LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
MONDAY, DECEMBER 20, 2021

PERSPECTIVE

7 tips on appellate oral argument: perspectives from the bench & bar

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Brief writing and oral argument form the core of appellate advocacy. We previously provided a few tips on brief writing. We now turn to oral argument, with insights gathered over collectively nearly half a century of appellate judging and advocacy.

Prepare, prepare, prepare. For argument before a state supreme court or the U.S. Supreme Court, or complex arguments before an intermediate appellate court, preparation can take six weeks or more. Preparation for other appellate arguments can take three to four weeks.

Why is this? Because preparation for oral argument requires full mastery of the record and the law, as well as a distillation of the primary questions in the case down to their essence. This means you must read the record again, review all the appellate briefs and study every case cited in the briefs on key issues. You should lay out every question you think the justices might ask and craft potential answers to them. You should consider an appropriate theme for argument, which may vary slightly from your appellate briefs. If you represent the respondent, you may want to respond to the arguments in the appellant's reply brief.

At its best, oral argument is a conversation with the justices, and to best converse with them, you will need to anticipate their concerns and potential lines of inquiry. And the justices themselves will have prepared for this conversation too. They will have read the briefs and record, as well as the law, prior to argument. You will want to be at least as thoroughly prepared as they are.

Narrow the points you raise at argument. Your briefs may discuss many issues. Do not argue all of them. Instead, focus on two or three issues that are crucial to your case and deserve further discussion, or about which the court might need further information. Less is more.

Consider a moot court. In a potentially precedent-setting case, a formal moot court might be appropriate. Most advocates before a state supreme court or the U.S. Supreme Court, for example, have two formal moot courts where they are peppered with questions by smart lawyers and law professors who are not familiar with their case but are familiar with the court or the area of law being decided in the case.

Loyola Law School, for example, has a complimentary moot court program tailored to the 9th U.S. Circuit Court of Appeals and California Supreme Court. Retired justices from the court you are presenting argument in also may serve as formal or informal moot court judges. Members of your firm, or appellate colleagues at other firms, may serve as sounding boards for each other, whether at formal or informal moot courts.

Answer the court's questions. You may have a short, planned statement to start your argument. You likely have certain points you and your client want to make. But when a member of the court asks a question, it is important to answer that question right away. Do not ignore the question, barrel on to make the point you want to make or tell the justice you will get back to their question later. Answer the question simply and directly. If the question calls for a yes or no answer, do that first and then proceed to explain your answer. If there is no follow-up question, you can move on to the next point you planned to make. You should welcome questions because they give you a window into the justices' thinking and what issues they believe are important. This feedback is invaluable, and you should tailor your argument accordingly; it's what makes oral argument a conversation and not a speech.

Weigh possible concessions. It may be wise to concede a weak point and explain why your client should prevail nevertheless. Doing so will help you build credibility with the court.

Be nimble at the lectern. Prepare a few key points you want to make in case there are no questions, as well as some points you can use to refocus after answering a question. But you must be sensitive to the overall direction of the argument and remain flexible. Listen to the justices. Don't treat their questions as interruptions. They may be telling you that another point is more important or that the point you are making has not persuaded them to rule in your client's favor.

Do not make these mistakes. Never read your arguments or just repeat what is in your briefs. Get right to the core legal issues and stay away from lengthy fact statements. Remember, with few exceptions, it is improper to discuss facts outside the appellate record and to argue cases or issues not raised in the briefs. Avoid sarcastic comments and personal attacks on opposing counsel or the trial court. Steer clear of feigned moral outrage and finger pointing.

Disclaimer: The content is intended for general informational purposes only and should not be construed as legal advice. If you require legal or professional advice, please contact an attorney.

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