

TIPS FOR BECOMING A BETTER APPELLATE ADVOCATE— ORAL ARGUMENT

By Donald Capparella and Amy J. Farrar*

I. DOES ORAL ARGUMENT REALLY MATTER?ⁱ

Can you change a judge's mind at oral argument? If you are committed to doing one, the only attitude to take is that you can; any other assumption is both risky and counterproductive. One writer stated that "oral arguments are as useless today as the judges during my clerkship considered them....Oral arguments have become little more than a moot court exercise....At the end of the day, you may have picked up points for style, but you have still lost your case."ⁱⁱ It should be noted that this was written by someone who represents criminal defendants in Texas. This kind of advice does you no good when you are standing up there and looking an appellate court panel in the eye.

If the question is what percentage of the time is a judge's mind changed by oral argument, the answer seems to vary widely depending on the judge who is asked. One self-imposed poll of three 8th Circuit judges tracked their cases over a ten month period and found that their minds were changed 31%, 17% and 13% of the time respectively. This was after they had all read the briefs and reached a tentative conclusion prior to oral argument.

Another judge of the Illinois Court of Appeals met with sixteen of his colleagues and asked the following questions: (1) What percentage of those cases did the oral argument affect your decision concerning the outcome of the case? The answers ranged from 0% to 100%; (2) In those cases where your decision was somehow affected, did the oral argument cause you to change your mind about the way an issue in the case should be decided? One judge again said 0%, two judges 20%, and the rest were in between.

My personal unscientific polling of certain members of the Tennessee Court of Appeals and Tennessee Supreme Court have stated that oral argument is very important to them. They have typically said that in as many as 20-25% of the cases that oral argument had a substantial impact on their decision-making process. They do not agree with the old saw that you cannot win a case on oral argument, but you can surely lose it. You can win a case on oral argument. You can also lose one. You can also have no impact whatsoever.

There is no question that the brief is by far the most important part of your appeal. One writer has suggested that an oral argument is like sales. It is a chance to close a deal with a buyer--the Court. Unfortunately, your competitor has also been invited. The basic sales pitch has been made with your brief. The oral argument gives you a chance to ascertain what more it will take to sell your position and close the deal.

II. A BAKER'S DOZEN: THIRTEEN THINGS YOU SHOULD BE PREPARED FOR IN ORAL ARGUMENT

1. Be prepared for questions.

The phrase "oral argument" is a misnomer; it is not an argument, it is a discussion. At its best, oral argument is a conversation. The court needs to make a decision, and they want your help. Do not attempt to create a dramatic flourish or parade around as a great orator. It is your understanding and knowledge of the case that they are after.

You should see yourself as an invaluable resource to the judges; you are there to help them. You should think of oral argument as if they have asked you to come answer their questions and resolve their concerns. A judge that is on your side will often use you to convince another judge who is on the fence. It is important to also realize that they are, in most cases, right on the brink of a decision. Appellate judges very often leave the bench to go vote on your case. Oral argument is your last chance to affect their decision-making process.

2. Know the law.

If you think of yourself as a resource, you can tell them why a particular case is distinguishable or why it is controlling; you can synthesize the law. Know the statutory scheme and what problem it was trying to address and the underlying policy reasons behind its passage. Try to be an intellectual peer of the judges.

3. Be prepared to concede points that hurt you.

Be ready to quickly turn weak points around to show that, despite the problem with your case, you still win. Remember, if you are on appeal, and you are the appellant, you have already lost once. There has to be a reason you lost, and you cannot just blame the trial judge or the jury. Be prepared for questions that ask you to concede something, earn credibility by admitting the concession, and be prepared to point out something in the case that cancels out the negative point, or makes it irrelevant. If you are the appellee and there was an error below, better to admit to it and show that it was harmless.

4. Know your standards of review.

Standards of review are critical in oral argument. First, the standard of review will tell you which arguments on appeal are likely to be the subject of the oral argument. The issues on appeal may be very different than those that were the hardest fought at trial, and the reasons will likely be the standard of review. If you are appealing a jury trial, and there was a hard-fought factual issue, (e.g., who ran the red light), that will not be an important issue on appeal because the standard of review is the material evidence rule. Very few jury verdicts are overturned for lack of material evidence.

On the other hand, if one of your issues is a legal one, the standard of review is de novo. I have won cases where the court of appeals applies the abuse of discretion standard, but I was not expecting to win. Knowing the standard of review for each issue helps you focus on the decision-making process of the Court of Appeals, and will make you better prepared for their areas of inquiry.

5. Be prepared to listen.

Aside from engaging in a discussion with you directly, appellate judges are also engaging in a discussion with each other through you. Listen, and read the judge's questions and body language. Listening to the judges is just as important to the appellee as to the appellant. The appellee should pay special attention to the judge's reaction to appellant's arguments.

6. Have a theme that ties the parts of your case together.

The first five minutes (maybe the first 2 minutes) of your oral argument are the most important. This is true for both the appellant and the appellee. The most dramatic moment in an appellate argument is when the appellee rises to respond to the appellant's argument. If you are the appellee, do not be locked into your argument. Be prepared to tee off on something the appellant argued, or on something a judge said in response to his or her argument. The first few minutes of your time is when you have the judges' highest level of attention. If you go over the facts or do background at that point, you will lose the court.

7. Do a mock oral argument.

This gives you a chance to "practice" law. Find one, two or three colleagues, make them read the briefs, and sit there for fifteen minutes (or more) and have them ask you questions. It will raise your confidence level immensely. It will also prepare you to answer the tough questions in a more prepared way. Tape yourself if you dare. If you do not do a mock argument, pretend you are the judge and anticipate the questions that they would ask; practice answering them on your feet and out loud. We sound better in our heads than we sound out loud.

8. Think about your demeanor.

I think it helps to smile (appropriately). Show no fear of their inquiry. Try to be thoughtful when they ask a question. Do not be afraid to stand there and think for a little bit before answering a question; be wide open, show no defensiveness. Eye contact with the entire panel is important.

9. Do an outline of your argument.

Make sure your argument outline fits on one page; it is there to trigger your memory about the structure of your argument should amnesia or nerves hit you. One

writer said you must be thorough and flexible. I think you *cannot* be flexible unless you are thorough. An outline helps you get back on track if you are asked a lot of questions. For example, create prepared concise statements on: (1) the procedural posture of case; (e.g., "This is an appeal of the trial court's grant of summary judgment on statute of limitations grounds." or "This is an appeal of a jury verdict where the plaintiff was awarded damages in the amount \$150,000 for medical malpractice."); (2) each issue in the case; Use simplified language, do not remain wedded to the issues as stated in the brief. (3) the critical facts of the case.

10. Know what you want.

Be prepared for the court to ask you the following questions: If you could craft the rule that you want this court to adopt, what would it be? Is there a compromise rule that will satisfy you? What are the underlying policy grounds and good sense that support the result you want? Why is it good for others than just your client?

11. Keep rebuttal brief and to the point.

There should be no more than three points for rebuttal, and it should always come from discussion during appellee's argument, not a repeat of what you said in your argument. Save no more than three minutes for rebuttal; be prepared not to use it.

12. Use visual aid if necessary.

In rare cases, demonstrative exhibits are helpful. I try and imbed them in my brief, e.g. a key letter or timeline that is quoted. I then ask the court to look at the language with me together. Do not use a demonstrative exhibit as a crutch; only use it if it really helps. If a case turns on some language, a statute, or a letter some people think it is helpful blow up the language so it can be in front of everyone while it is discussed. Be careful to make it big enough! Some judges have poor eyesight.

13. Make certain the law you cite is current.

Read slip opinions (TAM) before oral argument. Shepardize your cases to make sure they are still good law

III. TEN THINGS YOU SHOULD NOT DO IN ORAL ARGUMENT

1. Do not be a lifeless lawyer who parrots a mediocre brief. You must not be boring--do not read your brief or simply repeat yourself; sound like you care.
2. Don't argue your weak issues; if they have to be in the brief at all, don't raise them yourself.
3. Do not miscite the record or authority, and if your opponent does, point it out respectfully (and you better be right!).

4. When you are asked a question, never say "I will get to that in a minute." Answer questions directly, completely and immediately.
5. Don't make jury arguments, make subtle appeals to emotion. Judges are human, and want to do the right thing as they interpret it. Find out what is right in their world and restate your position to fit.
6. All you have is your credibility, you must live to fight another day, so always be credible with your positions and citations.
7. Don't rush. Keep your poise, go with all deliberate speed.
8. Wear proper attire!!
9. Don't guess. If they ask you a question you really can't answer, admit it. Try and make sure this does not happen by knowing every question they might answer. If necessary, offer to write a supplemental brief if it would help the Court.
10. Don't introduce your client to the court.

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ⁱ Other sources for this article include:

Hon. Joseph W. Hatchett, Robert J. Telfer, III, *The Importance of Appellate Oral Argument*, 33 Stetson L. Rev. 139 (Fall 2003).

Oral Argument: Does It Matter? 35 Ind. L. Rev. 451 (2002).

How to litigate successfully in the United States Court of Appeals for the Eleventh Circuit? 29 Cumb. L. Rev. 1 (1998).

ⁱⁱ Hon. Joseph W. Hatchett, Robert J. Telfer, III, *The Importance of Appellate Oral Argument*, 33 Stetson L. Rev. 139 (Fall 2003).

