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Openings in Appellate Oral Arguments

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You are on your feet at the podium and you have told the appellate panel who you are and whom you represent. What is the first substantive thing you should now tell the court (always assuming you get that opportunity before questions assault you)? It obviously depends on the case, the number and type of issues on appeal, and the court itself, but here are some opening gambits to consider and test in any mock oral argument you conduct.

1. Opening the argument as the appellant.

When you open as the appellant, you want to get the panel engaged from the outset in your argument. But, you don't yet know where the court wants to go, and you want to go where the court wants to go. So how do you best get there, before the court's questioning begins?

One of our very experienced appellate lawyers almost always starts his argument as the appellant by saying something like this:

> I'm going to address three points:
> - First, the judgment should be reversed for entry of judgment for the defendant because it owed no duty to the plaintiff as a matter of law.
> - Second, at a minimum, the judgment should be reserved for a new trial because the trial court failed to instruct on the defendant's causation defenses.
> - Third, in all events, prejudgment interest was erroneously awarded.

This opening always is short and crisp. It gives the panel a quick roadmap and makes clear you have different points that you will be addressing during your argument. The obvious danger is that questions may come immediately on issues other than the one you would like to press at the outset. But that danger exists whenever there are multiple issues on appeal, no matter how you start your

argument. And the benefit is the court takes you where it wants to go, which may be a different point than the one you thought was your winning point on appeal.

Sometimes, you may want to identify a single issue you will be addressing, saying you will rely on the briefs for the other issues, absent questions from the court on them. The obvious benefit is that this allows you to focus on what you perceive to be your strongest point. The obvious danger, once again, is that the court may be more interested in some other issue. So you need to be prepared to address all of your issues, even if you don't want to start with them.

Many lawyers like to start an argument for the appellant with the best fact or point in their favor and then expand on it, hoping they will catch and then hold the panel's attention. For example:

> This case arises from a business dispute that was resolved by a settlement agreement the appellee admittedly failed to perform. Nonetheless, the trial court ruled the appellee was not liable for its breach. But it was, and here is why.

Hopefully the court will want to hear your explanation before questions start.

This approach is rooted in the frequently given observation that "when the right point of view is discovered, the problem is more than half solved." Consequently, simply framing the ultimate issue for the court at the outset of your argument (always consistent with the applicable standard of review) can be a very effective opening to an appellant's argument.

In the same vein, squarely framing the issue as it has been narrowed by the answer brief and the reply brief often can be effective. (Indeed, as will be discussed, this can be effective for the appellee as well.) But the issue always should be fairly stated, not unfairly slanted. The test should be whether your statement of the issue could be properly adopted by the court in writing its opinion.

Judges consistently say it is not effective for the appellant to launch into a description of the facts below. That is for the briefs to do. Oral argument is to cogently make clear why, given the facts and law addressed in the parties' briefs, the court should reverse the trial court's order. If that is a de novo determination by the appellate court, the appellant should remind the appellate court of that in stating the issue to be resolved on appeal.

2. Opening the argument as the appellee.

In some ways it is harder for an appellee's oral counsel to prepare an effective opening for the responsive argument since the appellant's argument has not yet been heard. But it is important to prepare one if for no other reason than the calming effect it has on you before the argument starts. It

also will provide a quick mantra to have in mind, which you almost certainly will be able to use at some point in the argument.

Most appellate arguments provide ample opportunity to the appellee for a forceful argument, and you should take advantage of the presumptions of correctness that often flow to the appellee's benefit. To that end, framing (or reframing) the fundamental issue before the court also may be a good starting point for the appellee. For example, saying "the briefs make it clear that the issue for the court to decide rests on the applicability of the doctrine of *contra proferentem* to a sophisticated insured whose broker obtained its policy" can effectively set the parameters for your conversation with the panel.

It likewise can be effective to say something like this: "The appellant's argument fails for three reasons. First, it ignores this Court's standard review. Second, it ignores the record facts taken in the appellee's favor. And third, it ignores the law applicable to the facts. I will address each in turn."

But, however much you love the opening words you had originally planned to say, you must stay flexible and willing to decide on the spot how to open in response to the appellant's argument. By the time you rise to your feet, you will know where the appellant and the court have gone. It may be where you anticipated, but if not, you need to be prepared to go where the court takes the parties.

So don't be afraid to change your opening based on the argument (or lack of argument) by the appellant's counsel on a particular issue, the questions (or lack of questions) to the appellant's counsel, and the body language of the judges. Adapt your opening points to the reality of how the appellant's argument proceeded. There may have been some devastating questions from the bench or some key misstatements or omissions by the appellant's counsel that you want to seize on from the very start of your argument.

Never assume, however, that the case has been won based on the panel's reaction to the appellant's argument. I once listened to a panel blast the appellants' counsel to bits in his opening argument. Before I could say a word when I got to the podium, however, the panel had turned its guns on me. Outside the courtroom after the argument, opposing counsel told me that, although the argument certainly had been "fun," he thought we ought to promptly settle. So did I.

3. Musings on what to say first.

Perhaps the best opening I know about is, "The issue before the Court is whether *Brown v. Smith* is still the law of this Country." Supposedly the United States Supreme Court began its opinion with the sentence "*Brown v. Smith* is still the law of the Country." That is the gold standard for a good opening of an appellate argument!

Whether advocating for the appellant or appellee, I always work hard on the first words I hope to say to the court in the first minute I am on my feet. Then I always change them after my argument is mooted. Always. That's one good reason to always do a mock oral argument before the real thing.

By the same token, listen to what your gut tells you at the actual argument. You may not need to start where you planned to start. You may be able to shorten what you had planned to say to the court and sit down early if there are no questions to you. Just because you had planned a full argument on all issues doesn't mean you have to give that entire argument.

And remember, sometimes what you planned to say as your opening words may turn out to be powerful closing words.

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