge as a civil servant.[57] A judicial career is but one of several possibilities open to law school graduates.[58] A prior

[50] Tetley, *supra* note 7 at 703.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 35 at 29.
[55] *Id.*
[56] Tarufo & La Torre, *supra* note 20 at 136.
[57] *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 35 at 35.
[58] *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 35 at 35 Rise in the judiciary is at a

career in the public or private sector is unnecessary, a law student may become a judge immediately following graduation.[59] The great names in civil law are not those of judges but those of legislators and scholars.[60] The scholar is the real protagonist of the civil law tradition.[61] Legal scholars are the creative force behind the law, by publishing commentaries on the status of the law and how it should be interpreted and applied.[62] Although scholarly texts are not a primary source of law, they are doctrinally definitive and indispensible to the systematic and comprehensive understanding of the code.[63] The doctrine guides both judges and legislators toward consistency.[64]

Scholars mold the civil law tradition by using the formal sources of the law to create a model of the legal system.[65] This model is taught to law students and published in books and articles.[66] Legislators and judges

rate dependent on some combination of demonstrated ability and seniority, lateral entry in the judiciary is rare.

[59] *Id.*

[60] *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 35 at 36. Legislative positivism, the dogma of the separation of powers, the ideology of codification, the attitude toward interpretation of statutes, the peculiar emphasis on certainty, the denial of inherent equitable power in the judge, and the rejection of the doctrine of stare decisis – all these tend to diminish the judge and to glorify the legislator. *Id.* at 56.

[61] The civil law is the law of professors. *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 35 at 56.

[62] PODGOR & COOPER, *supra* note 14 at 6.

[63] *See* F.H. Lawson, A Common Lawyer Looks at the Civil Law 69 (1955). "Civil law is inconceivable without the jurist." *Id.*

[64] PODGOR & COOPER, *supra* note 14 at 6.

[65] *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 35 at 60.

[66] *See id.* at 60.

accept their ideas of what law is, and, when legislators and judges make or apply the law, they use concepts scholars have developed.[67] As a result, although legal scholarship may not be a formal source of law, the doctrine it established carries immense authority.[68]

The role of judges, as operators of the legal system, is to apply the applicable Code provisions to the case before them.[69] This application requires an adherence to existing Code principles, legal science and scholarly developed doctrine, but far less emphasis, than the common law, is placed on discretion and interpretation.[70] Although this may tend to suggest that Civil Codes are intended to be complete, Article 4 of the Louisiana Civil Code [71] and the legislative history of the French Civil Code demonstrate the opposite. These Codes were never intended to be a gapless system of legal rules, to comprise such a system in latent form, or to be treated as such a system for purposes of applying the law.[72]

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[67] *See id.*

[68] *See id.*

[69] *See* PODGOR & COOPER, *supra* note 14 at 4.

[70] *See* PODGOR & COOPER, *supra* note 9 at 4; *see also* MERRYMAN & PÉREZ-PERDOMO, *supra* note 30 at 36 The function of a civil law judge, when presented in all but the most extraordinary of cases with fact situations to which a ready legislative response will be found, is to merely find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union.

[71] LA. CIV. CODE ANN. art. 4 (2010). Article 4 states that, in the absence of legislation or custom, courts should do the following: "[w]hen no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages." *Id.*

[72] *See* Dennis, *supra* note 4 at 7-8. The Louisiana Civil Code respectively defines the

As such, a civil law judge may sometimes find himself in a position where he is required to resort to a rulemaking method in order to perform his duty to decide the case.[73] For example, a judge may be required to formulate concepts in cases where the Code refers the judge to use his judgment.[74] This may be done by express delegation (judicial discretion) or by using indeterminate words that demand appraisal of values, such as "fault," "good faith," "public order," or "public policy."[75] Alternatively, a similar appraisal of interests by the judge will be required in cases where a "gap" in the Code exists because statutory concepts or rules are contradictory or entirely lacking.[76] In these cases the judge, rarely, if ever,

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sources of law as legislation and custom. Legislation is a solemn expression of legislative will. Custom results from practice repeated for a long time and generally accepted as having acquired the force of law, which may not abrogate legislation.

> The commissioners who drafted the Louisiana Civil Code in 1825 realized that they could not foresee every possible situation that might arise and could not make appropriate provision to meet these contingencies. In their preliminary report to the Legislature they suggested that in such cases the court would decide "according to the dictates of natural equity, in the manner that 'amicable compounders' are now authorized to decide, but that such decisions shall have no force as precedents until sanctioned by the legislative will."

Mary Garvey Algero, *The Sources Of Law And The Value Of Precedent: A Comparative And Empirical Study Of A Civil Law State In A Common Law Nation*, 65 LA. L. REV. 775, 778 n.7 (2005) (citing John H. Tucker, Jr., *The Code and The Common Law in Louisiana*, 29 TUL. L. REV. 739, 758-59 (1955)).

[73] *See* Dennis, *supra* note 4 at 12.

[74] *Id.*

[75] *Id.*

[76] *See id. But see* Valcke, *supra* note 31 at 83-85 & n.106 (stating gap-filling not necessary in a civil law system in which the source of law is a code that is "gapless" and judges' primary duty is to apply that law logically, rather than try to create consistency of

relies *exclusively* on his own independent evaluation.[77] Rather, he will render the decision he would propose if he were a legislator by using his assessment of social, economic, and moral factors and following the guiding ideas or values pervading the Code and the legal system as a whole.[78] By doing so, he relies, at least in part, on the principles or values within the code or the legal system when he formulates a rule or concept.[79] A civil judge, then, "creates" law only to the extent that the judge makes concrete what was a general and abstract rule in the code.[80] The judge's decision, however, does not become a source of law, nor do other judges

interpretation).

[77] *See* Dennis, *supra* note 4 at 12-13.

[78] *See id*.; *see also* Tetley, *supra* note 7 at 705 (stating the first step in interpreting an ambiguous law is to discover the intention of the legislator by examining the legislation as a whole, as well as the provisions more immediately. Hiram E. Chodosh et al., *Egyptian Civil Justice Process Modernization: A Functional And Systemic Approach*, 17 Mich. J. Int'l L. 865, n.89 (1996) (discussing distinctions between modern French civil law and U.S. common law systems). Modern "civil law" systems generally acknowledge the existence of gaps in legislative enactments. Such gaps must be filled by judicially created analogies to other rules or by interpretations of broad equitable principles, themselves contained in civil codes surrounding the obscure text.

[79] *See* Dennis, *supra* note 4 at 13; *see also* MERRYMAN & PÉREZ-PERDOMO, *supra* note 35 at 44. Provisions of the Italian Civil Code of 1942 dealing with the interpretation of statutes state that:

> In interpreting the statute, no other meaning can be attributed to it than that made clear by the actual significance of the words according to the connections between them, and by the intention of the legislature. If a controversy cannot be decided by a precise provision, consideration is given to provisions that regulate similar cases or analogous matters; if the case still remains in doubt, it is decided according to general principles of the legal order of the State.

MERRYMAN & PÉREZ-PERDOMO, *supra* note 35 at 44.

[80] Taruffo & La Torre, *supra* note 20 at 136.

have to follow that decision.[81]

In a civil law system, judicial decisions are not a source of law.[82] It would violate the convention against judicial lawmaking if decisions of courts were binding on subsequent courts.[83] The orthodox view, consequently is that no court is bound by the decision of any other court.[84] In theory, even if the highest court has already spoken on a question and indicated a clear view of its proper resolution, the lowest court in the jurisdiction can decide differently.[85] This power held by the lower court demonstrates there is no concept similar to binding precedent or stare decisis in civil law.[86]

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[81] *Id.*

[82] MERRYMAN & PÉREZ-PERDOMO, *supra* note 35 at 46. *See* HUHN, *supra* note 4 at 42. Judicial decisions are not meant to be a primary source of law, but intended to be merely advisory opinions about the meaning of a law.

[83] *Id.*

[84] *Id.*

[85] *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 35 at 47.

[86] *See* Valcke, *supra* note 31 at 83-85 & n.106; *see also* Mazzotta, *supra* note 16 at 128 (discussing the broad meaning of precedent in the Italian legal system). Beyond some superficial similarities, what is usually understood a precedent in Italy is completely different from what is usually understood as precedent in the U.S. *Id.*

> The Italian Constitution along with the other Articles of the Code clearly states that a precedent binds only the parties involved in the dispute and, also, the rule adopted by the court does not bind other courts since that rule is not law under the meaning given by Article 101 of the Italian Constitution. Thus, it is possible to talk about precedents in Italy only to the extent that it is clearly stated that a binding precedent does not exist.

Taruffo & La Torre, *supra* note 20 at 135. "There is no formal bindingness of previous judicial decisions in France. One might even argue that there is an opposite rule: that it is forbidden to follow a precedent only because it is a precedent." Michel Troper &

Prior decisions, however, are not without any respect in the civil law system; the decisions may have persuasive value to later courts. The doctrine of *jurisprudence constant* refers to a series of decisions forming a constant stream of uniform and homogenous rulings that have the same reasoning, the doctrine affords the cases considerable persuasive authority and justifies, without requiring, the court in abstaining from new inquiry because of its faith in the prior decisions.[87] Civil law courts justify the persuasive use of earlier cases because the long and continuous use and influence of cases indicates the current decision is in harmony with the code. Further, deviation from a series of cases as opposed to a single case would impair the values protected by those earlier cases.[88] This repetition of a particular interpretation of a code article, however, does not create or

Christophe Grzegorczyk, *Precedent in France*, *in* INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 115 (D. Neil MacCormick & Robert S. Summers eds., 1997); *see also id*. at 111-12 (quoting F. ZENATI, LA JURISPRUDENCE 102 (1991)) ("'[T]he very idea that a judge could search for the base of his decision in a prior judgment is literally unthinkable in a legal system based on statutory Law"'). In Spain, a fundamental principle of law is that "'the judge is bound by (statutory) law and not by 'precedent.'" Alfonso Ruiz Miguel & Francisco J. Laporta, *Precedent in Spain*, *in* INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 259, 269 (D. Neil MacCormick & Robert S. Summers eds., 1997). This statement is based in large part on the fact that jurisprudence, or precedent, is not listed in the *Codigo Civil* (the Civil Code of Spain) as one of the sources of law, which are legislation, custom, and general principles of law. Algero, *supra* note 72 at n.66.

[87] *See* Dennis, *supra* note 4 at 15-16 (citing FRANCOIS GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF § 220 n.606 (Louisiana State Law Institute trans., 2d ed. 1954). *See* Algero, *supra* note 72 at 787-88. Although many civil law jurisdictions have recognized some form of the doctrine of jurisprudence *constante*, the prevalence and availability of reported decisions and the hierarchical nature of modern court systems has led to the recognition that even a single decision by a highly ranked court may carry great weight or even serve as a *de facto* binding authority.

[88] *See* Dennis, *supra* note 4 at 16.

change the law or lessen the burden on judges to apply the code.[89] It merely reinforces the rationale of the earlier decisions.[90]

III. Advocacy

Advocacy is the process of trying to convince your audience through the technique of persuasion.[91] Oral advocacy is an interactive effort that requires a well-organized presentation of an advocate's case as well as spontaneous responses to the judge's questions.[92] Oral argument presents a valuable opportunity to convince the courts of the merits of your case and to dispel any doubts a judge may have after reading the briefs.[93]

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[89] *See e.g.* Robert Alexy and Ralf Dreier, *Precedent in the Federal Republic of Germany*, *in* INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 26 (D. Neil MacCormick and Robert S. Summers, eds. 1997) (stating that he precedent set by the German Federal Constitutional Court is strictly binding for all constitutional organs of the Federation and the German states, as well as all courts and authorities, however, all other forms of precedent are not formally binding); Aulis Aarnio, *Precedent in Finland*, *in* INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 86 (D. Neil MacCormick and Robert S. Summers, eds. 1997) (In practice, published Supreme Court decisions are *not* formally binding but have persuasive force and are considered an *authoritative reason* which should be taken into account in all subsequent decisions)

[90] *See* Valcke, *supra* note 31 at 83-85 & n.106. The civil law system of France does not expressly recognize precedent, or the doctrine of stare decisis as binding on the courts; however, in practice, Court of Cassation decisions are reported and widely considered by lower courts, forming a body of doctrine, "la jurisprudence," which has a significant influence over judicial interpretations of law. Chodosh et al., *supra* note 78 at n.89.

[91] *See* Honorable Jacques L. Wiener, Jr., *Ruminations from the Bench: Brief Writing and Oral Argument in the Fifth Circuit*, 70 TUL. L. REV. 187 (1995); *see also* HUHN, *supra* note 3 at 85 (**"**What lawyers sell is the art of advocacy, and their stock in trade consists of legal arguments").

[92] BOARD OF STUDENT ADVISERS, HARVARD LAW SCHOOL, INTRODUCTION TO ADVOCACY 69 (7th Ed. 2002) (hereinafter: INTRODUCTION TO ADVOCACY).

[93] *See* INTRODUCTION TO ADVOCACY, *supra* note 92 at 69. The oral argument should be a conversation with that judges in which the advocate discusses his views on how the case should be resolved and address any doubts the judges have regarding the law and

In both common law and civil law jurisdictions, advocates should have a mantra that reduces their case to the bare essence.[94] That is, the advocate should have a central theme that she will approach from different angles: facts, law, intent, and policy.[95] This theme should then flow through the oral argument, the traditional structure of which is generally divided into four component parts: (1) Opening Statement; (2) Road Map; (3) Body of the Argument; and (4) Conclusion. For both common law and civil law advocates parts one, two, and four are similar in form and substance.

In the opening statement the advocate should cordially greet the judges, and introduce him or herself as counsel as well as co-counsel where appropriate.[96] Next, the advocate should briefly set forth the procedural posture of the case. This is followed by what the advocate is asking the court to do; affirm, reverse, remand.[97] At the conclusion of the introduction,

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facts. *Id.* at 73.

[94] David C. FREDERICK, SUPREME COURT AND APPELLATE ADVOCACY 247 (2d ed. 2003).

[95] *See* INTRODUCTION TO ADVOCACY, *supra* note 92 at 71; *see also* Mary Massaron Ross, *A Practitioner's Guide to Effective Oral Advocacy Before the Michigan Supreme Court*, 87-FEB MICH. B.J. 36, 38 (2008) (discussing the need for "overarching theme or theory that crystallizes the advocate's position"); Timothy A. Baughman, *Effective Appellate Oral Advocacy: "Beauty is Truth, Truth Beauty,"* 77 MICH. B.J. 38 (1998) (stating the best way to engage the judges with your argument is to develop a *theme* for the argument).

[96] Depending on the court or tribunal that the advocate is appearing before the appropriate form by which to refer to the judges may vary. For example, an advocate may properly address a United States state or federal judge as "Your Honor." Whereas, before the International Court of Justice an advocate should properly address the judge as "Your Excellency."

[97] *See* Allan van Gestel, *Oral Advocacy at the Motion Stage: Some Thoughts from the*

an advocate should ask if the court would like a brief statement of the facts.[98]

After the opening statement, an advocate will present her road map to the court. Here, the advocate should give the court a concise outline or road map of the issues she will argue to support her position. The road map lets the judges know the order in which the advocate has organized the issues.[99] Rather than merely reciting the issues, the advocate should state the points of her road map in an affirmative and persuasive manner. An advocate is always well-advised to present her strongest points first in the argument. This will not only attract the court's attention, but also ensure that these points are not omitted if time runs out.

During the argument, the advocate should anticipate questions,[100] and

Audience, 47-JUN BOS. B.J. 8, 9 (2003) (stating advocate should begin by telling the court what you are seeking); Frederick Bernays Wiener, *Oral Advocacy*, 62 HARV. L. REV. 56, 63 (1948) (addressing the need for an effective opening to an oral argument).

[98] An advocate should only ask the court if it would like to hear the facts, if it permitted by the court or competition rules.

[99] A well-organized road map will allow an advocate to get back on track with her argument when a judge's questions may have thrown her off course.

[100] Advocates should not proceed under the mistaken impression that an oral argument is an uninterrupted speech. It is not a monologue where the advocate recites her brief. Rather it is a conversation between the judge and advocate, where the advocate persuasively educates the judge on the case before him. James D. Dimitri, *Stepping Up to the Podium With Confidence: A Primer For Law Students On Preparing An Appellate Oral Argument*, 38 STETSON L. REV. 75, 79 (Fall 2008). *See* Ross, *supra* note 95 at 38 (noting advocates should expect the following question types: the parties involved, including business and background concerns; the opinion under review; the view of different courts to address the same issue; the scope of the rule being advocated; the impact of a particular conclusion on the disposition on the case; precedent and distinctions in the case law; statutory text and legislative history; public policy underlying the rule); *see also* Honorable

should directly respond to the questions asked. Where appropriate the advocate should begin with a yes or no answer and then follow with the reasoning for that answer.[101] The answer should be framed to address the judge's concerns. Evasive answers may provoke the judge to repeat the questions and/or badger the advocate.[102]

Where rebuttal is appropriate, an advocate should not reserve more than two or three minutes for rebuttal, perhaps even less for sur-rebuttal.[103] Rebuttal is not the time to raise points that the advocate neglected to make in her main argument. Rather, the advocate should use rebuttal time to make two or three concise points in response to the most injurious points of the opponent's argument.

Finally, the conclusion should briefly summarize the important points of the advocate's argument in light of the theme she set forth at the beginning of the argument. If the allotted time expires before the advocate has finished her argument, she should ask the court to grant her time to conclude. Where appropriate, the advocate should ask the court if it has any further questions before thanking the judges and sitting down.

Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567 (1999) (discussing how an advocate should handle questions).

[101] *See* Baughman, *supra* note 95 at 39 (stating the heart of effective oral advocacy is persuasively answering the judge's questions).

[102] "Don't give evasive answers to tough questions. A frank answer is best even if it hurts." Wiener, *supra* note 91 at 204.

[103] *See* Dimitri, *supra* note 100 at 101-102.

A. Oral Advocacy in Common Law Jurisdiction – The Body of the Argument

In the common law the dominant style of reasoning is inductive: courts interpret and synthesize earlier court decisions to create general legal principles and then apply those principles to the facts of the case before them.[104] They do the same when applying statutes.[105] Accordingly, the common law advocate must focus on fact patterns.[106] In the body of her argument she must analyze cases presenting similar but not identical facts.[107] She must, from those cases, extract the specific rules, and then through deduction, determine the often narrow scope of each rule, and sometimes proposes new rules to cover facts that have not yet presented themselves.[108]

The body of the argument must be organized with appropriate attention to the facts and the law. An advocate who fails to integrate the factual and

[104] PODGOR & COOPER, *supra* note 14 at 5.

[105] *Id*.

[106] *See* Stephen A. Higginson, *Constitutional Advocacy Explains Constitutional Outcomes*, 60 FLA. L. REV. 857, 869 (2008) (discussing the importance of an advocate in mastering the facts of her case).

[107] *See* Tetley, *supra* note 7 at 701; *see also* PODGOR & COOPER, *supra* note 14 at 21-22. The common law advocate should prepare for her oral argument by reviewing the applicable provision of the statute, if any. If there is a statutory provision that governs the issues the advocate must then determine how courts have previously interpreted and applied that provision. When an appellate court interprets and applies a statute to a dispute, that court's decision becomes part of the body of law on the topic the statue addresses. Therefore in order to understand what the statute means an advocate must be fully versed in the appellate cases that have interpreted or applied that statutory provision.

[108] *Id*.

legal elements of her arguments risks an adverse decision, because the court was not able to understand the advocate's position.[109] Common law advocates fashion the body of the argument from a close study of prior cases.[110] The advocate should make a connection between the two as much as possible.[111] It is usually enough for an advocate referencing a particular case to make a general statement of what the case holds and why the court should apply its reasoning to the present case, or in the alternative decline to do so. In some instances, however, controlling cases and those particularly on point should be driven home by showing how close their facts are to those of the case presently before the court.[112]

As discussed above, precedent is prior decisions functioning as a model for later decisions.[113] It plays a central role in the body of the common-law

[109] "What judges want to know is why this case, or line of cases, should apply to these facts rather than the other line on which the opponent relies with equal certitude, if not certainty. Too often the 'why' is left out….[T]he discussion of the underlying principles as related to the present application counts heavily to swing the scales." W. Rutledge, *The Appellate Brief*, 28 A.B.A.J. 251, 253 (1942).

[110] *See* Curran, *supra* note 5 at 76; *see also* Higginson, *supra* note 106 at 871-72 (discussing the need for an advocate to understand precedent).

[111] "The pre-eminent appellate advocate make a distillation of the facts to show why the case fits neatly between two opposed precedents, and why this particular case should follow one rather than the other." HONORABLE WILLIAM O. DOUGLAS, THE COURT YEARS 180 (1980)

[112] ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES 421 (2d ed. 1989).

[113] "Applying lessons of the past to solve problems of the present and future is a basic part of human practical reason." D. Neil MacCormick & Robert S. Summer, *Introduction*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 1 (D. Neil MacCormick & Robert S. Summers eds., 1997).

appellate argument.[114] Generally, judges do not feel free to impose their own views of policy and morality.[115] Instead, they endeavor to fit a case into the body of precedent by taking into account the rationale behind the rules.[116] This process involves at least three separate, but closely related, steps in judicial reasoning: (1) recognition of a similarity between cases; (2) interpretation of a rule fashioned from the material facts of the first case; and (3) application of the rule to the second case.[117] Often a court will be required to determine which of two competing precedential lines will govern the case before it. In these circumstances, the precedent, itself, does not tell the court which line should be followed.[118] The advocate's argument must persuade the court to select one line over the other.[119]

[114] *See* FREDERICK, *supra* note 94 at 103; *see also* Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 J. APP. PRAC. & PROCESS 7, 21 (1999) (arguing that the advocate's position when facing a divided court should be to argue for a narrow, fact-based ruling that will not force judges to reopen old precedent).

[115] STERN, *supra* note 112 at 421.

[116] *Id*.

[117] *See* Levi, *supra* note 16 at 1; PODGOR & COOPER, *supra* note 14 at 27-8. "Reasoning" refers to the decision-making process in which the court engaged to reach its decision, such as the court's analysis or an explanation of how the court arrived at its result. In common-law courts, judges engage in inductive reasoning by analyzing and deriving legal principles from a collection of legal authorities. The judges then synthesize the authorities to generate a legal rule that the court then applies to the facts of the case before it. Analogical reasoning expressly connects current decision to precedent, thereby invoking the doctrine of stare decisis. Analysis first compares or contrasts the facts of the previously decided case with the facts of the present case; if the facts of the previous decision and the current case are similar the court reaches the same result. If the facts of the precedent decision and present case are different the court reaches a different result from that of the precedent case.

[118] STERN, *supra* note 112 at 420.

[119] *Id*. Along with the freedom and adventure of crafting innovative new legal arguments derived from prior court decisions, common-law advocates may hope not just to

An appeal to precedent is a form of argument--and a form of justification--that is often as persuasive as it is pervasive.[120] The rational of the argument is that like cases must be treated alike if a legal system is to be even minimally fair. That is, when a case is like another in all relevant respects but it happens to arise at a later moment in time, the latter must be decided in the same way as the earlier case.[121] An argument using precedent is essentially reasoning by analogy.[122] A naked argument from precedent thus urges that the court give weight to a particular prior result regardless of whether that court believes it to be correct or believes it valuable in any way to rely on that prior result.[123] While a court may decide to overrule its precedent, it will generally only do so for good reasons that outweigh the policies of certainty, predictability, and fairness underlying stare decisis.[124]

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win their case, but also to forge new legal standards by persuading the judge to adopt their arguments, however novel. The advocate more ingenious at seeing how prior case law can be analogized and distinguished according to the needs of the client's case may make law by presenting the more persuasive of the two conflicting interpretations of precedent that the adversaries argue to the court.

[120] HANKS ET AL, *supra* note 15 at 165.

[121] *Id.* at 194.

[122] HUHN, *supra* note 3 at 42. "Applying lessons of the past to solve problems of the present and future is a basic part of human practical reason." D. Neil MacCormick & Robert S. Summer, *Introduction*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 1 (D. Neil MacCormick & Robert S. Summers eds., 1997).

[123] *See* HANKS ET AL, *supra* note 15 at 165.

[124] *See* Calleros, *supra* note 32 at 645. "Stare decisis bends where there has been a significant change in circumstances since the adoption of the legal rule, or where there has been an error in legal analysis." State v. J.P., 907 S.O.2d 1101, 1109 (Fla. 2004) (internal citations omitted); *see also* Algero, *supra* note 72 at 786. Courts in common law jurisdictions typically venture from strict adherence to precedent when the precedent appears to be outdated, when "the existing rule has produced undesirable results," or when

When arguing from precedent, success as an advocate will depend on persuading the court of the accuracy of the analogies the advocate suggests between her client's situation and that of the precedent she cites. Inversely, an advocate, must persuade the judge that her client's situation is different from situations that arose in the precedent she hope to distinguish.[125] The advocate must also persuade the judge that the advocate's interpretation of existing case law accurately reflects prevailing contemporaneous legal standards, and that the accumulated body of relevant precedent compels the court to rule in favor of the advocate's client.[126] The core of an advocate's argument must not be merely drawing the court's attention to favorable precedent. It is equally important to demonstrate why unfavorable precedent is not relevant.[127] Thus, common law advocates engage in complex factual triages, distinguishing as factually different and distant those cases whose outcomes would militate against their client's interests

"the prior decision was based on what is now recognized as poor reasoning." Mazzotta, *supra* note 16 at 127 (citing 20 AM. JUR. 2D COURTS § 150 (1999)). Common grounds for deviation from a precedent include, error in the precedent, unreasonableness of the principle of law established by the precedent, likelihood that adherence to precedent would cause greater harm to the community than could possibly result from disregarding stare decisis in a particular case, and inconsistency between the precedent and a constitutional pro-vision. However, even if the earlier precedent was wrongfully decided, the court will not overrule the precedent where any adverse or harmful effects have been limited or where it has remained standing for significant period and many have relied on it, such as in the case of a rule of property.

[125] *See* Curran, *supra* note 5 at 76.

[126] *Id*. at 76-77

[127] *Id*. at 77.

and, conversely, presenting as analogous the facts of cases whose outcomes militate in favor of their clients.[128]

1. Common Law Advocacy in Practice

A case argued before the Massachusetts Supreme Judicial Court addressing the question as to whether a medical malpractice lawsuit was timely filed, demonstrates the heavy reliance on precedent in the substance and form of the body of the argument in a common law jurisdiction.[129] The advocate appearing before the Court began by arguing to the court that it should follow a plain language interpretation of the governing statutory provisions pertaining to the failure to disclose a medical condition. In framing the statutory interpretation the advocate sought the court to accept, how past cases had independently interpreted the fraud and failure to disclose statutory provision which governed the issues now pending before this court. The advocate continually referred to precedent to shape his interpretation of the governing statute and to persuade the court to follow a similar interpretation.[130] As this was the first case where the Massachusetts Supreme Judicial Court had been asked to construe the relationship between

[128] *Id*.

[129] Oral Argument, Joslyn v. Chang 445 Mass. 344, 837 N.E.2d 1107 (SJC-09539), *available at* http://www.suffolk.edu/sjc/archive/2005/SJC_09539.html.

[130] *See infra* Part (B)(1) discussing a similar argument made by a civil lawyer made in a civil law jurisdiction.

two governing statutes, the advocate urged the court to look to how other states had interpreted similar statutory provision through a review of case law.[131]

B. Oral Advocacy in Civil Law Jurisdiction – The Body of the Argument

An advocate cannot structure the body of her argument before a civil judge as she would before a common law judge because the common law theory of precedent is incompatible in many ways with the legal method of deciding a case within the context of the Civil Code.[132] In the civil law the dominant style of reasoning is deductive: courts apply general legal principals to specific situations by reasoning with guidance from scholars.[133] As a result, he civil law advocate must build the body of her argument around legal principles tracing their history, identify their function, determining their domain of application, and explaining their

[131] The advocate primarily relied upon the Nebraska and Kansas Supreme Courts, each of which had adopted a holding with matching reasoning as the petitioner urged. While these ruling from other states are not binding on the Massachusetts Supreme Judicial Court, where this was a case of first impression and binding precedent is lacking, an advocate may fashion here argument using persuasive authority from other states to persuade this Court that it should adopt a similar rule.

[132] *See supra* Part II and accompanying text (discussing the lack of binding precedent and the central role of the Code and scholarly doctrine in civil law jurisdictions).

[133] PODGOR & COOPER, *supra* note 14 at 5. When courts apply statutes in civil law countries, the court typically utilizes deductive reasoning. *Id*. at 27. This method has the court begin with the general proposition about the law and then move to more specific propositions. *Id*. Analysis flows from an explanation of the general legal principles to more specific legal principles, and application of the legal principles to the case facts to support the conclusion. *Id*.

effects in terms of rights and obligations.[134]

Although at common law the rational for deciding a case may be determined solely from a previous case, this is contrary to the mandate of civil law jurisdictions.[135] This is particularly true when the Civil Code contains a concept of law precisely covering the advocate's case and accommodating a conflict identical to that before the court.[136] Similarly, the common law court's ability to create a rule exclusively from the facts of an earlier case is antithetical to civil law methodology.[137] Civil law requires the judge to search for legal concepts in the Civil Code delineating a pattern of

[134] *See* Calleros, *supra* note 32 at 650. Civil lawyers are apt to think of a code as providing an answer to any dispute regarding civil obligations, even if such application requires extrapolation from companion provisions or enduring underlying principles. *Id. See also* Tetley, *supra* note 7 at 702.

[135] *See* Dennis, *supra* note 4 at 14.

[136] *Id. See generally* Daigle v. Clemco Inds., 613 So.2d 619 (La. 1993). In Daigle v. Clemco Inds., the Louisiana Supreme Court was called upon to decide whether the wife and children of a terminally ill worker could validly compromise, before his death, their own potential wrongful death claims against the tortfeasors who allegedly exposed him to dangerous industrial abrasives. In ruling that family members could validly compromise such claims the Louisiana Supreme Court relied on the fact that there existed no express constitutional or legislative prohibition against the settlement of a potential wrongful death claim after injury has occurred but before the tort victim's death. The court reasoned that applicable sections of the Civil Code provided, as a general rule, that future things may be the object of a contract. Despite the fact that in a previously decided case, a court of appeals had set aside a similar compromise by reasoning that such a compromise is analogous to the sale of a living person's succession or a contract having a succession as its object which is prohibited by a specific Article of the civil code. The Daigle court ruled that the previous court of appeal decision was "not a persuasive example of the interpretation and application of the Code that should be followed in the present case." Rather it found that this type of claim was subsumed under the general Code rules allowing persons freedom to make future things the object of their contracts and to compromise any difference they may have in the present or in the future.

[137] *See* Dennis, *supra* note 4 at 14-15. *See* Tetley, *supra* note 7 at 702 -03. Civil law decisions first identify the legal principles that might be relevant, then verify if the facts support their application.

competing interests closely resembling the interests pressing for recognition in the instant case.[138] Where an advocate, arguing in a civil law jurisdiction, argues in the form of an appeal to precedent, she is asking the civil law judge to do the exact opposite of what he is bound to do – adhere as closely as possible to the code.[139] In those instances where there is no legal precept in the Code upon which the judge may fashion a rule to apply to the advocate's case, the advocate should still refrain from using an appeal to precedent.[140] Doing so would essentially be requesting the creation of amorphous case law, a concept which is inconsistent with the guiding values of the Civil Code and, therefore, incompatible with the civil law.[141]

1. Civil Law Advocacy in Practice

A case argued before the Louisiana Supreme Court addressing the question as to whether notice of the lapse to the medical board was required, demonstrates the diminished role precedent plays in the substance and form of the body of the argument in a civil law jurisdiction.[142] The advocate appearing before the Louisiana Supreme Court argued that the specific terms of the statute relating to whether notice of the lapse to the

[138] *Id.* at 15.
[139] *Id.*
[140] *Id.*; *See supra* Part II.
[141] *See* Dennis, *supra* note 4 at 15.
[142] Oral Argument, Thibodaux v. Donnell, 994 So.2d 612 (2008-C-2436), *available at* http://www.archive.org/details/LouisianaSupremeCourtThibodeauxV.Donnell.

medical board was required, was governed exclusively by the statutory language. He argued that the statute's plain language clearly stated the tolling period for the one-year deadline, and that the two relevant statutes must be read together to create a proper application. At no point in his argument did the civil law advocate attempt to rely on prior cases apply the same statutory provision.[143] Rather, he noted that while cases pointed in the right direction, they were merely suggestive of the proper interpretation and not determinative. Throughout the body of his argument he repeatedly focused his position of the conclusion that a common-sense application of the statutory language supported his argument. In accordance with civil law principles the advocated argued that the court should look only to the statutory language for determining the proper application to the case pending before it.

IV. Transferring Common Law Advocacy Skills to Create an Effective Civil Law Argument

The goal of an advocate is to convince the court that her client should prevail.[144] To achieve this goal, the advocate must understand and

[143] See supra Part (A)(1) discussing a similar argument made by a common law lawyer made in a common law jurisdiction.

[144] Dimitri, *supra* note 100 at 78, citing Alfonos M. Saldana, *Beyond the Appellate*

appreciate the main goals of oral argument–persuasion and education.[145] Transferring common law advocacy skills to create an effective civil law argument requires, (1) an understanding of the purpose of the oral argument, as well as the governing rules of the court or tribunal hearing the argument; (2) an appreciation for the role of the judge hearing the argument; (3) a broader grasp of what the common law considers secondary authority; and (4) an awareness of the applicability of non-binding precedent.

An advocate must familiarize herself with the governing rules of the court or tribunal before which she is appearing in order to achieve the main objectives of oral argument.[146] The advocate must clarify the issues the parties have submitted and persuasively frame those issues so that a judge is convinced to rule in her favor. A common-law court is formally bound by prior reported rulings on specific disputes, decided by the Supreme Court or higher courts within the state or federal jurisdiction.[147] In contrast, a civil law court is not similarly bound.[148] The doctrine of stare decisis does not apply in the civil law system and, therefore, does not bind lower courts to

Brief: A Guide to Preparing and Delivering the Oral Argument, 69 FLA. B.J. 28 (May 1995).

[145] *Id.*

[146] *See generally supra* notes 7, 71 & 72 (discussing examples in the ICJ Article and the Louisiana Code).

[147] *See supra* Parts I & II and accompanying text (discussing the central role of binding precedent in a common law jurisdiction and lack thereof in a civil law jurisdiction).

[148] *Id.*

follow decisions of higher courts in the same jurisdiction. Accordingly, a civil law advocate should not fashion her argument as an appeal to precedent.[149]

An advocate appearing before a court or tribunal in a civil law jurisdiction needs to shift her focus to make the applicable code and treaty provisions central to the body of her argument. While the advocate is not wholly precluded from making reference to the decisions of other courts she must understand that the court is not bound by the prior ruling.[150] The body of her argument cannot solely rely upon and make reference to earlier decision. Rather, her argument must also find support in scholarly doctrines and notions of customary international law, consisting "of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way."[151] Similarly, an advocate must not solely rely on precedent when answering a question posed by the court. A judge may ask why the court should take particular action. An advocate

[149] *See supra* Part III and accompanying text (discussing differing structure of the body of an oral argument as between common law and civil law jurisdictions).

[150] *See supra* Part II and note 87. The doctrine of *jurisprudence constant* refers to a series of decisions forming a constant stream of uniform and homogenous rulings that have the same reasoning, the doctrine affords the cases considerable persuasive authority and justifies, without requiring, the court in abstaining from new inquiry because of its faith in the prior decisions. Civil law courts justify the persuasive use of earlier cases because the long and continuous use and influence of cases indicates the current decision is in harmony with the code. Further, deviation from a series of cases as opposed to a single case would impair the values protected by those earlier cases.

[151] S. Rosenne, *Practice and Methods of International Law*, p. 55 (New York: Oceana, 1984).

who responds by relying entirely on the fact that a prior court has taken similar action under similar circumstances provides an unsatisfactory answer because the prior case in not binding on the present court. Instead, the advocate should respond to the question in a way that allows the court to adhere to existing jurisprudence, legal science, and scholarly developed doctrine and in so doing apply the relevant Code provisions to the case before it.

A civil law advocate should not be as concerned with the impact of the court's decision on future cases. In a civil law system, judicial decisions are not a source of law.[152] Arguments that focus on the positive or detrimental effect the decision will have on future cases are not as persuasive in a jurisdiction without binding precedent.[153] Common law advocates may rely on the fact that ambiguity in one court's decision, as to case law or statutory interpretation, may be cleared up when that same court, or another court within that jurisdiction decides another case on different facts addressing similar issues.[154] In part, this is because the examination--and interpretation--of cases and legal text by courts is of critical importance in

[152] *See supra* note 82.

[153] Dimitri, *supra* note 100 at 81(discussing potential questions in a common law court addressing the future impact of the court's decision on the case before it).

[154] *See supra* note 32.

common law systems where it is the judges' role to make laws.[155]

A legal system grounded in judge made law has an impact on the way the advocate structures her argument. Accordingly, a common law advocate must fashion the body of the argument from a close study of prior cases.[156] Conversely, a civil law judge applies the law; he does not create it.[157] A civil law judge applies general legal principals to specific situations by reasoning with guidance from scholars.[158] An advocate appearing before a civil law judge must present an argument that requires the application of the law, as contrasted from an argument that requires interpretation or creation of new law. As a result, the civil law advocate must build the body of her argument around legal principles tracing their history, identify their function, determining their domain of application, and explaining their effects in terms of rights and obligations.[159]

An advocate, appearing before a civil law court, must appreciate the role scholarship, what at common law is considered a secondary source, will play in her argument. At common law, secondary sources such as legal

[155] *See supra* note 34.
[156] *See supra* note 110 & 121. When arguing in the form of an appeal to precedent, success of the advocate will depend on persuading the court of the accuracy of the analogies the advocate suggests between her client's situation and that of the precedent she cites.
[157] *See supra* note 56.
[158] *See supra* note 133.
[159] *See supra* note 134.

encyclopedias, treatises, legal periodicals, and law reviews are not binding on courts.[160] Law students are taught that these resources are a starting point for research in an unfamiliar area.[161] Cited with less frequency than primary authority, the use of secondary sources is generally limited to providing background, explanation, and grounding in the law.[162] Secondary sources are not an important source of authoritative statements about the law.[163]

In the civil law, legal scholars are the creative force behind the law. Although scholarly texts are not a primary source of law, they are doctrinally definitive and indispensable to the systematic and comprehensive understanding of the code.[164] As such, because scholars' commentaries are fundamental as to the status of the law and how it should be interpreted and applied, an advocate must, in structuring her argument,

[160]http://www.libraries.psu.edu/content/dam/psul/up/socialsciences/documents/secondarysources.pdf

[161] *See* Peggy Roebuck Jarrett, Mary Whisner, "HERE THERE BE DRAGONS": HOW TO DO RESEARCH IN AN AREA YOU KNOW NOTHING ABOUT; Perspectives: Teaching Legal Research & Writing, Winter, 1998. *See also* Nancy P. Johnson, *Best Practices: What First-Year Law Students Should Learn in a Legal Research Class*, 28 LEGAL REFERENCE SERVICES Q. 77, 93 (2009) ("For students to relate to legal research, they must know how and when to use the materials").

[162] MORRIS L. COHEN & KENT C. OLSON, LEGAL RESEARCH IN A NUTSHELL 32 (10th ed. 2010) (discussing first steps and emphasizing that it is often wise to begin with a secondary source). See also Richard Buckingham, THINKING LIKE A LIBRARIAN: TIPS FOR BETTER LEGAL RESEARCH; 12 T.M. Cooley J. Prac. & Clinical L. 1, 6 (2009)(identifying secondary sources as aiding the researcher in understanding the issue being researched by providing analysis and explanation).

[163] Liana Fiol-Matta CIVIL LAW AND COMMON LAW IN THE LEGAL METHOD OF PUERTO RICO: ANOMALIES AND CONTRADICTIONS IN LEGAL DISCOURSE 24 Cap. U. L. Rev. 153, 191 (1995).

[164] *See supra* note 64.

use these scholarly doctrines, not merely as research tools, but as sources which provide support for her argument. In similar fashion to a common law advocate's use of primary authority, a civil law advocate should weave doctrine into her argument to persuade the court that a proper application of the governing Code section mandates a ruling in her favor.

Conclusion

Cicero's advice, although centuries old, still rings true today. An advocate must be clear so that the court understands her argument. An advocate must be interesting so that the court pays attention to her argument. And, an advocate must be persuasive so that the court rules in favor of her argument. In order to properly achieve this trifecta, the advocate must first fully comprehend the legal system that governs the court or tribunal to which she is presenting her argument.

An advocate, trained in a common law jurisdiction, cannot present her argument in form and substance, in an identical fashion in both common law and civil law courts. Although the common law and civil law legal traditions share similar social objectives, the common law corner stone of stare decisis and theory of precedent, are incompatible with the Code based method applied by civil law courts. Accordingly, an advocate cannot structure the body of her argument as an appeal to precedent. Rather, she

must begin with a strong understanding of the substance and structure that comprise a common law argument and then transfer those skills to create a persuasive civil law argument. By garnering a greater awareness for the civil law system, including an understanding of the rules that govern the court or tribunal that will be hearing the argument, an appreciation for the role of the judge hearing the argument, and an appreciation for the role of scholars in the civil law system, an advocate will be able to effectively craft a persuasive civil law argument.