Perfecting YOUR ORAL ARGUMENT

By Christopher Keleher

Attorneys often approach an appellate argument with a mix of trepidation, anticipation and excitement. Whether a novice or veteran, these feelings are natural. The anxiety caused by an oral argument stems from its amorphous nature. Just as no two cases are alike, no two arguments are alike. Beyond the inherent factual and legal distinctions, the makeup of an appellate panel often differs with each case. That makeup impacts the tenor of the argument. Further, there can be a disconnect between bench and bar as to the focus of the argument. The court may inquire about matters that counsel (perhaps correctly) considers peripheral. Such questions must be answered before addressing the issues counsel deems dispositive. As the court largely controls the direction of oral argument, unpredictability reigns.

Counsel can mitigate this uncertainty with a presentation that is fluid and flexible. A fluid argument absorbs questions and uses the answers to pivot to the next point. While the segue from answer to argument is hard to master, the source of that difficulty can be the very thing attorneys cling to for support—their notes.

GOING PAPERLESS

Large binders are often lugged to the lectern. Other than a decade-long antitrust case, this is cumbersome. Even bringing the appellate briefs is unnecessary. By the time of argument, the case should be distilled to its essentials. A one-page outline is preferable. Better yet, bring nothing. While arguing without notes is not always feasible, for a typical two- or three-issue appeal, it is attainable.

So why go paperless? The advice to aim for a conversational tone at argument is familiar. Indeed, you want to talk with your listeners, not at them. But how many conversations with friends or colleagues occur while glancing at paperwork, or consulting an outline when they ask a question? Notes impede the process because they interrupt the flow. A conversational tone is difficult when papers are shuffled.

Contrast an argument without notes. Along with a conversational tone, judges will be more attentive because you are engaging them, not the lectern. Your presentation loses its rigidity because you are not tied to a script. Eye contact is maintained the entire time. There is nothing to look down at when a difficult question is posed. Put simply, there is no crutch. While this may sound problematic, for a prepared practitioner, it is not.

IT'S NEVER TOO EARLY TO PREPARE

Going paperless is not as daunting as it sounds. The key, like most things, is preparation. An argument becomes instinctual with substantial and consistent preparation.

When to start? As soon as practical. Oral argument is often not set until months after appellate briefing finishes. For a harried lawyer, that few-month gap can be a lifetime. This passage of time dilutes the momentum and knowledge that come from writing a brief. Waiting until a week before argument to prepare requires relearning the case. A more efficient and effective method is to prepare right after finishing your response brief (if the appellee) or your reply brief (if the appellant). This way the case is fresh. While an appellee will not yet have the appellant's reply brief, the argument should still be developed because it is better to lead with the merits of your position.

Adequate preparation enables you to speak effortlessly without notes. Practice out loud regularly. Record your practice

runs to gauge how you look and sound. Have colleagues sit in so that eye contact becomes second nature. These sessions allow you to learn the material, to pace yourself and to polish the content of your argument.

CRAFTING YOUR MESSAGE

Even the best preparation is for naught if the substance of your argument is weak. Time limits will prevent you from addressing every issue during oral argument. Thus, after briefing, assess the merits of each point and recognize which has the best chance of success given the standard of review, law and facts. Select the most viable issue and build the argument around it. The core of your message should be about why you prevail, not why your opponent loses. While an opponent's flaws should be highlighted, that focus is secondary.

The key to a convincing message is a forceful introduction. The one aspect of oral argument counsel controls, albeit tentatively, is the beginning. Before the clamor of questions, assert your strongest point. Framing your position in the best light—whether it is fact, law or policy—starts the argument on favorable terms. While the court can quickly shift the debate, it must acknowledge your opening comment.

A strong start is important for another reason. Information presented at the beginning tends to be better retained due to the effect of primacy. Dull introductions such as "this is an appeal of a summary judgment" or "this case involves a breach of contract" are lost opportunities. Instead, pique the court's interest with an attention-grabbing introduction. This is confirmed by Chief Justice John Roberts: "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." [1]

A flexible argument anticipates both positive and negative reactions. If the court is unreceptive and you are mired in hostile questions, try to find common ground and build from there. If the court is not grasping the import of a critical fact or principle, restate it. Restating is the art of being redundant without being repetitious. To restate, use different types of support: an example, an analogy or a case. What motivates one judge may fall flat with another. Restating increases the likelihood the panel will better understand your position. It also recognizes the divergent needs and motivations of different listeners. Speaking experts emphasize that you communicate not by what you say, but by what listeners hear.[2] Saying something multiple ways makes it more likely judges will hear your message in a way that individually resonates with them.

If time permits, finish assertively. A conclusion with a memorable impact statement is superior to the staid request for reversal or affirmance.

CONVEYING YOUR MESSAGE

While appearance is not everything, you should still be mindful of how the court perceives you. Aim for an aura that exudes control. Approach the lectern with a purposeful stride. Plant your feet firmly, don't sway, and don't lean on the lectern. Project your voice with confidence. You should come across as wanting to be there. A positive and confident demeanor enhances your credibility.

Engage the court by using body language that shows you care about your client and your message. Avoid bristling at unfriendly questions. Instead, focus on the needs of the court by displaying a welcoming attitude towards questions. Provide full and forthright answers to those questions. Finally, employ silent pauses to give listeners (and yourself) a break.

CONCLUSION

Oral argument is your only chance to face the appellate court. Capitalize on this opportunity with a fluid and flexible presentation. With consistent eye contact and a conversational tone, you will strengthen your appellate argument and increase your chances of success.

1. *Garner, Bryan A. et al., eds., The Scribes Journal of Legal Writing (2010) at 20; available at http://legaltimes.typepad.com/files/garner-transcripts-1.pdf.*
2. *Krannich, Caryle Rae, 101 Secrets of Highly Effective Speakers (1998).*

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