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DAILY REPORT

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SPECIAL REPORT—ALTERNATIVE DISPUTE RESOLUTION

Making the Most of Mock Oral Arguments

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THE 13 FEDERAL Courts of Appeals don't receive half the media attention as their more glamorous superior, the U.S. Supreme Court. But for the vast majority of litigants, the appellate courts are more important. Indeed, for roughly 99 percent of federal cases, they are the courts of last resort.

That means that, when major commercial cases involving billions of dollars or an important legal principle reach an appeals court, the stakes are high, as it's likely entering the last stage of the case. It's why companies and their law firms spend an enormous amount of resources preparing.

One of the most effective tools to prepare, of course, remains mock oral arguments. The idea behind them is straightforward. Appellate lawyers want to prepare for as many kinds of questions as possible. It's like baseball players wanting to see a pitcher's full array of stuff—slider, curve, fastball, etc., before stepping up to the plate.

Appellate lawyers often enlist their law firm partners to play the part of judges in a mock oral argument. Increasingly, law firms are seeking out former appellate court judges to play those roles as well.

The reason is clear: With so much at stake, clients want to have every competitive advantage available, and judges have insights and experiences that others cannot offer.

To state the obvious: We've donned the black robe, asked thousands of questions at oral argument and written thousands of opinions. We've seen the good, bad and the ugly in oral advocacy, and we know where the pitfalls lie.

We've seen, for example, appellate lawyers unprepared to credibly discuss the facts developed at trial. We've also seen lawyers so keen on making particular arguments that they fail to truly listen to what a panel is asking them, missing a critical opportunity. With preparation, these mistakes can easily be avoided.

Growing Importance of Oral Arguments

In the federal courts of appeals, oral arguments are not guaranteed. Generally, courts grant oral argument only if they believe it will help them decide the case. This selectivity has increased dramatically over time.

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When I joined the Eleventh Circuit Court of Appeals in 1990, it handled roughly 3,000 appeals a year, and nearly all of those cases included an oral argument. By the time I retired in 2010, however, the court was handling around 7,000 appeals. But it granted oral argument in just 25 percent of those cases. That's consistent with many other appellate courts around the country.

What these numbers suggest is that oral arguments are becoming more important. While more cases flood the system, courts are becoming more selective as to which cases they schedule oral argument, making those events more important to a dispute's outcome.

Further, because each side of an appeal typically gets just 20 to 30 minutes for oral argument, every minute is critical. Judges are not seeking a regurgitation of a party's brief, but a more nuanced explanation for their arguments and responses to their opponents' arguments.

Unlocking the Value of Mock Oral Arguments

In a typical mock oral argument, I sit on a panel with two other former judges or lawyers. Prior to the argument, we read the lower court opinion, all the briefs submitted, and important related case law. Then we listen to the appellate lawyer's arguments and pepper him or her with our questions, seeking to make the experience as close to the real thing as possible.

Sometimes, it can be effective to break the argument into a couple segments, in which the lawyer has the first 20 minutes to give his or her best presentation uninterrupted, allowing the judges time to take notes. Then, for the next 20 minutes, the judges launch their questions.

Following the argument session, the panel of judges sits with the lawyers handling the appeal and engages in discussion over the strengths and weaknesses of the arguments. In my experience, this is where appellate lawyers receive the most value. They can ask the panel which answers were the most problematic and which resonated the most.

In these strategy sessions, I'm seeking to give my best understanding of the law and how the law should be applied under the given facts—just how I would have for any case when I was a judge.

But former judges can also opine on how their former colleagues currently on the bench might react. Once a panel has been set in a case, for example, lawyers have frequently asked me whether a particular argument would appeal to a particular judge or how a judge has responded to certain arguments in the past. These types of insights can help them customize their approach.

Of course, appellate attorneys don't have to wait until an oral argument date is set to engage a former judge. Frequently, I'm involved from the very beginning of an appeal. In those situations, a lawyer will send me the lower court's opinion and the first draft of their brief, and if they're the appellee, the brief of the appellant.

Often, I'm looking for ways that will make the life of judges and their clerks easier. This means, making sure that the brief does not overwhelm judges with unnecessary facts. Too often lawyers intimately knowledgeable about the details a case have a hard time communicating the big picture that judges new to the case so often need. Another common mistake is allowing bold statements not backed by a citation in the record or law make their way into a brief—always a red flag that can negatively affect a judge's view of a party's argument.

In the end, though, no one has a crystal ball that can predict with 100 percent accuracy how an appeals court will rule in any given case. But at least after a thorough objective evaluation from an experienced third-party, a party can feel more informed about its chances, and know that it did all it could to prepare. DR