Oral Argument: A Purposeful Conversation

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Justice Stephen Breyer of the United States Supreme Court has described oral argument as a conversation. Its purpose is to help the court decide the case. You help the court by having a well-developed argument and by answering the court's questions.

Although oral argument is usually optional, given its purpose it should not be waived. This is counsel's only chance to discuss the case with the justices who will decide it. (Appellate judicial officers are called justices in the state court of appeal and judges in the federal court of appeals. This article will refer to all judges on the appellate level – state and federal – as justices.) Further, because appellate courts rarely provide tentative opinions before oral

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argument, counsel rarely knows whether the court has questions about the case or has made a factual or legal error in its analysis. Waiving oral argument means losing a critical opportunity to affect the decision. Indeed, several appellate justices have commented that they are surprised when counsel waive argument; it suggests that counsel is not interested in engaging with the court.

Preparing for Oral Argument

The key to effective oral argument and confident delivery is preparation. As one colleague says, "Become master of the record and the law." Begin with reviewing your record summaries, and go back into the record itself to confirm critical factual points. Then read all the briefs. If a brief contains a factual statement that you do not recall from your review of the record, go back to the record to be certain the statements are correct or appropriately complete or contextualized.

As you review the record and briefs, begin reviewing the law. Re-read the statutes and leading cases on which you and your opposition rely. As time has passed between briefing and preparing for oral argument, a re-reading of the key cases is warranted; and the fresh reading may bring different insights about them. Research whether there have been any changes to the controlling statutes or any new decisions that may affect the case. If there are a number of relevant or key cases, you may find it helpful to create a chart or other summary of the cases – including citation, key facts, and holding – for easy reference during argument.

If there is a new, significant case on point to your factual or legal issues, bring that case to the court's attention. (See California Rules of Court ("C.R.C."), Rule 8.254, for the procedures

for doing so.) If your preparation reveals a critical case that you did not discuss in your brief or that is necessary to respond to appellant's reply brief, send a letter to the court, copied to opposing counsel, stating that you will refer to the case at oral argument.

When preparing, think anew about the case. Consider the strengths of your opposition: what is his or her best argument? Consider the weaknesses of your case: where is it vulnerable? Consider whether there are policy issues that you should address or that the court may raise. Anticipate the questions of the court. And ask yourself whether you can succinctly say where the trial court erred and why -- or why its decision was correct – under the governing standard of review and controlling law.

Corral your thoughts into organized notes. The notes should address all of the points that you want to make. (Your argument should be focused on a few main points, not necessarily on every issue raised in your brief. But be prepared to answer questions on any points raised in your brief.) The notes should include a carefully prepared opening that summarizes your position, capturing the justice and reason of your side of the case.

Organize all your materials for oral argument into a notebook. The notebook – which for preparation purposes can be physical or digital (for example, using Microsoft's OneNote) – should include your argument notes, copies of relevant statutes, summaries or copies of relevant cases, your chart of cases, a time-line of critical events, a list of essential facts, and key documents from the record which you may need to reference during argument. Whether you take the notebook to the lectern is a matter of personal style. Some lawyers prefer having just a page of notes, and some take no notes at all to the lectern.

The final step of preparation is practice. Say your argument aloud. Stand in your office

or in front of a mirror, with your notebook, and give your argument to nobody in particular! How does it sound to your ear? Does hearing it expose weaknesses, inconsistencies, flawed logic, or awkward transitions? Does it evoke questions? Work on these questions or weaknesses. After this polishing, practice it again. And again. Become so familiar with the arguments – familiar, not memorized – that you can easily access parts of the argument when answering the court's questions.

When you can assemble a moot court, do so. But do not be discouraged if moot court is not available. You can still practice, polish, practice, and practice again ("the Four P's")!

Presenting the Argument

In the California state-appellate courts, each party is generally allowed to designate how much time it wants for argument, up to a maximum of 30 minutes. (The calendar notice will probably disclose any different practice.) In the federal appellate courts, oral argument is mandated except in the most limited of circumstances, but the court will decide how much time is allocated to each side, also up to 30 minutes each side. (For state-court appeals, see C.R.C., Rule 8.256 and local District rules; for federal-court appeals, see Federal Rules of Appellate Procedure, Rule 34 and Circuit Rule 34.)

Do not give a prepared speech. Oral argument is not a closing argument, and an impassioned speech will not persuade – or even impress – the court. The conversation is the persuasion.

Your notes and outline are your guide for the conversation, not your script. If you have a "cold bench" that does not ask any questions, your notes will be the logical sequence of your

argument. If you have a "hot bench" that interrupts with questions, depart from your sequence but use the information in your notes to answer the questions. Questions are your friends. Questions allow you to focus on what interests the court. They provide insights into what concerns the court and can reveal a critical misunderstanding of the facts.

Listen to the questions. Ask the court to repeat a question if you are not sure of it (or, as happens, cannot hear it). If necessary, take a moment to think about the question. A justice may not be arguing or rejecting your point; he or she may simply be seeking help on how to write up a point. Sometimes a justice poses a question in an effort to resolve a debate among the justices or lobs a "softball" designed to underscore a point to another member of the panel.

Answer the questions, and answer them immediately. This is imperative – never just say that you will return to the point. If the court has a question, that is all that interests the court at that moment. If you are asked a "yes" or "no" question, answer with a direct "yes" or "no" and then explain your answer. If the court asks a hypothetical, answer it. Sometimes the court is exploring concepts through hypotheticals. After answering, if necessary, distinguish the hypothetical from your case or bring the court back to your facts. Concede weak points; it preserves your credibility. But explain why that weak point is not controlling or fatal. If you are uncertain of an answer, state that. Where appropriate, explain why you are uncertain. If the point is critical, ask for an opportunity to submit a short letter brief on the question. If the court thinks the answer is critical, it will probably give you that opportunity.

Listen to your opponent's argument. What has the court asked counsel? Do the questions reveal that the justices – or some of the justices – agree with you? Where is the court struggling? As respondent, start with these points. Clarify a point that your opposition could

not; clarify any misunderstanding or misstatements about the record. Help resolve the court's struggle. If the questions indicate that the court is sympathetic to your argument, reinforce the point by citing to the record or relevant authorities to assure the court that its sympathies are well-founded.

Know when to sit down. If it is clear that the court has fully accepted your argument, as reflected in the questions to your opponent, you should offer to submit on that issue "unless the court has any questions."

When the court has completed asking its questions and you have covered all your points, argument is finished. Try to end on a strong note, ideally with a prepared closing that summarizes why you should win or what relief you want (e.g., a full reversal, or reversal and remand on particular issues). Some counsel end with the prepared closing alone; others will then ask if there are any further questions as a final deference to the court. The final courtesy is to thank the court for its attention.

It is often said that we give three arguments – one we prepare to give, one we actually give, and one we give on the way home. The one on the way home is always the best. But when well prepared, the one we actually give can be very satisfying, whatever the outcome.