UNREAL ESTATE
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EXCLUSIVE
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THE BOND MEN
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THE GLOBE AND

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* and why you shouldn't be (page 29)

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Leading Litigation Lawyers

Special Edition

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"Mr. Finlay, with his usual consummate skill..." (Ontario Court of Appeal). Mr. Finlay is a senior trial and appellate counsel who practises commercial litigation. He is an elected fellow of the American College of Trial Lawyers.

Finally, at the appellate level, he says, judges meet in advance of the hearing to discuss the written submissions and to get a preliminary view of where they are and the questions they'd like to ask in oral arguments. "I've seen cases where the panel has come in pretty convinced based strictly on the written submissions that have been made. I can't emphasize enough how key written advocacy is."

> "Written advocacy is extremely important today."

Written advocacy didn't always play as important a role in Canada as it does today. Written briefing is not traditional in the British legal system — although it is the gold standard in the United States, where courts receive extensive briefing from all sides before any actual hearings, and the time allowed for oral arguments is often strictly limited.

Canada has been shifting in that direction, and time limits for oral arguments are now the norm at the appellate level as well as for some types of hearings at the lower level. "Written advocacy is extremely important today, whereas 20 years ago it was almost a formality," says Wendy Matheson, a civil litigator at Torys LLP. "It has advantages over oral advocacy. The judge or judges read it before the court hearing begins and it remains with them afterward. It's a roadmap showing how and why your client should win. It can, and often does, do a great deal of the work persuading the court to your point of view."

Like MacDonald, Matheson says it's especially important when a case is before either a court of appeal or the Supreme Court of Canada. "The judges come to court very well-prepared, having analyzed the case already, and they're going to have preliminary views on things," she says. "So the time you have with the court is spent answering their questions. It's not like in the old days when you would expect the court to come with a blank slate and be informed by counsel who tells them what the case is about. It just doesn't work that way anymore.

"And those preliminary views are formed entirely by the written material. So if you don't take advantage of that opportunity to put your best foot forward in your written materials, you may simply not have the chance to make up for it in oral arguments. That's the reality.

"At a minimum, it's a missed opportunity. And the real downside risk is you will fail because you never properly articulated what you felt was your best argument. The opportunity may never come around again."

Sandra Rubin is a Toronto-based writer and strategic consultant.

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