# ORAL ARGUMENT ON APPEAL: A VIEW FROM BOTH SIDES OF THE PODIUM

## DOES ORAL ARGUMENT MATTER?

Short answer: definitely.

Justice Brennan: "[o]ral argument is the absolutely indispensable ingredient of appellate advocacy . . . . [O]ften my whole notion of what a case is about crystallizes at oral argument. This happens even though I read the briefs before oral argument; indeed, that is the practice now of all the members of the Supreme Court . . . . Often my idea of how a case shapes up is changed by oral argument."[1]

Chief Justice Rehnquist on oral argument: "it does make a difference: I think that in a significant minority of the cases in which I have heard oral argument, I have left the bench feeling different about the case than I did when I came on the bench."[2]

Empirical review of the evidence suggests that oral argument often affects the disposition of a case "and at times is determinative of the outcome." S. Wasby, S. Peterson, J. Schubert & G. Schubert, *The Supreme Court's Use of Per Curiam Dispositions: The Connection to Oral Argument*, 13 N. Ill. U. L. Rev. 1, 30 (1992).

The judges retire to vote on a case shortly after oral argument. On occasion, oral argument can change a judge's view of the case; it very often will affect how the case is written (whether the opinion will be written broadly or narrowly, published or unpublished).

Although cases can be *won* at oral argument, they also can be *lost*.

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[1] Justice William J. Brennan, quoted in *Harvard Law School Occasional Pamphlet* No. 9, 22–23 (1967).

[2] William H. Rehnquist, *The Supreme Court* (2001).

## FUNCTIONS OF ORAL ARGUMENT FROM THE PERSPECTIVE OF A JUDGE

(1) Help the court understand how a particular holding might play itself out in the real world;

(2) Often teases out an issue that was lurking in the woodwork;

(3) Resolve questions/misunderstandings about the case;

(4) Serves the public interest: client has his day in court, the public witnesses the contentions of the parties.

## PREPARATION

- *Review the record and study the key cases:*

Many months have likely passed between the trial and the appeal. Do not trust your recollection of what witnesses said – it may have come out differently.

- *Consider whether to Shepardize cases*:

Especially with recently decided cases, it is possible that authority has been further appealed or reconsidered.

- *Moot courts*:

Like practicing for a recital, one or two moot courts in important cases will help you anticipate the questions you will face, make your answers to questions crisper, alert you to ways to improve your style of presentation, and will alert you to weaknesses in your case.

Select your sparring partners carefully, or the exercise will be a waste of your (and their) time.

- *Especially for appellants, develop a strong opening*:

Most appellate courts will let you speak for one to two minutes before jumping in with questions. Use that time wisely to drive home one or two key points.

- *Organizing materials*:

There is no single right way to organize the materials. Find a system that works for you.

- *Details*:

Where to sit; whether cell phones are banned from the building; parking; how to pronounce the names of the judges; who the judges are and their backgrounds.

## COMMON QUESTIONS

(1) Where is that testimony/evidence in the record?

(2) What is the strongest case for your position?

(3) What precise relief are you asking for?

(4) If you were writing the opinion, how would you phrase the rule of law you wish this court to adopt?

(5) Do we need to reach this issue if we decide on an alternative ground?

(6) Where in the record was this issue preserved?

(7) How did this alleged error make any difference to the outcome/why isn't this harmless error?

# THE ARGUMENT

"I used to say that, as Solicitor General, I made three arguments of every case. First came the one that I planned – as I thought, logical, coherent, complete. Second was the one actually presented – interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night."[3]

## I. PETITION ARGUMENTS VS. MERITS ARGUMENTS

### A. Petitions

- Less formal; time is even shorter
- The object of the argument: get the court to take the case; it is not necessary to win at this stage.
- Multiple reasons to take a case: the trial court was wrong; courts are reaching different interpretations of case law or statutes; recent precedent calls for reinterpretation of past cases; this is a case of first impression on a new statute.
- Only one vote necessary to have the case granted

### B. Merits

- Judges/Justices tend to be much more familiar with the facts and the law of the cases after they are granted; judges/justices have the benefit of the appendix – at the petition stage there is only one record.
- The object of the merits argument is to win.

[3] Hon. Robert H. Jackson, Advocacy before the Supreme Court: Suggestions for Effective Case Presentations, 37 *American Bar Association Journal* 801, 803 (1951).

## II. TEN COMMON MISTAKES AT ORAL ARGUMENT:

(1) Sticking to a script at all costs

(2) Overreliance on emotional appeals / delivering a jury closing argument

(3) Delaying the answer ("I will get to that in a moment") to the question

(4) Resisting or trying to sidestep questions as irrelevant

(5) If you don't know, don't guess!

(6) Needless concessions

(7) Long winded answers to simple questions – time is precious, use it wisely

(8) Failure to reserve rebuttal

(9) Answer the question "yes," or "no" and <u>then</u> explain

(10) Personal attacks on opposing counsel or the trial judge

### TIPS FOR HANDLING DIFFICULT SCENARIOS

In contemporary practice, oral argument is a chance for a dialogue rather than oratory. One of the central purposes of oral argument is to answer the court's questions. Counsel should welcome questions from the bench. Nevertheless, there are times when counsel needs to extricate from certain situations:

(1) The monopolizing judge:

- Keep your other judges engaged through eye contact or risk losing them.
- There are polite ways to suggest to the monopolizing judge that you need to move on.
    - E.g. "Your honor, I see my time is running short and I would like to address a few other key points."

(2) The judge who is determined to wring a concession:

- Some concessions are entirely appropriate, don't fight pointless battles.
- If not prepared to concede a point, make that clear and move on.
    - E.g. "Your honor, I am simply not prepared to concede that point."

(3) A judge who keeps dwelling on the weaker points of the case:

E.g. "Although I am not prepared to concede that point, that is not our main argument. Our principal argument is . . . ."

(4) Avoid long pauses after a string of questions – it just invites more questioning.

## CONCLUSION

Justice Ruth Bader Ginsburg offers sound advice in her paraphrase of Justice Joseph Story, drawn from his Advice for the Advocates:

Be brief, be pointed

Lucid in style and order

Spend no words on trifles

Condense

Strike but a few blows, strike them to the heart

Scattered fires smother in smoke and noise

Keep this your main guide

Short be your speech, your matter strong and clear

And leave off, leave off when done.[4]

[4] Hon. Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. Rev. 567 (1999).

Resources:

The Virginia State Bar has prepared an excellent (and brief) Handbook on Appellate Advocacy, covering both briefing and oral argument. It is available at: http://www.vsb.org/docs/sections/litigation/AAhandbook.pdf

David C. Frederick, *Supreme Court and Appellate Advocacy* (2006)

Ruggero J. Aldisert, *Winning on Appeal, Better Briefs and Oral Argument* (2003)

Stephen M. Shapiro, *Symposium on Supreme Court Advocacy: Oral Argument in the Supreme Court of the United States*, 33 Cath. U.L. Rev. 529 (1984)