

Sharpening your oral-argument skills

Be prepared for the Court to take control of your oral argument.

By Donna Bader

In Making Your Case: The Art of Persuading Judges, the authors, Antonin Scalia and Bryan A. Garner (Thomson/West, 2008), importantly note, "In most courts, the modern oral argument would be more accurately described as discussion led by the judges."



Fybel

Justice Richard D. Fybel of the Fourth Appellate District, Division Three, agrees. "The goal is to have a conversation with the Court, but it doesn't always happen. Attorneys are prepared to talk about the strengths in their case, but they don't always prepare for the most difficult questions about the weaknesses. The best 'conversation' occurs when we can discuss all aspects of a case."



James

Katherine James, an actor and one of the principals of Act of Communication, Inc., which trains and consults with trial lawyers, also points out:

> The justices believe they already have a handle on your case. The question is whether they are keeping an open mind to what you have to say. You need to make a compelling presentation and observe their physical and nonverbal signs. The attorney must listen to the meaning behind the justices' questions.

Presiding Justice Paul Turner of Division Five of the Second Appellate District says:

> The less prepared the Court is about your case, the greater the impact of oral argument. Every oral argument causes the justices to rethink their opinion, even if, as in most cases, oral argument may confirm that opinion.

Preparing for oral argument

Even if the Court ultimately decides the direction of oral argument, an attorney should prepare a formal presentation. Justice Fybel suggests that the most effective presentation involves an outline of the points to be made. He recommends that counsel should limit the presentation on oral argument to one to three key arguments that demonstrate reversible error. The attorney should also be familiar with the applicable standard of review. You may also want to include a few cites to the record so you can easily refer to them.

Justice Fybel offers different advice for the respondent. Rather than immediately taking a defensive position and responding to the points made by the appellant, the respondent should start off with the strongest points in favor of the position that no legal error occurred. Many respondents, he notes, immediately come off as too defensive.



Ehrlich

Jeffrey Ehrlich, an appellate attorney in Claremont who has argued over 100 appeals, cautions against focusing too much on your position. Look at the opposing party's briefs, he suggests. "Listen to what they are saying. Drop your guard and try to understand their point. If you don't understand their position, you won't be effective at responding." One solution might be to ask yourself how would you argue the case if you were in the opposing party's position.

Justice Turner suggests that when preparing to address a weakness, "marshal every fact that supports your position and be able to tell the court those facts."

At a recent appellate seminar, Justice Norman Epstein of the Second Appellate District, Division Four, said, "Don't ignore it and hope it will go away. Attorneys will often pretend not to hear the question or understand what is being asked. You have to deal with it. Think the question through and give the best answer the facts and law permit."

Some attorneys will type up an outline but never utter the words before ac-

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tual delivery. James claims, "If your oral argument is only on paper, you are unprepared. You have simply not made the argument your own."

On the other hand, avoid practicing the presentation so that you use the same words every time. You want to remember the points, not the actual sentences. Switch your argument around, sometimes starting in the middle or even the end, so that you can easily resume with your presentation after answering a question without stumbling around for your place.

To avoid rearguing points he has already made, Ehrlich tries to find the critical issues and how he can express them by adding a new wrinkle. "I don't want to come up with a totally new argument that seems out of left field, but I don't want to argue points already discussed in my briefs.

Justice Fybel feels eye contact is "absolutely essential. It's annoying when the attorney never looks at the panel but is buried in a written outline. How can they have a conversation with us? And remember, we are a 'panel,' so be sure to a look at all members of the panel, especially the justice asking the questions." Justice Fybel also notes that attorneys might want to have their styles critiqued, and if necessary, consider voice training.

Appellate attorneys are considering mock oral arguments, especially if the stakes in the case are high. Ehrlich, a solo practitioner, notes the difficulties of getting a "panel" together that will read your briefs and ask questions. Firms can frequently rely on the other attorneys. Norman Pine, an appellate specialist in Sherman Oaks who has been working exclusively on appeals for 18 years, is fortunate to be able to conduct mock oral arguments with the help of his law partner and wife, Beverly.



Pine

Laypeople can also help in preparing you for oral argument. While the attorney may not analyze relevant cases, he or she is forced to be interesting and succinct. Laypeople may also point out areas of confusion or those having the most impact.

Questions, questions, questions

The biggest concern an attorney may have about oral argument is how to deal with questions. This is one area the attorney can't always control or anticipate.

Questions should be looked upon as a great opportunity. First, you learn which issues the Court wants addressed. You can focus on an area of interest and have a meaningful discussion about it. If you can't understand the question, don't tough it out; ask for clarification.

Justice Fybel warns about trying to figure out why the justices are asking questions. There simply isn't enough time and there may be many reasons for asking a question. "I ask a lot of questions to test the theories in the case." He is surprised when attorneys try to avoid questions in favor of resuming their formal presentations. "Why would they do that when they know the justice is more interested in getting an answer to a question rather than having the attorney go back to an outline that he or she may feel more comfortable with? It's better to give us an answer, then resume with the presentation."

Justice Turner adds, "We tell the attorney that we're friends here. Just tell us what's important about your case. If the attorney is nervous, he or she is less able to communicate and tell us what we need to know."

James adds, "You are not up there just to broadcast your presence and hope your words land somewhere. Not only must the attorney listen to the questions asked, but he or she should be willing to explore what is *underneath* the question."

If the attorney believes he or she must give a great speech, the attorney is putting unnecessary pressure on the "performance" as the center of attention. If the attorney views the process as a discussion or conversation, with the goal of assisting the justices, the process becomes more collaborative and the pressure is removed. Justice Fybel notes, "Our goal is to find the right answer. It is not our goal to get a performance from the lawyer or make him or her look good. So, answer the question."

That includes addressing the weaknesses in your case. Justice Fybel says, "An attorney should prepare for questions concerning the weaknesses in your case. You probably know the strengths, but it is a problem when we ask about weaknesses and the attorney is not prepared to discuss them. We get that 'deer caught in the headlights' look. It amazes me when we get that reaction because the opposing side has raised the issues. Attorneys need to be prepared to have answers for both the strengths and weaknesses in their case."

Ehrlich agrees. "Do not be afraid to answer questions put directly to you. Attorneys try to hedge. I will give a 'yes' or 'no' answer, then discuss my reasons. Before you argue, give some real thought to the questions you are likely to get. You should be able to see them coming."

Pine comments, "Once in a while a justice may ask a question and the attorney can tell that the justice has a firm mindset. Oral argument may not change that. Many times a justice will ask a question because he or she is honestly considering ruling in my favor; however, unless I can provide a good answer to the question, the justice may not be able to rule for my client."

Ehrlich warns against finishing up oral argument by saying, "'If there are no further questions, then I will submit.' I think that is a weak way to end your presentation. We all know that if the Court has additional questions, it will ask them."

Justice Turner agrees, "No great speech was ever concluded with the statement that 'If there are no further ques-

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tions, I will submit.' It's simply not a great ending."

Don't ignore your physical preparation

As you prepare for oral argument, don't overlook the physical aspects of your preparation. You can fill your brain with facts and law, but if your delivery is dead due to lack of sleep, anxiety and an inability to focus, you won't be effective.

You may spend hours in one position while reviewing your case. Your body will store the tension, resulting in a stiff delivery during oral argument. Try to relax; nervous energy does not help.

Relaxation techniques can include:

- Exercise
- Yoga
- Meditation
- Massage
- Fun activities
- Sleep

Logic vs. passion

Does passion have a place in oral argument? Justices often express displeasure when they are required to sit through a closing argument that is more properly addressed to a jury.

Ehrlich says, "My goal is to win the argument with logic, not my passion." Even so, he has been involved in some cases that have an emotional core, and he is willing to express passion in his argument.

James believes passion has its place in an oral argument. She says, "Passion for the law has always got to be there. If an appellate attorney doesn't have passion for the law, who will? You are appealing to the court's sense of justice at its most basic level, but your argument must also be heartfelt. Without the law to support your position, the whole house of cards falls down. I think the justices want to know that you really believe in what you are saying."

Justice Turner minimizes the role of passion. He suggests selecting words to convey a dramatic impact. Some attorneys, he notes, confuse intensity with being loud, which is unnecessary when facing three justices in close proximity.

Waiving oral argument

Appellate attorneys and justices advise against waiving oral argument in most circumstances. If you don't show up, you may miss an opportunity to answer a crucial question.

When asked why bother with oral argument if the court rarely changes its mind, Pine immediately responded, "For the same reason I always put on a seatbelt, even though I am 'rarely' in an auto accident. You never know which one is the one you really need it for. You don't want to find out after the case has been decided."

The big day draws near

The day before oral argument is not the time to experiment with a spicy new dish from Indonesia. Try to avoid foods that may be upsetting to your stomach and stick with a regular diet. Coffee? It may make you too jittery and require more trips to the bathroom. Your adrenaline will kick in to give you a boost anyway. Plan to be at the courthouse in plenty of time before oral argument. If you have a morning appearance in a court that is not close to home, consider spending the night at a nearby hotel. You don't need the additional stress of trying to make it to the courthouse on time. Plus, you can save traveling time and spend it on case preparation.

You may want to warm up your body by stretching to free it from stored tension. Don't forget to warm up your voice as well. (Act of Communication offers a tape on vocal warmup.) If nothing else, try singing on the way to the courthouse.

Breathe deeply. Nervous people tend to take shallow breaths, not taking the air into the lungs. It's part of our "fight or flight" behavior. That only increases nervousness.

Watch your posture as well. Bending over restricts the lung area, again forcing shallow breathing. Keep the lung area open by throwing your shoulders back and standing tall. It will also enhance the impression that you are confident and knowledgeable.

What do you take to the lectern? If you are tied to your notes, you will find yourself constantly looking down. Most experienced practitioners will take a few sheets of paper that contain points – not full sentences – to trigger their memories. Make sure the font size is large enough so that you don't have to squint to see the words.

Justice Fybel enjoys the small courtesies, such as starting off with a formal "May it Please the Court." At a minimum, he says, the attorney should state his or her name and let us know which party they are representing. Justice Turner suggests the attorney begin with an introduction of what is going to be discussed.

Unlike trial attorneys, appellate attorneys cannot move around the courtroom. We are essentially tied to a small space around the lectern, especially if there is a microphone. "That doesn't mean," warns James, "that you must be frozen in place. You can move to the right or left, and you can make gestures, which you can't do if you are digging your fingernails into the lectern."

James also suggests using language that is active, simple and almost free of legal jargon. If you realize your greatest impact is at the beginning of your presentation, start with the strengths of your case, even as a respondent.

Make sure that you have advised the court and opposing counsel about any authorities you plan to discuss that are not referenced in the briefs. Most courts will not allow you to explore new cases unless they are disclosed. And if you are facing such a situation, you might ask to submit supplemental briefing to address the new case.

Justice Turner advises attorneys to be thoroughly prepared. "Tell us what you are going to talk about, know your authorities, stay within the time estimate,

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respond to questions from the court and be succinct."

Pine concurs, "Be very sharp and focused, and attend to what you are being asked."

Richard Pfeiffer, an appellate attorney in Santa Ana, adds, "When I started, the hardest part of oral argument was learning when to quit while you are ahead. In other words, shut up and sit down if the argument is going well. It's not always an easy thing for an attorney to do."

Once you have concluded oral argument, avoid going over it again and again in your head. There are no reruns in oral argument. Lamenting your responses will not serve any purpose. (Dark chocolate is especially helpful at times like this.) Go out and enjoy yourself, forgetting about the case until the opinion arrives in the mail!


Bader

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Resources:

Making Your Case: The Art of Persuading Judges by Antonin Scalia and Bryan A. Garner (Thomson/West, 2008).

Act of Communication, www.actofcommunication.com or (310) 391-9661 (Seminars, tapes, and personal consultations)

Oral Argument Guide for Division Five, http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/documents/oralargguide.pdf

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