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Appellate Oral Argument: A Primer in Two Parts

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Months (or even years) have passed since you filed your last appellate brief in a case. Your memory of the issues might have become a bit hazy. Now the oral argument notice appears. You have three to four weeks - if you are lucky, a bit more - in which to reacquaint yourself with the case and prepare for argument.

You might think this process would be quick and easy. After all, you spent weeks researching and writing the briefs. You just need to refresh your memory. Two or three days should be enough time to prepare. Thinking this way would be a mistake.

Oral argument calls for a different presentation and skill set than are needed to write persuasive briefs. And, if your case is before one of the California appellate courts, a draft opinion has already been written. You will need to either make the court feel comfortable about the tentative decision it has reached, or be prepared to explain why the court should reach a different result.

To do this well, you will need to start preparing the moment you receive the argument notice.

Run an Oral Argument Update. Important appellate decisions directly relevant to the issues in your appeal may have been published since briefing in your case closed. This may be particularly true if briefing was completed several months ago. Immediately upon receiving the oral argument notice, run an update of all cases cited in all of the briefs. If there are any cases of direct relevance to your appeal, send a short letter to the court as soon as possible citing those cases. Do not include argument about the cases. At most, cite the arguments and pages of the briefs to which the cases relate.

Re-read all the briefs, key portions of the record and the law. Reacquaint yourself with the case. Consider starting out by reading all of the appellate briefs in order. You should be able to view them with a fresher eye than when you first wrote some of them. Read as a dispassionate observer, or a neutral decision maker, not as an advocate. Take note of any troubling facts or arguments. Write down any questions that come to mind. Then re-read your record notes. Review key portions of the record. Review all major cases cited in the briefs (I like to read them in order, oldest case first, so that I can see whether any new patterns or clues to the development of the law emerge.)

Simplify and Synthesize. Break the issues down. Find your oral argument theme. Consider what this case is really about, on a human level.

I once spoke to 100 high school students about a complex human rights case I handled. I didn't speak about the technical terms of the relevant treaties; I spoke about the need for justice and closure for the families of the victims, who learned that the tortured and mutilated bodies discovered around Ciudad Juarez, Mexico might be their sisters or daughters.

Consider how you would present your case to a 15-year old. Judges are not teenagers and they will certainly expect you to be able to discuss the finer points of the law. Considering how

you might explain your case to a young layperson, however, will help get you out of your head and into the heart of the matter. After all, judges are people too.

Know what to Omit. Unless you are an appellant raising only one issue on appeal, you cannot and should not argue every issue briefed. Recognize which issues to leave to the brief, and which issues to highlight at oral argument. If you have strong punitive damage and liability issues with significant public policy elements, you will probably not want to discuss any settlement offset or discrete evidentiary issues (unless of course the court asks about them).

Prepare for the two primary components of argument: questions from the court and your prepared statement. In that order. Your oral argument statement should be a modular set of two to four paragraphs succinctly covering the major points you want to make. This is the statement you will hold in your back pocket should you get no questions from the bench. In a perfect world, you will never have to deliver this statement. You will instead be responding to the justices' questions. Therefore, spend more time figuring out what questions you might hear from the bench. Formulate succinct and helpful answers to these. If you have prepared sufficiently, at argument you will hear fewer unexpected questions.

Compile as many potential questions as possible and refine your answers. Keep looking for questions the court might ask as you read the briefs, prepare your statement, and review the record and cases. Ask a colleague - preferably one not involved in the briefing - to read the briefs and provide you with questions as well. Write down your answers. Edit and refine them down to three or four short sentences each. Practice transitioning back to your main themes.

Understand the larger context of your case. Particularly if you are arguing before a Supreme Court, the Court will be interested in the broader impact of its decision. Do not focus on just your case. Be prepared to explain why a decision in your client's favor will create the best public policy decision for the state or nation. In addition, be prepared to understand the practical consequences of the decision, which may require you to learn about the realities of your client's business beyond what is in the record.

Practice your argument. Practice your argument out loud. How you do this is a personal choice. Some conduct one or more moot courts with colleagues, clients, or retired justices. Other counsel practice in front of their spouse, or a mirror. Whatever you do, do not let the first time you present your case out loud be when you stand up before the justices.

Oral Argument Day - What to Bring. Again, what each counsel brings to the lectern is a matter of personal choice. I bring a notebook containing my prepared statement, anticipated questions and answers, key cases, and key pages of the record and record and case citations. Others bring certain volumes of the record or the briefs. But whatever it is, it should help you respond to the court's questions quickly and accurately.

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Tuesday, January 5, 2011

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Oral argument is not a speech. Oral argument, at its best, is a conversation. Indeed, as Justice Ruth Bader Ginsburg has described it, oral argument is a discussion between court and counsel and a conversation of ideas about a case. Oral argument is counsel's last opportunity to clarify matters in the record and persuade the court. Make the most of it.

Adopt a sincere, respectful, but firm tone. The time for closing argument to the jury has passed. The appellate courtroom is not a senate chamber where a dramatic oration might gain some traction. Before an appellate court, then, a respectful but firm tone is best. Deal politely with any misstatements by opposing counsel. For example, say: "There appears to be some confusion about our position. I would like to clarify that. Our position is..."

Be brief. If the court has few questions, answer them, discuss your key themes or points, and sit down. Do not try to "run out the clock" on your allotted time. *Speak in short, succinct sentences.* Think of answering a question from the court in three to four sentences, each of which is no more than three lines long. While a longer sentence with dependent clauses may work in a brief, it is much harder for a listener to follow.

Slow down. When people get nervous, they tend to speak faster. Calm down and slow down. If you speak overly fast, you may not convey all of your points to the court. Pausing and slowing down can also lend more gravitas to your words.

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Beware the use of exhibits. The trial is over. Sometimes, counsel will cart in a large exhibit from trial and use it to "illustrate" their points. If you feel there is an exhibit the court must see to properly decide your case, transmit it to the court in advance of argument, in accordance with the Rules of Court.

Engage with the justices. Do not read to the court. Having spent so much time preparing written statements, you may feel compelled to read your carefully worded prose to the court. Resist this urge. First, reading will speed up the cadence of your speech. Second, reading will disconnect you from your audience. The goal is to engage the justices in conversation and to satisfy their areas of concern. To do that, you will need to learn what those concerns are by listening to the justices' questions.

Be flexible. Adapt your presentation to the court's questions. The court's questions are paramount. With a question in mind, a justice is less likely to hear what counsel says on other points until the justice hears the answer he or she is looking for. You can still make the points you planned to make; just weave them in after you have answered the court's questions.

Answer the court's questions directly, then explain. The best approach is to answer the court directly and immediately. "Generally, yes." Or "Yes, and here is why." Or "yes, but not in

all cases and here is why." Or, "no, your Honor, for three reasons." You do not want to appear to be avoiding the court's questions.

Maintain your credibility. Accurately cite the record and the law. Have key portions of the record available so that you can direct the court to particular pages as necessary during argument. Similarly, have the pinpointed citations for key cases available to provide to the court. Do not guess what the correct citation is. If opposing counsel miscites a case or the record in any way, politely provide the correct citation or quotation to the court. If complex, previously unbriefed issues arise, ask for leave to submit supplemental briefing. If the court's questions concern areas that were not fully briefed by the parties, or involve an issue raised independently by the court, seek leave from the court at oral argument to submit a supplemental brief on the subject. Do not try to answer the court's question at oral argument alone. You will not be able to provide the court with an answer of requisite depth at argument.

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