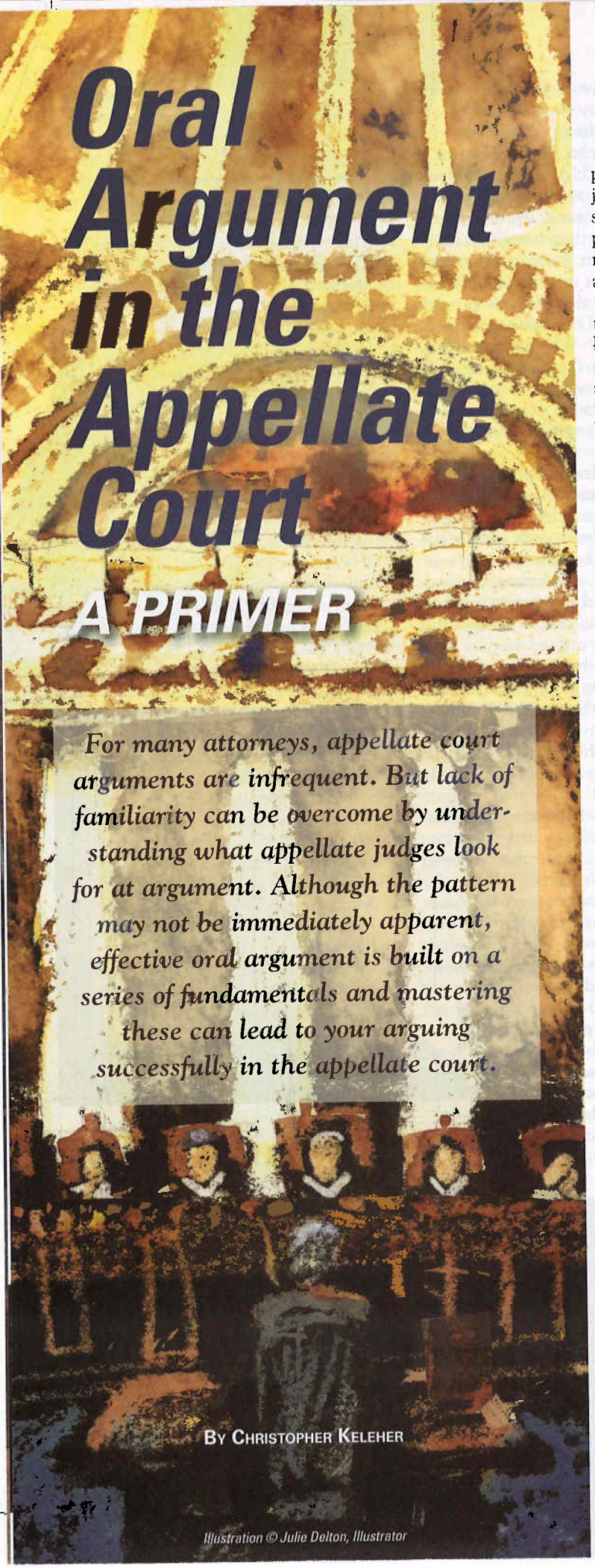
Oral Argument in the Appellate Court

A PRIMER

For many attorneys, appellate court arguments are infrequent. But lack of familiarity can be overcome by understanding what appellate judges look for at argument. Although the pattern may not be immediately apparent, effective oral argument is built on a series of fundamentals and mastering these can lead to your arguing successfully in the appellate court.



By Christopher Keleher

Illustration © Julie Delton, Illustrator

1 The Purpose of Argument

To excel at oral argument, first recognize that the argument is not about your polished presentation or criticizing the trial court. Instead, it is your chance to persuade the appellate court through a mutual dialogue. Your job is to placate the court's concerns by providing honest, insightful, and complete answers to the court's questions. Supreme Court Justice Ruth Bader Ginsburg describes oral argument as "an opportunity to face the decision-makers, to try to answer the questions that trouble the judges."[1]

Effective appellate advocates know the argument is not theirs. As the court dictates the parameters, an argument must be malleable. How the court will react is unknown; questioning may be relentless or sporadic. The focus of the argument also depends on the court. You may want to argue an evidentiary issue, but the court fixates on jurisdiction. Flexibility is key, and you must disavow any notion that you will have an uninterrupted presentation.

2 Don't Be Fatalistic

By the time you approach the podium, the appellate court will have read the briefs and, in most instances, already made its decision. Surveys confirm oral arguments change a judge's mind in approximately 10 percent of cases. While it is easy to conclude the outcome is a foregone conclusion after the briefs are filed, such fatalism will sabotage your argument preparation. Michigan Court of Appeals Judge William C. Whitbeck warns that "it may well be your case that is the exception to the rule and, consequently, it may well be your argument that changes the outcome."[2] Thus, to say with certainty that your appeal falls outside the 10 percent range is fanciful. And with your client's interests and your professional reputation at stake, 10 percent is significant enough. Even in cases where your opponent's position is untenable, a worst-case scenario approach is best.

3 Preparing for Argument

Depending on the court, the time between the conclusion of briefing and argument can span a couple of weeks to many months. The best way to bridge a lengthy gap is to read the briefs every few weeks. Keeping the case fresh in your mind will obviate the need to relearn it. Additionally, be aware of any relevant opinions issued in the meantime.

Once the argument date is on the horizon, delve into the record and relevant authority. Discussing appellate arguments would be incomplete without the obligatory refrain: know the record and the law. While this advice is axiomatic, two corollaries of these tenets are often forgotten. First, understand how the law applies to the facts as this is often a source of the court's questions. Second, recognize the outcome you seek must be feasible for later cases. An appeal is not confined to an isolated set of facts; it culminates in an opinion with precedential value. Caught in the throes of your case, you may easily forget this. But effective appellate advocates understand the court's decision must function for both the parties at bar and future litigants. Anticipate questions about the limits of your position and whether you are asking the court to tread new ground.

Essential to preparation is visiting the court to watch an argument session. Familiarize yourself with the court's protocol and dynamics. If this is not feasible, listen to arguments online. Courts vary on this feature—Minnesota Supreme Court and 8th Circuit arguments are available online, but Minnesota Court of Appeals arguments are not. Finally, mooting sessions are imperative as they can prepare you for the questions later asked in court. Making these sessions as realistic as possible will reduce your nervousness when facing the real thing.

4 Know the Backstory

Judges are inquisitive. They are sometimes interested in the "why" of the case, asking about seemingly trivial points not addressed in the briefs. For example, they may be intrigued by the reason the parties are litigating over an insignificant amount of money or the current status of the parties. Be able to ease the court's curiosity. Providing information not germane to the issues demonstrates your command of the appeal. This ability is fostered by thoroughly understanding your client and the case.

5 Credibility is Critical

Whether at trial or on appeal, credibility is a litigator's lifeblood. But by the time of argument, credibility can be squandered if the brief misconstrues the record or precedent. Assuming your brief accurately reflects the record and the law, parlay that goodwill with an argument that does not strain credibility.

There are two principal ways to lose credibility at oral argument. First, by giving a jury argument. There is nothing more cringe-worthy than counsel treating an appellate court like a jury. Emotion is not a reason to reverse and the court will not be persuaded by an appeal to pathos. You can also ruin your credibility by evading the court's questions. Attorneys have a duty to give honest responses and parrying questions with non-answers does nothing but frustrate the court. Appellate judges know a non-answer when they hear one and the best oratory will not disguise an unwillingness to answer. Foiling inquiries is a Pyrrhic victory because without a responsive answer the court will presume its own or your opponent's position is correct. Moreover, if the response is harmful and you are forthcoming, you can aid your cause by demonstrating your credibility. In short, if the court perceives you as being less than forthright, your argument will mean nothing.

6 Revel in Questions

Dodging questions often stems from a refusal to acknowledge the weaknesses of your case. No case is perfect, and the court's job is to probe your Achilles' heel. Be prepared to explain why you win despite your weaknesses.

Predicting the court's position going into argument is perilous. It is not until argument begins that you can gauge the court's inclinations through its questioning. View questions as an opportunity, not a nuisance. An attitude that welcomes questions conveys confidence. Avoid the bristling body language and look of annoyance that some counsel unwittingly display when questioned. Finally, Judge Whitbeck advises that "if you don't know the answer, don't fake it. A dishonest answer, an incomplete answer, or a misleading answer is far worse than no answer at all."[3]

7 Beginning of the Argument

The time before questioning begins is often short. While the Minnesota Court of Appeals "makes some effort to let the oral advocate have a minute or two of uninterrupted discourse before the questions begin,"[4] do not waste this opportunity by rehashing the procedural posture or engaging in pleasantries. Instead, trumpet the best reason you should win. Supreme Court Chief Justice John Roberts stresses this point: "You're only guaranteed usually about a minute or so … before a Justice is going to jump in. So I always thought it was very important to work very hard on those first few sentences."[5]

8 Content of the Argument

When not answering questions, reduce your case to its essentials and emphasize its strengths. Tell the court why you should prevail—not why the other side should lose. While an opponent's flaws should be highlighted, first provide the court with something positive about your case. Explain why your position aligns with precedent and the needs of the judiciary and society. If common sense is on your side, say so.

Ad hominems have no place in an argument. No matter how reprehensible the other side's conduct, never spew invective. Similarly, guard your criticism of the trial court. Many appellate judges once sat on the trial bench and will not be persuaded by an attack on a colleague's competence or integrity. If a trial judge's conduct is outlandish, it will speak for itself.

Remember that oral argument is the sole opportunity to look the court in the eye and ensure your best argument passes through the court's mind at least once. Chief Justice Roberts advises that "if you can't explain what this case is about and why you should win, you've got to go back and practice it again. You're too immersed in it, you're too much at the level of jargon, or you don't understand it."[6]

9 While Your Opponent Argues

From the moment you enter the courtroom, be aware of your presence. This includes while your opponent attacks your case. Maintaining a professional demeanor is difficult when your opponent argues. Resist the urge to make facial gestures, sigh, or shake your head. Keep a calm demeanor and document counsel's errors. When it is your turn to speak, correct the misstatements.

Summation

Appellate argument is an honor, not a tribulation. The argument is the only chance to interact with appellate judges and tell them why they should adopt your position. Appreciate that opportunity through adequate preparation, respectful demeanor, and helpful answers. ▲

CHRISTOPHER P. KELEHER is special counsel in the appellate practice group at Bates Carey Nicolaides in Chicago. A graduate of Marquette University, he received his J.D. summa cum laude from the DePaul University School of Law where he was admitted to the Order of the Coif and served as Notes & Comments Editor for the law review. He subsequently clerked for the Hon. William J. Bauer of the U.S. Court of Appeals for the 7th Circuit. He is admitted to practice in Illinois, before the United States Supreme Court, and before the 4th, 6th, 7th, and 8th Circuit Courts of Appeals.

Notes

[1] Garner, Bryan A. et al., eds., *The Scribes Journal of Legal Writing* (2010) at 136; *available at http://legaltimes.typepad.com/files/garner-transcripts-1.pdf.*

[2] Whitbeck, William C. "Part 2: Arguing To Win at The Court of Appeals," 85 *Michigan Bar Journal* 24 (July 2006).

[3] *Id.*

[4] Herr, David F. & Haley N. Schaffer, "Suggestions From the Practicing Bar: Things Practitioners Wish the Court of Appeals Would Do Differently," 35 *Wm. Mitchell L. Rev.* 1286, 1294 (2009).

[5] Garner, *The Scribes Journal of Legal Writing*, supra n. 1 at 20.

[6] *Id.* at 25.