Appellate Tips for Trial Lawyers

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Archives of Past Issues

Appeals can be a minefield for those who don't regularly practice in the appellate courts. This series of short articles, provided by members of the Association's Appellate Courts Committee, will help you find your way. Although the articles focus primarily on California state court appeals, much of the guidance will apply in any appellate court.

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In last month's eNewsletter, Cindy Tobisman wrote an article titled, "Oral Argument: Is Anyone Listening?" Shortly thereafter, Myron Moskovitz submitted a response to Ms. Tobisman's article. Click **here** to read them.

Preparing for Oral Argument

By Frederic D. Cohen and John A. Taylor, Jr.

The dilemma facing appellate litigators who prepare for oral argument is best summed up in the admonition that presiding justices often give to counsel before calling the calendar: "Counsel, we've read your briefs, so please don't repeat what you've written." Balanced against this admonition is the prohibition against raising new contentions at oral argument. (**Estate of McDaniel (2008) 161 Cal.App.4th 458, 463** ["contentions raised for the first time at oral argument are disfavored and may be rejected solely on the ground of their untimeliness"].)

An appellate litigator must thread the needle between these conflicting requirements. Even in well-written briefs, pivotal issues can be obscured by sub issues, and the big picture-the logic and fairness of your client's position-can be lost. Oral argument is the opportunity to simplify your arguments for the court, to distinguish between the important and the really important, and to summarize your strongest legal and policy arguments in a five or six-minute presentation. The remainder of your time can be used answering the court's questions.

So how does one go about distilling a complex set of appellate briefs into a simple and persuasive oral argument? Methods differ from practitioner to practitioner, but the following steps should lead to a confident, persuasive oral argument presentation.

First, because there is always a delay between the close of briefing and the scheduling of oral argument, begin by updating the pertinent legal authorities in the briefs, both yours and opposing counsel's. This requires cite-checking the relevant cases and, particularly if you're representing the respondent or appellee and may need to respond to points in the reply brief, supplementing the legal research on key legal issues. Because counsel should not cite new authorities for the first time at the argument itself, a short, non-argumentative letter should be submitted to the court a week before the argument, citing the new cases and identifying the

sections of the brief to which they relate. If a more extensive explanation about a new legal development is necessary, counsel should seek leave to submit a supplemental letter brief on that development. (Cf. Rule 8.200(a) (4) ["No other brief may be filed except with the permission of the presiding justice"].) However, requests to file such supplemental letter briefs should be used sparingly, primarily to address "game-changing" developments rather than merely to discuss new authorities on points that are adequately supported in the briefs.

Second, read through the briefs and prepare a two- to three-page summary of your legal argument, in language that would make sense to an educated layperson. Unless an appeal turns on the construction of a specific statute or court opinion, cases and statutes should be omitted from this argument summary. Condensing your presentation to no more than three pages will force you to be selective about the issues you plan to discuss, and to summarize those issues with an eye toward clarity and simplicity. And in the unlikely event the court asks no questions, the summary will become your argument.

Third, read your reporter's transcript notes and key portions of the transcript, and review the key pleadings, cases, and statutes. Then annotate your two- to three-page argument outline with pertinent legal and record citations. Since the most productive oral argument time is spent answering the court's questions, try to anticipate what questions the court may ask. If your answers would require citing cases or statutes, include those citations in your outline, quoting or copying key passages from the relevant authorities.

Fourth, think about the case from your opponent's perspective. Deputy Solicitor General Lawrence Wallace, who argued more than 140 cases before the United States Supreme Court, advised lawyers who followed in his footsteps: "If you can't answer the question, 'What are the strongest arguments to be made for the other side?' you're not really prepared to argue the case." (ABA Journal, February 1998, page 14.) Make a list of your opponent's strongest arguments, formulate responses, and add them to your outline.

Fifth, conduct a moot court before two or three attorneys acting as "judges," or at minimum have an informal question-and-answer session with a colleague who is familiar with the case. Moot courts reproduce the dynamics of oral argument and are the best way to anticipate what might actually occur. Including on the moot court panel at least one attorney who has read the briefs but has not previously worked on the case (and therefore is not "invested" in your side of the argument) is helpful because it provides a fresh perspective, and perhaps a reality check to rein in overconfidence. Frequently, the toughest questions from the bench first come to light in moot courts, and you and the mock panel can analyze how best to respond to such questions. You can then supplement your notes with tips picked up during this practice session.

Sixth, organize your notes so that you can quickly locate what you need during the argument. Since it's unusual to get more than 30 seconds into an argument before the court begins asking questions, make the first 30 seconds count, and be sure that if you need to refer to your notes to supplement a point or find a citation in response to a question, you're able to do so quickly. Flagging the key legal points in your notes with tabs may help accomplish this goal, with the added benefit of providing a checklist of the main points you want to make during the argument.

The best oral arguments are conversations with the court, not speeches. The preparation steps outlined above should supply counsel with the best talking points for that conversation.

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