Oral argument

Do not waive it, do not blow it! Maximize the opportunities it presents

By Norman Pine

It took me a long time to finally understand and appreciate the central paradox of oral arguments. On one hand, attorneys are cautioned that the Court has thoroughly reviewed the appellate briefs, understands the issues, and does not want the attorneys simply to repeat what has already been written.

In light of the above, one might think they must want us to tell them something new. But, the law is equally clear that an attorney is generally not allowed to raise new factual matters or new legal theories *not mentioned* in their opening brief. (A few limited exceptions exist, e.g., informing the Court of any significant recently-decided case law, as long as the attorney does so in the proper way to ensure the other side is not prejudiced.)

So which is it? (1) "Do not repeat matters in your briefs?" or, (2) "You better not tell us anything if it was not in your briefs?"

The answer is some of each. Do not tell the Court new things, but tell them the important old things *in new ways*.

A newly devised hypothetical might be the perfect way to introduce the Court to a fresh view of the facts and/or the controlling law. (See "Jane Doe," below.) A new focus on some of the public policy arguments or real-world implications of a possible decision may also be very helpful. Obviously, however, to the extent you have important public policy or real-world reasons for why your side should win, the best strategic place to unveil them is in the briefs, not during the hurly-burly of oral argument, after the Court has already reached its tentative conclusions and, in the great majority of cases, already prepared a draft written opinion.

The existence of draft opinions raises one of the two fundamental issues this article will address: whether or not oral argument should be waived.

Do not waive it

Many people assume oral argument is a waste of time. Given that, prior to oral argument, the Court has "almost always" prepared a draft opinion, lawyers handling their own appeals often ask me why should they "bother" to prepare for and attend oral argument?

My response is simple. Why bother wearing seat belts? "Almost always," I will not have an accident while driving. But, one day I may and, if I do, the consequences could be so great that it would be crazy not to have taken that simple precaution.

The same is true with appeals. With extremely limited exceptions (e.g., if the economics simply preclude it), I firmly believe that if the appeal was worth bringing, this final opportunity to persuade the Court should not be forsaken. Though the likelihood is small, there is always a chance that despite all the briefing, the Court may still have some key misunderstanding that only oral argument can correct. (Rehearing petitions are no solution. I would be especially surprised if the Court would seriously entertain such a petition if the party claiming error had waived its opportunity to have oral argument to prevent any misunderstanding.)

As the two examples below illustrate, (although it only rarely happens) oral arguments can and have changed results that would otherwise have occurred. (The names of the parties have been changed to protect the privacy of the parties and justices involved.)

• Oral argument may be the only opportunity to recognize what may be bothering the Court, and to find the winning way to explain things* differently *when that is needed

In *Jane Doe*, one key issue on appeal was whether substantial evidence supported the jury's conclusion that the 21-year-old victim of an accident who suffered permanent brain damage could have earned the $1.2 million in future lost income awarded by the jury. The test under controlling Supreme Court authority was not what the plaintiff "would" have earned, but what she "could" have earned. Nonetheless, the defendant argued that because Jane's stated goal had been to teach dance, she would never earn that much money.

For reasons not clear, the lead justice accepted that argument and repeatedly asked how a dance teacher would ever earn $1.2 million. I responded by highlighting the key Supreme Court language about *"could"-not-"would"* which we had also stressed in our two appellate briefs. Nonetheless, the justice kept repeating that he just could not accept the jury's award. It became clear that again repeating the Supreme Court's language would be futile.

Grasping for another way to engage the reluctant justice, I literally pointed to my wife (and law partner) who was seated at counsel table. I informed the Court that she had been a music major in college and involved in different aspects of music after graduation. But, in her 30's, she unexpectedly decided she wanted to go to law school. I analogized that defendant's negligence denied Jane Doe *that opportunity* to change her mind and follow a more lucrative career. This analogy allowed the justice to look at the case from a different perspective and resulted in a

3-0 affirmance of the $1.2 million figure.

There is no question that the oral argument changed the result. Indeed, when the written opinion first issued, although the "Disposition" portion of the opinion affirmed the jury's $1.2 million figure, the section heading in the "Discussion" portion reflected the intent to reverse it, i.e., the author forgot to change that part of the opinion, leaving fossilized proof of the change in the Court's conclusion.

• Oral argument may be your only opportunity to act quickly to save the day

The prior example illustrated how oral argument allows the lawyer the opportunity to find a new way (e.g., by an apt analogy) to explain a concept so as to overcome the Court's resistance to a key point. Sometimes however, concrete action, not mere analogies, may be needed to turn defeat into victory. A second example where an oral argument changed the result of a case provides a perfect illustration of how one may need to take some action to save the day. It involved the appeal from a summary judgment in a disability discrimination case. Due to financial constraints I had been hired merely to consult on the Reply Brief and to deliver the oral argument.

The Respondent's Brief had asserted that if the plaintiff's action were allowed to proceed, the plaintiff could potentially win a "double recovery" because he had been receiving workers' compensation payments during the period that the potential disability discrimination damages were also accruing. The Reply Brief made expressly clear that no double damages were being sought and that if the summary judgment were reversed and damages ultimately awarded, the defendant could simply claim an offset of all workers compensation benefits paid during the applicable period.

But, at oral argument, the Court was unconvinced. The lead justice repeatedly expressed his fear that, because our client might somehow assert some type of limitations argument to resist any offset, there was still a danger of double damages. He seemed to need some further assurance. But, because I had never even spoken to the client, I felt I could not waive any of his rights without at least conferring with, and obtaining permission, from my co-counsel. When I sat down I told co-counsel that either he give me permission to expressly waive whatever rights we might have to resist an offset or we would almost certainly lose the case. He said: "I know the client will want you to do whatever you think you need to do." So, when the opportunity arose for reply, I expressly disclaimed any and all rights the client may have had to resist the offset.

As we left the courtroom, I told my co-counsel that I did not know whether the open-court waiver would be sufficient to satisfy the justice's concern and reverse what was obviously a losing appellate position. I added that we would probably still lose the case but, that, if we had managed to reverse our fate, the opinion would contain a footnote stating that appellant's counsel, in open court, had waived any right to challenge the offset. Sure enough, when the opinion came out, the magic footnote was included.

In short, oral arguments reversing the Court's unmistakable trajectory *can* and *have* occurred in cases involving seven-figure judgments. Simply imagine what might happen in a case where the Court affirmed a judgment based upon a clearly mistaken factual or legal point that could have easily been corrected if only you had not waived oral argument. Then imagine what you tell your client and his/her recently-hired malpractice attorney.

Do not blow it

Having hopefully convinced you not to waive oral argument, it is equally important to provide useful insights into how to not blow the opportunity once you have elected to take it.

• Guidelines for the appellant

You have requested that the Court devote its valuable, limited time to hearing you orally present your case. You owe it to your client, the Court, and yourself to ensure that time is well-spent. That obligation precludes getting up and reading prepared text to the Court or orally summarizing your briefs. Rather, you need to engage the Court, i.e., get it interested in what you have to say by implicitly assuring it that you are not going to simply repeat what's already been written.

The best way to do this is to create a hook of some kind. Good trial lawyers know they must distill their cases into one of two main themes which a jury can easily understand and willingly embrace. A good appellate argument should strive to achieve the same result, albeit with a far more informed and sophisticated audience – and one which will not hesitate to interrupt you with questions or comments.

To develop an effective hook, try completing the following sentence, which might well become your opening statement to the Court: "In re-reading all the briefs to prepare for today, I realized that what this case is really about is simply whether or not [now, it is your turn to be creative, e.g., a newly-minted analogy.]"

Such a sentence immediately serves notice that you are not the typical lawyer planning simply to rehash the briefs, but rather an advocate who is inviting the Court to engage in a conversation concerning how your appeal should best be resolved. You are also inviting the Court to tell you how and why it may disagree with your characterization of the case.

The desired "conversation" described above may be more or less easy to achieve depending on which three justices are on your panel. The truth is that some judges relish the prospect of oral argument, calling it the highlight of their jobs. Others dislike oral argument, finding it a waste of their time. You must be prepared to adeptly handle either type of judicial reception.

If you have a "hot" panel (one that likes to ask many questions), your job is relatively straightforward. Answer them – directly, respectfully and immediately. Once during a Supreme Court argument, I witnessed a justice ask a question to

which the lawyer responded: "I'll get to that later." A different justice immediately retorted: "it is now later."

In addition to showing proper respect for the justices (itself never a bad idea), the obvious benefit of immediately shifting gears and answering the question put to you is that it would be wholly counter-productive to continue down the path you were on. If a justice has asked you a direct question, how much attention or sympathy do you think they are really going to give your pre-planned "argument-that-just-can't-wait?"

Postponing or ignoring a justice's questions is a bad idea for a different reason. It shows an ignorance of the very purpose of oral argument. As the appellant, you should be thrilled when the Court asks you questions. As the party with the burden of persuasion, you want the Court to be interested and engaged. If it is not, it is unlikely you will be able to change the status quo (the adverse decision from which you are appealing.)

Moreover, questions are the key to understanding what it will take to convince the Court to upset the status quo. (In both the case histories I described above, it was only through the questions asked that I was able to know what bothered the Court and how I might fix it.)

In answering questions, do not "fight the hypothetical." If the justice gives you one, do *not* simply say: "Well, our case is different because of X." Assume the justice knows that and is trying to press the logical limits of a given position. It is far better to say: "The answer to the question in your hypo would be 'no,' but, of course, that is irrelevant to our case because, as our brief demonstrated, X happened here."

One final thought. While thinking about this article, I asked a veteran justice what would be helpful to potential readers. The response was intriguing. Recalling a particular argument, the justice stated that when a tough hypothetical was posed, the lawyer responded: "I really am not sure. May I take a minute to reflect on it?" The lawyer did so, and then gave a thoughtful answer. The justice appreciated the honesty in the initial "I don't know" and the courage it took to ask the Court to wait while he thought about a proper response.

If you think facing fire from a "hot" panel is bad, try appearing before a "cold" panel. It is a very empty and frustrating experience. The purpose of argument is to have a conversation with the justices, encourage them to think anew about the case (if they were leaning against your position), and draw out and answer any questions or misconceptions they may have. Offering a soliloquy about the case is likely to achieve none of those goals.

Of course, you cannot make them ask you questions if they do not want to. So what can you do in such situations? I recommend trying to be a lightning rod.

Try taking the key elements your client needs to establish and then challenge the justices to tell you if they think your client has failed to prove them. For instance, in an employment discrimination case, you might first point out that the other side concedes: (1) the existence of an employment relationship; (2) that your client is in a protected class (e.g., an African-American); and (3) that an adverse action occurred. You can then focus on the facts supporting the inference that there was a causal link between race and the adverse action by making provocative statements such as: "Given that white employees who also had an unexcused absence were not disciplined, it is impossible to say that a jury could not find discrimination was the reason for the adverse action."

You hope that if any of the justices believe that the record did not show that white employees with an unexcused absence were not disciplined, or that there were legitimate reasons why those white employees might not have been disciplined, they will cut you off by saying, "That's not true" or "Isn't the case with the white employees different because . . ." If they do so, congratulations. You have successfully provoked a conversation and you can now explain why you believe the justice is incorrect.

Special considerations for respondents

As the respondent you are the clear "favorite" and will most likely prevail. Nonetheless, reversals are frequent enough – and the consequences devastating enough – that the "Seat Belt" rule previously discussed is operative. There are two special considerations to focus upon.

• Do not simply be prepared to "respond" to what the appellant says during argument

Remember that the appellant had the opportunity to file a Reply Brief that you were never able to respond to. To the degree there may be misstatements of law or fact therein, or good solid punches that demand a response from you, oral argument is your only chance. And do not feel limited by the fact that appellant may not repeat these points during their initial presentation. Early on during your oral argument, inform the court that there are certain points in the Reply Brief that require a response from you and then go through those items.

Besides the foregoing; there is a need for special preparation as a respondent that most advocates know nothing about. It does not happen often, but on occasion, when the appellant's counsel walks to the podium, respondent's counsel will hear the Court say: "Sit down counsel. We'd like to first hear from respondent."

Yes, your instinct is correct – that is a very bad sign. It means that, at least tentatively, the Court is persuaded that your side should lose. However much you may have felt like your Respondent's Brief destroyed the appellant's arguments, the answer is it did little if any damage to them.

You must try to find out what the Court is troubled by and address it – or at least be prepared to give a spirited defense of the result below and why it should be affirmed. Doing this effectively – while in a state of shock over your

apparent impending doom – is quite difficult. Therefore, I recommend preparing an emergency argument in advance. Assume the Court has uttered the dreaded words and outline the points you would make as if you were the appellant because, in fact, you should assume that you do now carry the burden of persuasion.

• ***Knowing when* not *to talk!***

In most cases, respondents have the wonderful advantage of hearing the interplay of opposing counsel and the Court. This allows evaluation of which points appear to have been accepted by the Court, how many justices seem inclined to affirm or reverse, and what points now seem to be the important ones for you to stress when your turn arrives. Use the information gleaned during appellant's opening to your strategic advantage in deciding whether to waive your respondent's time altogether (other than directly asking whether the Court has any questions for you) or to reduce the time you use to make the few points you believe may still be appropriate.

But, a little information may be a dangerous thing. For instance, assume one justice has demolished opposing counsel, having made plain that the justice has rejected all the key parts of appellant's argument. Inexperienced counsel might assume that the silence of the other two justices meant that they agreed and the case was clearly going to be won. Not necessarily. The one vocal justice might well be the dissenter, working to convince one of the other two to agree. You just cannot know.

Therefore, unless at least two justices have clearly made their intentions known, do not assume you are going to win. Indeed, even if two justices do appear to be in your camp, you still cannot be sure – but at least, at that point, you should consider making a strategic decision to offer a very limited oral argument.

The strategic decision facing you concerns the classic warning: "do not snatch defeat out of the jaws of victory." If the Court is strongly leaning your way, it is usually better to say little, or nothing.

This is because of the danger that something you say may unexpectedly inspire a thought that none of the justices (or opposing counsel) had before about a good reason that your side should lose. Why risk it? Usually it is far better to let the momentum of the appellant's unsuccessful argument be the last impression the Court is left with.

An additional consideration points to the same conclusion. If the respondent says little or nothing, then there is little or nothing the appellant is permitted to address in the time they had reserved for rebuttal. To the degree you sense that the appellant had intentionally held back any of their strongest arguments, hoping to unleash them from the safety of rebuttal (i.e., the last word), you can thwart them by saying nothing, thereby making any "rebuttal" moot and unavailable.

Indeed, harken back to the example at the beginning of this article concerning the potential "double recovery" issue. Respondent's counsel did me a big favor by using the time he had requested. It was while that (unneeded) argument was going on that I had the time to consult with co-counsel and obtain the permission needed to formally "waive" any alleged right we had to attack the offset.

Conclusion

If a case is worth appealing, it is – with rare exception – worth insisting upon oral argument. But simply showing up does nobody, least of all your client, any good. So, if you are going to do it, do it right. Following the suggestions set forth in this article should help increase the chance that you will use the gift of oral argument to your client's best advantage.


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