

Appellate Tips for Trial Lawyers

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Appeals can be a minefield for those who don't regularly practice in the appellate courts. This series of short articles, provided by members of the Association's Appellate Courts Committee, will help you find your way. Although the articles focus primarily on California state court appeals, much of the guidance will apply in any appellate court.

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Oral Argument: Is Anyone Listening?

By Cindy Tobisman

Once upon a time, the spoken word was the centerpiece of any appeal. Lawyers filed briefs that were indeed brief, little more than outlines of points and authorities. They presented their complete cases orally to an appellate court that until then knew little about the case. Oral arguments could take days.

Today, the written word predominates. Court rules require comprehensive briefs 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. It is short, measured in minutes rather than days, and there may be a dozen cases on a single day's calendar.

In addition, when a lawyer stands up to argue in a California court of appeal, the justices staring back at him or her are often holding a draft opinion in their hands. The Constitution requires justices-on pain of not receiving their paychecks-to issue opinions within 90 days after a case is "submitted" for decision (i.e., 90 days after oral argument). (Cal. Const. Art. 6, sect. 19.) The result? Appellate courts work up their cases and draft their opinions before hearing oral argument.

Given all of this, does it really make sense to bother presenting oral argument? The answer is a resounding "yes."

Oral argument represents the only chance the lawyer will ever have to engage the bench in a conversation about the key legal and factual issues in the case. The importance of this opportunity cannot be overstated. As Chief Justice William Rehnquist summed it up: "You could write hundreds of pages of briefs, and, you are still never absolutely sure that the judge is focused on exactly what you want him to focus on in that brief. Right there at the time of oral argument you know that you do have an opportunity to engage or get into the judge's mental process." (Myron H. Bright, *The Power Of The Spoken Word: In Defense Of Oral Argument*, 72 Iowa L. Rev. 35 36-37, citing Transcription, Jurists-in-Residence Program; St. Louis University School of Law (Apr. 8, 1983).)

Because a lawyer can correct misunderstandings about the record or refocus the panel's attention on the key legal issue in the case, oral argument is the last, best chance to change an appellate justice's mind. For instance, Justice Antonin Scalia uses oral argument "[t]o give counsel his or her best shot at meeting my major difficulty with that side of the case. Here's what's preventing me from going along with you. If you can explain why that's wrong, you have me." (Hon. Joseph W. Hatchett & Robert J. Telfer, III, *The Importance of Appellate Oral Argument*, 33 *Stetson L. Rev.* 139, 142 (2003), citing Stephen M. Shapiro, *Questions, Answers, and Prepared Remarks*, 15 *Litig.* 33, 33 (Spring 1989) (citing *This Honorable Court* (WETA 1988) (TV broadcast).) One division of the California Court of Appeal-Division 2 of the 4th District Court of Appeal in Riverside-expressly uses oral argument for this purpose; it circulates a tentative decision to the parties so that they can "concentrate on the issues found significant by the court." (<http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv2/programs.htm#tentative>.)

Moreover, some lawyers are better at presenting cases orally than in writing, and some appellate judges learn better by listening than reading. As Justice Blackmun has suggested, "A good [oral argument] can add a lot to a case and help [us] in our later analysis of what the case is all about. . . . Many times confusion [in the brief] is clarified by what the lawyers have to say." (Johnson, *Oral Advocacy Before The United States Supreme Court: Does It Affect The Justices' Decisions?* 85 *Wash. U. L. Rev.* 457, 462, citing Philippa Strum, *Change and Continuity on the Supreme Court: Conversations with Justice Harry A. Blackmun*, 34 *U. Rich. L. Rev.* 285, 298 (2000).)

Oral argument also plays an important part in the collegial operation of an appellate court. 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. As Justice Scalia has explained: "It isn't just an interchange between counsel and each of the individual Justices. What is going on is also to some extent an exchange of information among the Justices themselves. You hear the questions of the others and see how their minds are working, and that stimulates your own thinking." (33 *Stetson L. Rev.* at p. 142, citing Shapiro, *Questions, Answers and Prepared Remarks*, 15 *Litig.* 33, 33.)

If there were any remaining doubt about the importance of oral argument, the California Supreme Court has put it to rest. In *Moles v. Regents of University of California* (1982) 32 *Cal.3d* 867, the Supreme Court reaffirmed "the right to oral argument in all appeals" and recognized that "'many judges find that the opportunity for a personal exchange with counsel makes a difference in result.'" (*Id.* at p. 872, original italics, citing *Com. On Revision of the Fed. Ct. App. System, Structure and Internal Procedures: Recommendations for Change* (1975) p. 47.) As the Court noted, "[t]his aspect of oral argument-the chance to make a difference in result-is extremely valuable to litigants." (*Ibid.*)

In sum, while it is certainly true that in many cases oral argument can be wasted motion, it is equally true that in certain cases, it is absolutely essential-it can make the difference between winning or losing. This isn't wishful thinking. Studies have shown that a good oral argument can significantly increase the chances of winning on appeal. (Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 *Iowa L. Rev.* 35, 40 (1986) [study by federal appellate judges tracking number of cases in which oral argument changed judges' minds].)

The bottom line: Never, ever waive oral argument.



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