Thoughts on Presenting an Effective Oral Argument

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First, in order to present an effective oral argument, the advocate would do well to ignore all guidance in the abstract and focus instead on the particulars of the case at hand. How a particular case can be effectively argued depends more on the case itself than on any generally applicable set of rules or guidelines. If an adverse decision in your case would truly lead to catastrophic consequences, by all means begin your oral presentation by highlighting those. If you believe the result you seek is compelled by a recent Supreme Court decision, ignore all advice about how to structure the perfect argument; begin and end with that controlling decision. How to play your hand depends largely on the cards you are dealt.

Be particularly skeptical of advice on how to argue an appeal from appellate judges. The great Supreme Court lawyer John W. Davis, in his classic piece on appellate advocacy, asserted that "a discourse on the argument of an appeal would come with superior force from a judge who is in his judicial person the target and the trier of the argument,"[1] but Davis' comment must be qualified in an important respect: most judges give good advice on how to win a winning case. They all say to focus on the language of the statute in a statutory interpretation case, to discuss the facts fairly and objectively, to describe the holdings of any controlling cases. Good advice if the statutory language is helpful, the facts support your position, and the precedent leans your way; perhaps not so good advice if the opposite is true. Judges have no interest in the court reaching a "wrong" result, but fifty percent of clients *do*.

The substance of what you argue on appeal, then, will be dictated by the strengths and weaknesses of your case. General rules are of no help there. What follows are procedural suggestions, approaches to handling oral argument that may be helpful no matter how easy, or how desperate, your case on the merits.

The central reality that informs these suggestions is that crowded dockets have severely limited the time available for oral argument. Daniel Webster could argue for days before the Supreme Court; today's advocates have 30 minutes. And that half-hour seems luxurious when compared to the allotments in the federal courts of appeals, where 15-20 minutes is typical and a mere 10 minutes per side is not uncommon.

These limits have affected the way judges approach oral argument, and that in turn affects how lawyers should prepare for it. Judges know that they can no longer expect to learn what a case is about at the argument, even if (as Justice Frankfurter, for one, thought) that was a desirable way of proceeding. There simply is not enough time. As a result, most judges are better prepared for argument than their predecessors, which may account for the prevalence of "hot" benches these days — panels of active, probing questioners. The following suggestions are intended to help advocates with a short amount of argument time, much of it filled with aggressive questions from the bench.

1. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 895 (1940).

PREPARATION

Although some very good appellate advocates do not do moot courts, rehearsing can be an invaluable part of preparation. Schedule at least three separate moot court sessions, ideally about a week apart, with the last one four days to one week before the actual argument. In this arrangement each session serves a different purpose. The first serves as a sounding board for what may be markedly different approaches, which helps to give a sharper focus to the bulk of the preparation. It is not so important at this stage to have all the answers to the judges' questions as it is to learn what the difficult questions are, so that you can keep them in mind as you shape your argument.

By the second moot court session, you should have a general approach in mind and some facility in handling the questions, though there is still time for radical surgery if the session suggests that your approach is not calculated to win the hearts and minds of the judges. The third session, just a few days before the actual argument, should be a dress rehearsal, designed to instill confidence in your mastery of the material and to fine-tune responses to anticipated lines of questioning.

You should select as your judges both lawyers who have worked on the case and some who have only read the briefs; experts in the area as well as non-experts. Barrett Prettyman suggests first going through a planned argument uninterrupted, with the judges commenting on both the substance and style of that presentation, and then beginning again with active questioning, continuing in role until the advocate, judges, or questions are exhausted, saving time for evaluation and suggestions at the end. This allows the judges to hear what you would like to say and evaluate that, before you are derailed by questions. It also tends to generate more focused questions.

How to prepare what you plan to say is beyond the scope of this article. Given the prevalence of "hot" benches and abbreviated argument times, however, your preparation should place a premium on making points concisely: you should have at your fingertips 30-second answers to the most likely questions. You may have the opportunity to say more, but far more likely you will be interrupted by another question within 30 seconds of answering its predecessor. You will probably never have the chance to deliver an eloquent four-part, five-minute answer to a question, so do not prepare one. Doing so would not only be a waste of time, but trying to deliver such an answer may prevent you from getting out the meat of your reply, which is all the questioner is interested in in any event. Such extended discussion is for the written brief, not the oral argument.

The same concern needs to be kept in mind in deciding what points to attempt to make apart from responding to questions. Oral argument may be the most exciting and visible part of the appellate process, and judges — who ought to know — are always expounding on how important it is,[2] but no doubt the written brief typically plays a greater role in shaping the decision.

Do not make the mistake of viewing the argument as simply an oral version of your written brief. This is more than just the prohibition against reading your argument — everyone knows not to do that, and if you do not know, the rules of most courts tell you in no uncertain terms.[3] The point is instead that some arguments are more suited to oral presentation than others, and that factor needs to be taken into account in figuring out what you intend to say. Your brief may lead with a rather intricate roadmap through various regulatory provisions, and give second place to an analysis of the purposes of the regulatory program, while the oral argument may lead with the latter point — not because it is stronger than the first, but because it can be more effectively presented orally, while an oral presentation of the first might engender only confusion. The brief and oral argument should work together and complement each other; they do not stand alone.

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2. *See, e.g.*, Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35 (1986); Bright, *The Ten Commandments of Oral Argument*, 67 A.B.A. J. 1136 (1981).

3. *See, e.g.*, S. Ct. Rule 28.1; Fed. R. App. P. 34(c); D.C. Cir. Rule 34(a) ("This court will not entertain any oral argument that is read from a prepared text.").

Supreme Court Clerk William K. Suter, in his very helpful "Guide for Counsel in Cases to be Argued before the Supreme Court of the United States," puts it this way:

> Remember that briefs are different from oral argument. A complex issue might take up a large portion of your brief, but there might be no need to argue that issue. Merits briefs should contain a logical review of all issues in the case. Oral arguments are not designed to summarize briefs, but present the opportunity to stress the main issues of the case that might persuade the Court in your favor.

CASING THE JOINT

The heading of this section comes from Judge Aldisert,[4] and it is difficult to overemphasize the importance of his advice. Unless you are intimately familiar with the court before which you are to argue, always — if possible — arrive in town a day early and observe a session of the court. If nothing else, this will help ensure that you end up where you are supposed to be on argument day. I failed to heed this advice recently when I was arguing a case in state court. I secured detailed instructions the day before from my client on how to find the courthouse, situated out in the country: "take route so-and-so, turn left onto route so-and-so, and turn right when you see the courthouse from the road — its a huge complex, you can't miss it." When I headed out from my hotel that morning, with plenty of time to spare, the fog was so thick you could not see a thing, let along a "huge" courthouse off the road. After several false turns I barely made it in time for the argument!

On a less dramatic level, the fact is that the mundane mechanics of an argument are conducted differently in different courts. Some courts like you to introduce yourself and note any reservation of time for rebuttal at the outset; others — the U.S. Supreme Court, for example — do not. No panel is going to rule against you if you do the wrong thing (I once saw a lawyer introduce not only himself but his proud family in the guest section to the Justices), but a critical part of the oral presentation is conveying a sense of confidence in your position. That is hampered if it appears that you do not know what you are doing when it comes to the protocol of the court.

Always make a point of talking to the courtroom bailiff in advance of the argument session. You can learn, for example, how rigorous the court is in enforcing time limitations. You may discover that the judges *always* allow counsel a minute or two for rebuttal, even if they have used up all their allocated time — information that can significantly impact how to budget your time.[5]

If you can observe the same judges who will hear your argument, you may also pick up valuable clues to questions they might ask. Supreme Court observers, for example, know that Justice O'Connor will likely ask the first question, that the Chief Justice might ask an advocate for the Supreme Court case that most supports his position, and that Justice Breyer often asks a comprehensive question about the advocate's theory of the case near the end of his argument time. Any "local knowledge" you can gain about your panel or court along these lines can help eliminate the element of surprise from your argument.

WHAT TO BRING TO THE PODIUM

A recent survey of Supreme Court practitioners by Barrett Prettyman reveals a wide variety of practices when it comes to what they bring to the podium with them for the argument.[6] Some bring nothing, others (myself included) a page or at most two of notes, still others carefully constructed notebooks. With

4. Aldisert, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 320 (1993).

5. The Supreme Court practice is quite to the contrary. One prominent practitioner, upon seeing his red light go on (signaling he had used his entire 30 minutes), said "I had intended to save some time for rebuttal." The Chief Justice responded: "But you have not."

6. E. Barrett Prettyman, Jr., Differences of Opinion, The American Lawyer (May 1995).

whatever you are comfortable keep three rules in mind:

1. Don't lose whatever you intend to bring. One partisan of the notebook school, who had the second argument at a Supreme Court session, made the mistake of placing his invaluable notebook at counsel's table, only to have it inadvertently spirited away by counsel in the prior case, who was hastily stuffing his papers in his trial bag to make his exit. Something of a wrestling match took place while the panicking first lawyer tried to retrieve his notebook from the uncomprehending departing lawyer, while the Justices — anxious to get on with the next case — curiously looked on.

2. Make certain whatever you bring fits on the lectern. For example, the space on the Supreme Court lectern is about 12 inches top to bottom. Counsel who bring legal size papers or a legal size notebook, will spend much of their argument time juggling their materials to keep them from sliding off the lectern.

3. Finally, ignore whatever you bring. Judge Silberman of the D.C. Circuit makes the point that "[n]otes are crutches, and when you look down you lose the attention of the court."[7] You may not feel comfortable enough to go to the podium without notes, but at the same time realize you will almost never have the chance to look at them once the argument begins. Most appellate benches are so active these days that the brief pause you might take to glance at your notes simply provides an opening for the next question.

THE APPELLANT'S ARGUMENT

Forget what you may have learned about how to structure an argument: a review of the facts, the holding below, and so on. There simply isn't enough time. Try to have one opening sentence that tees up the issue in an advantageous way, and then proceed immediately to the meat of the argument. Most judges today are well prepared, will be bored by a recitation of the facts or holding below, and will move you to the heart of the case with questions if you tarry on background. Much better to get there on your own terms, right away, rather than have even your first point dictated by a question.

THE APPELLEE'S ARGUMENT

It is critically important for those arguing "bottom side" — appellees or respondents — to act, when they stand up, as if they have been listening to what was going on during their opponent's presentation. You are entering the unfolding drama midstream, and if you do not pick up the flow (redirecting it, if necessary), you will lose any chance to be effective. When arguing bottom side, prepare several different openings, and use the one that corresponds most closely to the court's interest, as revealed by the judges' questions to your adversary. If the court has just spent one-half hour peppering the other side with questions on issue B, you look silly and as if you have something to hide if you rise and announce that you would like to talk about issue A. By all means get to issue A if you need to, but deal with what the court is interested in first.

TIME

Much of the preceding advice has been based on the severe time constraints facing oral advocates these days before most appellate tribunals. Therefore, this suggestion may come as a bit of a surprise: try not to use all your time. Having the red light end your argument conveys the impression that you did not do what you set out to do, that you were derailed somewhere along the line, that you were still in the process of persuading rather than having accomplished that result. If you can end just before the red light goes on, it contributes significantly to conveying the important impression of confidence: I could go on talking, but I've said enough to convince you, so I'll just stop now. If the judges have more

7. Advocacy Tips from Judges, Legal Times 17 (Dec. 24, 1990).

questions, don't worry — they'll ask them. But there is no recorded instance of judges objecting that a lawyer sat down too soon.

REBUTTAL

Always leave time for rebuttal, if only a minute. Even if you do not use it, it will help keep your opponent honest. If you are arguing at the Supreme Court and have not saved any rebuttal time, you're out of luck. In most other courts, however, the presiding judge will listen for a minute or so if you pop up and say something like "If I could respond briefly." Know the practice of your court.[8]

If you are an appellee and your opponent has saved time for rebuttal, you can often effectively turn that time to your advantage. If it fits in with the flow of your argument, you can end with an indirect challenge to the appellant, along the lines of "We argued in our brief that appellant had no answer to X, and we did not hear one in appellant's opening argument. Perhaps we will hear it in his remaining time." This can completely disarm your adversary, who has no doubt been preparing an effective rebuttal. He either has to respond to your challenge (and presumably, since you get to select the challenge, the response is weak), or he has effectively to concede your point, if he fails to respond and adheres to his (presumably stronger) planned rebuttal. Even then, in many instances the judges will say "Wait a minute. What is your answer to your opponent's last point?" As an appellee you do not have the last word, but you may be able to select the last subject.

8. The First Circuit actually discourages advance reservation of time for rebuttal, on the grounds that "[n]ot only does such action reduce the limited time allotted but is likely merely to allow repetitious argument." First Cir. Rule 34.1(b). The court goes on, however, to note that "[s]hould unexpected matters arise, such as the need for factual correction, the court is prepared to give counsel who have not reserved time a brief additional period for real rebuttal." *Id.*

QUESTIONS

Perhaps the most important skill for today's appellate oralist is handling questions. You should, as John W. Davis remarked, "rejoice" when the judges ask questions,[9] because it (1) shows that you have not yet put the panel to sleep, and (2) allows you to focus on precisely what at least one judge is interested in. As noted earlier, you should have prepared very concise answers to every question you can reasonably anticipate. But be sure and listen carefully to the question before delivering one of your prepared replies: don't assume the judge is asking a question you're ready for, just because that makes the answering easier. And don't assume that the question is hostile — don't fire on the lifeboats coming to save you.

In fact, many lawyers react too defensively to questioning in general, as if the judge is trying to trip them up. These lawyers try to get in an answer that does no perceptible harm to their position and get back to what they were saying as soon as possible. That approach is wrong. Oral argument is not some quiz show, in which you win so long as you avoid any pitfalls the judges may try to spring on you. Try to react to what you can learn from the questions, and adjust your approach accordingly. If you had planned on making points A, B, and C, in that order, but the judges jump in with questions on point C, by all means deal with that first — and not just to the extent necessary to answer the questions. Such flexibility will give a more natural flow to your argument, and facilitate a meaningful dialogue with the bench. Indeed, in rehearsing, you should present your argument in every conceivable order — ABC, BCA, CAB, BAC, ACB, CBA — precisely so that you can readily adjust it in response to the order of the questioning.

REFERENCES TO EXHIBITS, APPENDICES, AND THE LIKE

By all means *cite* to the record, if it helps you: "Petitioner contends that we failed to object to this evidence. Of course we objected,

9. Davis, *supra*, n. 1 at 897.

Joint Appendix page 32." But generally do *not* invite the court to *look* at the record, briefs, or anything else. You may think that would be more effective, but for some reason it almost never works out well. First, it takes an enormous amount of time — your valuable, limited time — to get all the judges looking at the right brief or other document. Second, you automatically lose eye contact with them while they look at the page or fumble around trying to locate the correct brief. Third, you may never get that contact back. Once invited to read a line or two, many judges will read on, or glance at the next page — judges, particularly appellate judges, are often better readers than listeners. If you give the correct reference, any judge who's interested can check it out later.

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In this era of abbreviated argument times and prepared, active judges, the advocate must be flexible and able to think on his feet. As one court recently noted, however, "[t]hinking on one's feet is a useful tool of appellate advocacy only if the thinker has a suitable foothold in the record."[10] The only way to develop the necessary flexibility is relentless preparation — at the end of the day, that remains the one overriding key to presenting an effective oral argument.

10. *Uno* v. *City of Holyoke*, 72 F.3d 973, 985 (1st Cir. 1995).