Appellate Oral Argument

by Gary L. Sasso

Some lawyers say you can't win appeals in oral argument, but they think you can *lose* them there. I think that is half right. Close cases especially can be won *or* lost in oral argument. There are many reasons Appellate judges are busy, and they are fallible The time they can spend on an appeal before they vote is a tiny fraction of the years of litigation history that make a case what it is. An appellate court must depend upon lawyers to supply what it needs to know to decide the case, but counsel have few chances to do that. The briefs are crucial, of course, but many judges read briefs quickly, sometimes 15 minutes here or there, amidst their other duties. And a few judges do not read the briefs at all; they ask their law clerks to do the reading and prepare bench memos summarizing the parties' contentions

An appellate court's only direct contact with counsel is oral argument This is the sole occasion when the panel can talk to a lawyer, and it is usually the first time that the panel devotes its undivided attention, as a group, to your case. So it is that several years of litigation, scores of depositions,warehouses of documents, hundreds of thousands of dollars of expense, and millions of dollars in controversy may depend on how you use 20 minutes at the lectern. It deserves thought

Too often, lawyers fail to take full advantage of this chance to inform and persuade the court Worse, by mishandling argument, a lawyer may make a good case look bad The problem stems from a failure (or refusal) to grasp certain fundamentals Most lawyers have heard these fundamentals; they may claim that they observe them. But, in actual practice, counsel either do not take them to heart, or they wrongly feel justified in making exceptions that swallow the rules

Before considering these principles, there is a yet more basic matter You cannot—absolutely cannot—be effective in oral argument unless you establish and maintain *credibility* with the court This is not a gimmick Credibility does not mean merely sounding sincere, although that will follow from doing everything else you need to do Credibility comes from having command of the issues, the facts, and the law. It comes from clear reasoning. And it comes from your honesty and integrity in dealing with the court In other words, it means demonstrating, in all you do, that you are worth listening to and that you can be believed The principles that follow all contribute to that

1. Keep it simple.

This maxim has been stated so often that it may seem numbingly obvious. But the same might be said of "Thou shalt not kill." Each is repeated a lot because each means a lot. Violating either rule can lead to disaster.

Chances are, whatever you *expect* to argue, the court will make you keep it simple by using up your time asking questions. Those inquiries will concern a few central issues But you don't want to get to simplicity by accident To be most effective, you need to *plan* a limited, incisive argument If you begin complex, the court will leave you stammering, searching vainly for a way to argue what the court does not want to hear.

In handling an appeal, "keeping it simple" means limiting the appeal, as counsel for the appellant, to one to three grounds, and, as counsel for either side, selecting one to three points about those grounds to emphasize in argument.

If you represent the appellant, you should have made hard judgments, long before argument, when selecting the grounds for the appeal Frustrated by an adverse outcome and peeved by many unhappy rulings, large and small, trial counsel often want to appeal on six or eight grounds Bad idea. Appellate courts are skeptical of scattershot appeals Appellate courts loathe appeals that (1) take issue with a trial judge's exercise of discretion in gray areas, or that (2) attack rulings that probably had no impact on the outcome Appellate courts cannot and will not second guess trial judges on such points. Almost always, appeals that raise too many issues spend too much effort on points that fall into one of these two categories

What is worse, pursuing weak grounds on appeal limits the attention you can give, and that the court will give, to the

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few grounds that really matter Equally important, asserting weak grounds will impair your credibility; it will cast doubt on your good judgment and on your understanding of the difference between trial and appellate courts. Resist the temptation to make all possible arguments. Your client is paying you to exercise judgment Do this by selecting the strongest grounds for appeal And decide *not* to argue some points.

Whichever side you represent, you must tighten the focus even more when selecting points to be emphasized in oral argument. You will not have time to say everything that could be said about even two or three grounds for appeal. You may not even have time to address such grounds adequately Take your best shot, focus your time and attention on the pivotal point or points. Then tell the court that you will rest on your brief on the remaining points, and offer to answer questions on those issues

2. Do not reargue your brief.

Resist the temptation to base the text and structure of oral argument on the contents of your brief. It usually is unwise to organize your argument exactly the way you organized your brief.

This is so because briefs and oral argument have different functions and conventions Writing and talking are different activities What works in one does not in the other.

The written brief will discuss the record and the law in considerable detail Although you should prepare the statement of facts, the discussion of the law, and the written argument in ways that substantiate your basic analysis, a brief must incorporate material that you need not repeat, and cannot repeat, in the short time allotted for oral argument. Remember, we do not talk like we write—and judges do not listen like they read, flipping back and forth through parts or pages, or even sentences, of the brief.

A brief and oral argument have different starting points Your brief will constitute the court's first exposure to the case, or to your side of it By the time you argue the case, however, the court probably will have read your brief, or at least will be familiar with it. In fact, your own perspective on the case may have evolved since the time you filed your initial brief

In preparing for oral argument you should of course carefully review the briefs (More on that later.) But then put them aside, with the written argument fresh in your mind, ask yourself what the case is really about. Do not cheat by looking back at the briefs. Simply *think* about the case.

Once you have that clear idea of the essence of the case, independent of your earlier written exposition, address it head-on in your argument. Feel free to characterize or analyze the issues differently from the way you did in your brief (without injecting entirely new issues, of course).

Briefs begin with a detailed statement of the case. Oral argument should not. Begin your oral argument with a concise (one or two sentence) statement of the issues. Then tell the court how you believe the issues must be resolved. Next, state the key facts—not all the facts—that should dictate the outcome. This should take no more than a minute—the oral equivalent of a paragraph. (You will have a chance to discuss significant details later during your argument.) You should include in this early part of your argument only those facts that provide a necessary predicate to your analysis.

Having set the stage for your analysis, discuss why your client should prevail. This is the heart of your argument; it should consume most of your time. Begin with a concise statement of the controlling legal principles. Do not ramble, and do not make things complicated By this time, you should have sufficient command of the case to reduce the controlling principles to clear, simple statements that are compelling and supportable. Do not digress to discuss authorities in any detail unless the entire appeal turns on a key case

Next, if possible, state the policy served by these principles or the practical basis for them. This should take no more than two or three sentences Then apply the controlling principles to the central facts in your case You should have these facts at your fingertips, each should be reduced to a sentence or two

If your case involves an issue of statutory construction, you will need to organize the argument somewhat differently. Start with a short description of the issue and of the factual setting in which the issue arises. If particular canons of statutory construction may be dispositive, start with them. If not, begin by characterizing the statutory provision involved, asserting your interpretation Then concisely discuss the exact language of that provision and the language of other relevant provisions, demonstrating how the text of the statute supports your construction Discuss any applicable legislative history Next, summarize any judicial interpretations Finally, apply the statutory language and purpose to your case You will have done all this in detail in your brief, of course In oral argument, the discussion must be reduced to simple, distinct points that

flow logically from one to the next.

The object of your analysis is to help the court forge a rule of law—a decision with possibly wide-ranging implications—to decide your case. This will amount to the court's "holding" in your case, and the court understandably will be interested in it. Your framework for analyzing the issues and the holding that emerges must be good policy, not only in your case but in others like it.

At all times, you should move logically and briskly through your argument, keeping the points you want to make and the crucial facts you want to emphasize distinctly in mind. Regardless of the case, you should be able to state the key elements of your argument in two or three minutes. You should be able to list these elements in bullet-point form on the front of one page, and you should be able to recount the holding you seek in a sentence or two. If you cannot do this, work harder at really understanding your case

3. Explain why you are right.

In planning and making your argument, you must develop an explanation of why your client should win, *regardless* of what your adversary argues. You must show the court why you are right, not just why the other side is wrong. The two are not the same

It surely is possible that your opponent will stumble. He may overlook important arguments or facts in his favor, or he may make weak arguments that you can destroy. But beating your opponent—hammering at these fault lines—is not enough. An appeal is not a debate to be won on points Regardless of the respective lawyer's skill, the court wants to reach the *right* result—an outcome that will make good law and good sense If you focus your efforts on attacking your adversary's argument, you may stint on helping the court determine the right way to analyze the case.

Remember, even if you leave the other side's bad arguments sprawled in the dust, the *court* may think of its own reasons why you should lose. So you must give the court a sound framework for deciding the case that will guide the panel after it retires to chambers. It helps to think about how you would justify what you want if the other side had never submitted a brief or entered an appearance.

You must explain why your client should win and not just attack your opponent's errors.

This means that if you represent the appellant, you should first make *your* case; save your refutation of the appellee's arguments until rebuttal, unless the court's questions require you to do that earlier

As counsel for appellee, you must take special care not to be yanked onto the other side's turf If you do, you will spend all of your time on the defensive—and you will have, in a sense, accepted the appellant's approach You will have dignified it by attacking it There may of course be times when you should begin by addressing points that came up during your opponent's argument. But, in so doing, explain your own perspective and framework for the case.

Say, for example, that in making a particular point, opposing counsel has overlooked a central principle that governs the case. Then tell the court what that principle is and how it controls the outcome. If you have done your homework well, you should be able to address all the arguments your adversary makes, but within your framework for the case

Do not, however, feel obliged to refute *everything* your adversary says You must make judgments about what is important and what is not Once again, your objective is to hammer home the right way—*your* way—of analyzing the issues. Do not let your adversary take you (and the court) down rabbit trails that will lead away from this central objective.

4. Answer questions promptly and responsively.

I have heard even experienced counsel complain about "interruptions" during oral argument by the court. The court's questions should *never* be regarded as interruptions You are thinking the wrong way if you fail to see questions as the principal reason for oral argument. Appellate briefs usually are thorough What oral argument adds is a chance for the court to ask lawyers about questions it has after reading the briefs If oral argument were merely a time for restating the contents of the briefs, it might inflate lawyers' egos, but it would be largely useless to the court.

Questions by the court must be taken as important opportunities to learn what may be troubling the judges Many judges prepare questions before argument starts. Each question is asked for a reason

Address the court's questions directly and immediately In *all* cases, begin your response with "yes," "no," "it depends," or "I don't know." *Then* provide any necessary explanation *Never* say, "I will get to that shortly," or "I need to provide some background before I answer the question." The panel may allow this, but the judges will not like it If a judge asks a question at a particular point in the argument, it is because the judge wants the answer *then*, not later.

It is equally unacceptable to answer a question circuitously, with a long-winded answer, rather than by starting with "yes," "no," or the like *You* may believe that you are answering the question directly, but the court surely will not The court will perceive that it has hit a nerve. It may conclude that your long-winded response is an effort to be fuzzy about a topic on which a simple, pointed response would be unfavorable to your client At best, the court will lose patience with you.

In fact, if your adversary sidesteps a question, or answers it evasively, you should seize the opportunity during *your* argument to answer the question squarely That way, you show the court that *you* have command of the case, that *you* have nothing to hide, and that *you* understand what the court expects from lawyers during argument

If you have prepared well, you will anticipate all the court's important questions You will be able to use these questions as points of departure to explain your framework. Ideally, you will be able to make every point you need to make by developing your responses to the court's questions.

By the same token, if you have prepared well, you will be able to recognize when a question has little to do with the central issues Sometimes, after all, an inquiry may emerge from judicial misunderstanding. Answer such questions anyway, but do not belabor the point Return as gracefully as you can to the matters at hand.

5. Be flexible.

Partly because the court's questions are so important, you must be flexible going into argument Several years ago, Lawrence G. Wallace, a Deputy Solicitor General, began an argument before the United States Supreme Court by giving an elaborate outline of what he intended to cover "Mr. Wallace," then Associate Justice Rehnquist asked dryly, "will you be entertaining questions?"

If the court starts by asking about an issue you wanted to cover last, be prepared, on the spot, to reorganize your argument; cover the last point first. You may not have time to take up the issue "in turn" Remember also that if you address the point at any length in responding to questions, the court may not have the patience to hear more about the same point later merely because it is there on your outline.

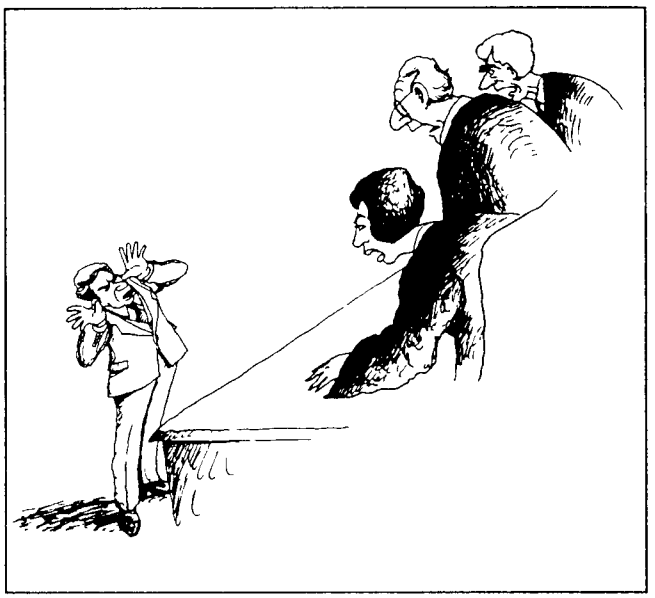
If your argument is as simple and cogent as it should be, you ought to be able to reshuffle its parts, like reorganizing flash cards Only the transitions will change. This approach may be new to you, you may balk But such flexibility is crucial if you are to have any chance of making an argument that the *court* wants to hear—as opposed to one that *you* are determined to make.

The court understands that its questions take time to answer. It knows that its questions may affect the organization of your thoughts. But the court wants dialogue, not speeches. If you have prepared (as you should) to make a few key points, you will get them across in response to some question or other. And if you understand how each is significant to the rest of your analysis, you can explain that effectively, too.

6. Be honest with the court.

In responding to the court's questions, you may be called upon to address difficult matters of law or fact that you did not develop in your brief. Such questions may make you squirm. Answer them anyway, like all others, honestly and concisely. It is permissible to use your skills as an advocate to put your weak points in the best light, but *never* trifle with the court. Apart from ethical considerations, you will wreck your credibility and seriously compromise your client's interests if you are evasive or untruthful.

Sometimes the court may ask you hypothetical questions.



Such inquiries test the limits of the rule of law that you advocate. These are different from questions about the record or the case law. You are free to tell the court that "we take no position" on a hypothetical question, but it may be imprudent to do so You *may* irritate the court or lose credibility, and you *will* leave unaddressed the concerns that prompted the question. Generally you will be better served by thinking through the implications of your position enough to be able to address hypothetical questions directly and succinctly. This may include making concessions when necessary, while making clear that your client must still prevail in the different, *non*-hypothetical circumstances of your case.

7. Maintain a tone of "respectful equality."

You must show the appellate panel deference in presenting your case and in responding to questions. Still, you should not confuse respect with timidity or obsequiousness. Maintain a tone of "respectful equality." In your demeanor and in the force and conviction of your argument, show the court that you are an intellectual peer, but at the same time treat judges courteously. Do not raise your voice, make faces or show impatience at questions from the bench—and *never* interrupt a judge before he or she completes a question or finishes making an observation But do not be intimidated into conceding an argument that you believe you should win.

Remember that when you and the panel reach an impasse, the panel will win (absent review by a higher tribunal) You thus may sometimes be called upon to decide during argument that you should move on. It may become apparent that what you are arguing is going nowhere If this occurs, do not show disgust or despair. Simply move on to grounds that may meet with more success.

8. Prepare with the end in mind.

Finally, you should prepare for oral argument with a view to what will actually happen at argument. Many attorneys prepare by planning what they will say uninterrupted by the court. By now, it should be clear that oral argument involves much more than that You are not the only player. You must anticipate what the other players—the court and opposing counsel—may do.

Begin by reviewing all the briefs Make notes of problems that you must resolve by the time of argument, and then resolve them Become completely familiar with all your weaknesses.

Next review the full text of the principal cases cited by the parties. With the benefit of the briefs and the passage of time, you will likely gain new insight into the issues. Having taken this step, update your research to catch developments in the law and in the later histories of the cases you cited

Review the record, cover to cover You must know key passages and pleadings for the argument Tab these pages and include citations to them in your notes. You can also note pages in your brief that cite those portions of the record. During argument, you should be able to direct the court's attention to important parts of the record.

At this point, put all your materials aside and simply think about the case. Jot down the key issues, and rough out an outline of your analysis Then think about the case some more. The aim is to come to grips with what the case is really about — to develop a simple analysis that cuts through the fog. You must work until you identify straightforward, compelling reasons why your client should win. Keep revising until your argument is forceful, simple, and tight.

Do *not* write out your argument. Many lawyers do. If you are wedded to this practice, so be it But if you have not developed the habit (or superstition), do not start; and, if you have, break it if you can Scripting your argument will reduce your flexibility. Even during preparation, you will feel obliged to "edit" your script instead of trashing your simple outline and starting afresh when warranted During argument, the script will do you even less good If you rely on it much, it may hamper your ability to adapt. At best, writing your argument will waste time. Faced with persistent questions, you almost never will have a chance to deliver the argument as written.

Do not be too concerned about stumbling around somewhat in argument if you operate without a script. Almost everyone does. Remember, *what* you say is more important to the court than *how* you say it. An effective oral argument has less to do with eloquence than it does with clear thinking and getting to the point We no longer live in the era of Daniel Webster and his florid oratory

Having developed a basic idea of what your argument will be, broaden your preparation by reviewing all cases of any significance cited by the parties. You may want to annotate your brief with a one-phrase description of the holding or key facts of each such case Be prepared to distinguish bad cases that the court may ask you about

Next, list all difficult questions that the court may ask. Put yourself in the court's shoes for this exercise. Keep in mind that the court will be concerned about jurisdictional issues and the procedural posture of the case. It may want to determine the narrowest possible ground on which to dispose of the case. Do not ignore these matters simply because the *parties* have not devoted much attention to them or because you do not intend to raise them in argument. You may not have a choice. Ultimately, you must satisfy the court; you must be prepared to address *its* concerns.

Prepare a one- or two-line response to each question, jotting down in your notes a phrase or two. This will take some thought. You should not write out responses word for word That will be less helpful preparation than key words or phrases. You will not have time to find these answers and to read them during argument The point is to think through your potential responses *before* argument so that you can respond quickly and concisely, and to make a list that you can use to refresh your memory the day before argument. This will help you avoid long, rambling, non-responsive answers.

Anticipate Opposition Arguments

Anticipate the arguments your adversary will make, and prepare short, direct responses to them Identify the crux of your opponent's case, and decide how to meet it. Again, in argument you will not have the time to dispute unimportant, incidental arguments or assertions Do not succumb to that distraction.

Rehearse your argument two to three times, *without memorizing it* You will present the argument somewhat differently each time, but that is perfectly acceptable—in fact, it is desirable Rehearsing the argument will help you develop deft transitions, and it will "groove" the argument in your brain. Rehearsing the argument also will give you some sense of how long it will take to make the points you must make. You almost always will have to trim down the argument as a result of this exercise. In fact, even once it is trimmed, assume that actual delivery will take 40 percent longer than your best rehearsal.

A compromise security blanket is to memorize your opening line (usually a statement of the issues). This will have a calming effect as you first stand at the podium, it will help get you off to a good start But from that point on, look the judges in the eye and *talk*—not declaim or recite—to them.

For important cases, or for your first few appeals, ask colleagues to put you through a moot court. This can be tremendously helpful. Moot court members will see problems—even gestures or fidgeting—you may not know you have. Allow at least one day between moot court and the actual argument to give yourself enough time to research or think through issues that come up for the first time in the practice session—and perhaps to recover your self-confidence.

Having prepared your argument, condense your outline to one or two pages if possible. Set forth only the key points, key facts, and key citations that you may need at argument. Use words or phrases rather than full sentences. This will be far more helpful when you are on your feet than a full-text script attractively bound and tabbed in a three-ring notebook.

Be sure to review your court's procedural rules before argument. Check the rules *and* any internal operating procedures published or made available by the court in which you will appear.

Make a checklist of all materials that you want to bring to court, and list last-minute chores that you need to complete before argument These details are easy to forget amid the interruptions and distractions that inevitably occur before argument.

Finally, when and if you can, find out which judges will sit on your panel. If you have time (some courts will not tell you the panel's makeup until the day of the argument), review the key cases cited by the parties to determine whether any of your panel members participated in those decisions. This can help you avoid embarrassment if a panel member brings up a case during argument.

You may hear or believe that oral argument is an art To a degree, that is true, but it is irrelevant Whatever your experience or in-born skill, the fundamentals count Observe them, and you will improve your artistry