The Art of Oral Argument on Appeal

Once upon a time, the spoken word was the centerpiece of any appeal. The parties filed briefs that were indeed brief, little more than outlines of points and authorities. The parties presented their cases in full — the facts, the law, the argument — in oral argument to an appellate court that until then knew little about the case. Oral arguments could take days.

Today, the written word predominates in the appellate process. Court rules require that the briefs present all the facts, the law and the argument, with detailed record citations and supporting legal authorities. Oral argument is the last rather than the first meaningful opportunity for the parties to address the court. Generally, oral argument is short, measured in minutes rather than days, and there may be a dozen cases on a single day's calendar. The parties thus have little time to do anything more than emphasize their most important points and answer any questions the appellate court may have. In federal appeals, the court may choose not to hear oral argument at all.

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Nevertheless, oral argument remains a potentially important part of the appellate process. Appellate judges report that on occasion, oral argument has changed their minds about an appeal or at least altered the grounds upon which they decided the appeal. In addition, some lawyers are better at presenting their cases orally than in writing, and some appellate judges learn better by listening than reading. And some appellate judges use oral argument as a proving ground for their ideas about the case or as a vehicle to persuade other judges on the panel to vote their way.

Oral argument has been in the news lately. The California Supreme Court has issued a decision reaffirming that appellate courts may not unreasonably discourage the presentation of oral argument on appeal. *People v. Pena*, 32 Cal. 4th 389 (2004). In *Pena*, after briefs were filed, the Court of Appeal sent the parties a tentative opinion and a notice stating that (1) oral argument would not aid in the decision-making process, (2) if oral argument is requested, counsel must not repeat arguments made in the briefs, and (3) sanctions could be imposed for noncompliance with the notice.

The Supreme Court in *Pena* praised the Court of Appeal's experimentation with innovative methods to streamline the appellate process, including the use of tentative opinions.

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However, the Supreme Court ruled that Court of Appeal's notice improperly discouraged oral argument. Unlike federal practice, California law recognizes that a party has a right to present oral argument on a direct appeal. An appellate court should therefore keep an open mind until oral argument is over. In *Pena*, the Court of Appeal's notice improperly implied that its tentative opinion was not merely tentative and that oral argument could have no impact on the final decision. Furthermore, the admonition that parties must not repeat arguments made in their briefs was a Catch 22, because the rules of practice also say that an appellate court need not consider points made for the first time at oral argument. The Supreme Court directed the Court of Appeal not to use the challenged notice in the future.

Usually, lawyers fight for the opportunity to orally argue a case in the California or United States Supreme Court. However, in another recent case, a party's lawyers failed to appear in the California Supreme Court for oral argument of their appeal. *Lerner v. Aguilar*, 32 Cal. 4th 974 (2004). The non-appearing party was deemed to have waived oral argument, and the opposing party got to argue its case without rebuttal. A few days later, the Supreme Court issued an order to show cause why the non-appearing lawyers should not be held in contempt.

If you are going to orally argue an appeal, here is some practical advice:

• *Plan ahead.* Once the written briefs are in, the court clerk's office often can provide information about how long the court usually takes to schedule a hearing and what days of the month arguments are usually heard. If you have a potential conflict due to vacation plans or other pressing business, let the appellate court know well in advance. A last-minute request for postponement of oral argument might not be granted.

• *Keep the appellate court informed of case developments.* If the case settles, or is on the verge of settling, let the court know. Nothing ruffles the feathers of an appellate court and its staff of hard-working research attorneys more than to learn that a case they have diligently worked up for oral argument actually settled weeks ago.

• *Be there.* Do not request oral argument and then call in a waiver on the morning of argument. This is rude to the court and to the opposing party's lawyer, both of whom will have taken time to prepare for the argument.

• *Be prepared to answer questions.* Appellate judges' biggest gripe is that lawyers dodge their questions. Asking questions does not necessarily indicate disagreement with your argument. If you have prepared properly, you should not be surprised by any of the questions, and if the questions are off base, then you have the opportunity to explain why they are off base. And don't tell the court you will get to the answer later in your argument. This is the opportunity you have been waiting for, to engage in a dialogue with the appellate judges who will decide your appeal about the issues that they think are important. Of course, if you don't know the facts of your case and the main cases on your legal points, you should not bother with oral argument. But if you are really caught off guard by a question, you can request the opportunity to provide the court with the answer in a letter brief.

• *Don't make a closing argument to the jury.* Emotion plays a factor in deciding appeals, but the court must follow the rules of appellate review. The appellate court cannot reweigh the evidence on disputed factual issues. The court will reverse a judgment only if it is convinced that there was prejudicial legal error. Argument should focus on convincing the court of such error.

• *Don't read your oral argument.* Have notes, but talk to the court. Your goal is not to lecture, but to engage the court in a dis-

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cussion about your case.

• *Get to the heart of the matter.* Before the hearing, the appellate judges usually have read the briefs and a bench memo prepared by experienced staff attorneys addressing the facts and issues. Repeating the procedural history and background of the case is generally a waste of your very limited time.

• *Don't interrupt.* The temptation to jump in can be almost overwhelming, but let the appellate judge finish his or her question or comment, and let opposing counsel finish his or her entire argument.

• *Don't overstay your welcome.* If the court says it understands your points and would prefer to hear from the other side, this is almost always a good omen. Thank the court and save your time for rebuttal.

• *Don't fret too much afterwards.* Experienced appellate practitioners know there are really three oral arguments in every case: the one you plan to make, the one you actually make, and the one you make on the way home.

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