Preparing for oral argument

Rehearse your argument and don't forget to appeal to the justices' common sense and notions of fair play

By Monique Olivier

Oftentimes, lawyers fail to prepare effectively for an appellate oral argument. The thinking goes: the case has been thoroughly briefed, a draft opinion has likely been circulated before the argument occurs,[1] and 30 minutes of oral advocacy are not likely to change the outcome. That thinking is flawed. It is a missed opportunity to answer questions, address lingering doubts, and appeal to the sensibilities of the particular justices before whom the fate of your case lies.

Sometimes lawyers do not spend enough time preparing for an appellate argument simply because they do not know how to prepare. They believe if they read the briefs once or twice, they will have a few cogent, relevant things to say and that will probably take up their allotted time. But the truth is that the panel typically is looking for what is *not* in the briefing, answers to those questions lingering after all the writing is in.

Oral argument serves as the rare opportunity to have a conversation with the panel about your client's case – the one that by now you have spent hours toiling away on – and to clarify any issues that the panel members find troublesome. Indeed, appellate judges have gone on the record saying that oral argument *does* matter. Judge Myron Bright of the United States Court of Appeals for the Eighth Circuit said that oral argument changed his mind in 31 percent of the cases he decided. His colleague Judge Richard Arnold put the figure at 17 percent. (Myron H. Bright & Richard S. Arnold, *Oral Argument? It May Be Crucial!*, 70 A.B.A. J. 68, 70 (Sept. 1984).) And both jurists said that oral argument was "helpful" in deciding about 80 percent of cases by framing the issues and clarifying the reasoning for the decision. (*Ibid.*)

So when you get that notice 20 days or so before your appellate argument, clear some serious time on your calendar, and *prepare*.

Three key points and one theme

Unlike an appellate brief in which you have the opportunity to wax poetic, uninterrupted, for 14,000 carefully crafted words, an appellate argument requires a certain nimbleness. Will I have a panel of justices who start to fire questions off before I get out my first riveting point? Will I have a panel of three who just returned from a big lunch and are trying to stay awake and not asking a single question? Will I get a question that, in my view, has absolutely nothing to do with the issues at hand? Possibly, yes, all that and more. You have to be prepared for several possible scenarios.

One of the best pieces of advice I got before my first appellate argument was to prepare an argument notebook. At the time, I thought of it as Linus's blanket – something to grab onto if I started to feel uneasy or nervous, something to ground me to accomplish my task at the podium. It can be that, certainly. But it is also, and perhaps more importantly, a method of preparing for the argument, a way to develop the short story of Why You Win.

My own style of argument notebook has evolved over time, but the basics have remained the same. The first page (a *single* page) contains, in outline form, the three key points I believe I must make during my argument. This is drawn from a careful review of the briefing, the record (be an expert on the facts of your case), and the most relevant case law. In an ideal world, the three points are linked thematically, informing the court in a clear and concise way why my view of the outcome is the legally correct one. That first page gets revised and refined over the course of my preparation.

Behind that page is a more detailed outline which has a more thoroughly articulated argument and may contain cites to the record or to controlling legal authority. It is most useful during argument preparation but can also serve as a resource if you lose your way at the podium, or if you have a panel that asks no questions at all, leaving you with the time to elucidate your key points further. Behind that detailed outline are pages for the principal issues in the case.

For example, if I think a particular evidentiary matter is going to be at issue, I may make a page that contains bullet points with my argument, the relevant cases, and cites to the evidence in the record on that issue. I also outline any matters particular to the appellate court. Is there a dispute as to the standard of review? If so, what is the strongest articulation of the standard I can make in my client's favor? Are there any jurisdictional issues to address? Are there newly decided authorities that may impact the outcome? Finally, I may add a page or two containing specific excerpts of the record (e.g. trial testimony) if I believe they are particularly pertinent to the oral argument.

I rarely go beyond the first page of the notebook during an argument. In fact, during one argument, a jurist lobbed a question over the dais before I had even *opened* the notebook. But I have found that the process of assembling it is an effective means to prepare. It is a way to learn the record, identify the key issues, revisit the briefs with a critical eye, contemplate the questions that may be asked, and distill the key points of your

argument into a winning (and hopefully interesting) theme.

Once, twice, repeat...

Once you've prepared a draft of your argument notebook, it is time to start translating what is on those pages to the spoken word. An effective oral argument requires rehearsal. Do not think that you can or should show up the day of an appellate argument without ever uttering any of your points aloud. It is the rare advocate that is skilled or talented enough to make that work; best not to use your client's case to see if you are one of them.

First, do a couple of dry runs where you present your argument without interruption. It will give you a sense of how long it is taking for you to make particular points. It will also give you an opportunity to refine your theme, and the language you use to express it. Pay attention to what sounds and feels most compelling and rearrange the order of your points accordingly. Do not memorize a speech! Your presentation must be flexible enough to answer questions whenever and from whatever direction they come, and then move back to what you want to highlight for the panel. You will not be able to accomplish that end if you are searching for your place in a dense paragraph of prose.

Second, use props! Practice in front of the mirror. Yes, it is dorky. But then again, we are lawyers, so that should not be so unfamiliar to us. If you can, record yourself (use your iPhone). This will give you an incredible amount of information about what works and does not work in your presentation. When you are ready to take on questions from the panel, write down on index cards the toughest questions you think you could be asked, draw them at random and answer them aloud.

Finally, gather a group of your colleagues for a moot court. Give them the key briefing and ask them to come prepared to ask questions. Moot court sessions are an extremely effective means of crystallizing your key points and addressing the problem areas. Someone new to the case will likely see questions or issues you did not, and can weigh in on the persuasiveness of the arguments you intend to make.

Lean on a friend

Occasionally appellate cases draw the interest of outsiders, such as non-profit or industry groups. These groups may file amicus (friend of the court) briefs to address particular matters not necessarily or directly encompassed by the parties' briefs. The California appellate rules allow a party to split oral argument time with counsel for amicus upon permission of the party and request to the court. (See Cal. Rules of Court, rule 8.256(c), rule 8.524(g).) Although dividing the argument among two attorneys on the same side can present some coordination challenges, it can also be a very effective oral advocacy tool in the right case.

For example, several years ago I was approached about writing an amicus brief on behalf of the Consumer Attorneys of California in a civil rights matter. The facts of the particular case were not terribly sympathetic: a group of men were suing about whether it was lawful to charge them for access to night clubs while women got in for free (yes, the ubiquitous "ladies night"). But the decision of the Court of Appeal threatened a restrictive reading of California civil rights laws in all types of cases. Because I represented an interested third party, I was able to present a brief, and later share the argument before the California Supreme Court, on the broader impact the Court's decision would have. (See *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160.) So if your client's case has attracted amici, consider whether it makes sense to lean on a friend at oral argument.

Do not argue to a jury

Sometimes being the best advocate for your client is taking an approach that may, particularly as a trial lawyer, feel counterintuitive. You may have a vision of your appellate argument that consists of striding confidently up to the lectern and delivering an impassioned speech about the injustices that would be wrought if the panel does not side with your client. That approach may not best serve your client's interests.

By all means be confident, passionate and persuasive. But recognize that an appellate argument is not a closing argument before a jury. Instead, it is a conversation with three or more experienced jurists who have had the opportunity to carefully scrutinize the legal issues and will use this opportunity to ask questions about the weaknesses, and hopefully the strengths, of your positions. Observe the basics of communication: make eye contact, listen carefully to their comments and questions, and be responsive and clear.

If you present argument after your opponent, you will have the advantage of hearing the panel's questions and concerns before you are in the hot seat. Do not spend that time studying your outline – listen to what is going on! (Better yet, get to court early and watch the previous arguments to get a sense of the panel's style and mood that day.) Remember, however, that a judge may be playing devil's advocate, or may be making a point to another member of the panel through her questions. Do not assume that judge is on your side because she asked a question that indicated favor to your position. She may ask the inverse when it is your turn. Similarly, do not expect all questions to be hostile. I have often witnessed very experienced attorneys stay on the defensive and miss the opportunity to dialogue with a judge that is *agreeing* with their position.

Appeal to common sense, fair play

Finally, use your oral argument to appeal to the judges' common sense and notions of fair play. Your briefs may brilliantly convey the legal theory that should prevail, but often the panel will want to understand – and hear you articulate –

the real world impact of the position you are taking. How will the result you are seeking actually affect the parties in your case? What kind of effect will it have on other people and situations? Be mindful that the justices are people, and they are thinking about the practical application of the law in the real world. Like anyone else, they want to be confident that they are making the right choice. Use your oral advocacy skills to convince them that is the case.

Consider a specialist

If you are reading this and thinking that there is no way you will put that sort of time and energy into preparing for an appellate oral argument, consider working with an appellate specialist. A specialist can handle an appeal soup to nuts, or can consult on particular parts of the appellate process, including oral argument. Appellate specialists may also be familiar with the particular justices or panel before whom you are appearing, and may have insights into the potential ramifications of the issues presented in your case, beyond your case. For example, are there other pending appellate cases that raise the same or similar issues? Have there been recent decisions by the same panel that indicate what particular concerns it may have with your case? In addition, a specialist can bring a 30,000 foot view to issues you are likely seeing on a microscopic level at this point. In short, she can help you see the forest for the trees, and also place that forest in the wider legal landscape.

Olivier

Monique Olivier is a partner with Duckworth Peters Lebowitz Olivier LLP *in San Francisco and is a Certified Appellate Specialist (State Bar Board of Legal Specialization). She represents individuals and classes at the trial and appellate levels in employment, civil rights, and consumer protection matters.*

Endnote:

[1] It is particularly likely that a tentative decision has been prepared before an appellate argument in the California Court of Appeal or Supreme Court, because the California Constitution requires that all decisions be issued within 90 days of the case being submitted which, in the California appellate courts, is at the end of oral argument. (See Cal. Const. Art. VI, Sec. 19; Cal. Rules of Court, Rule 8.524, Rule 8.256). Indeed, the constitutional provision includes a penalty: "A judge of a court of record may not receive... salary...while any cause before the judge remains pending and undetermined for 90 days after it has been submitted for decision." So the panel's pay is tied directly to the timely issuance of its opinions.