Best Practices for Oral Argument: 12 Tips

By Mary Massaron

I have often heard lawyers say that oral argument is not important and rarely changes the outcome of appeals. But the argument offers an opportunity to crystallize the key points in an advocate's position, to answer questions that were not addressed or skimmed over in the brief, and to try to set the court's concerns to rest. Thus, the best oralists use the opportunity as a welcome chance to speak with the judges or justices who will decide their case to be sure they understand the most important factual and legal underpinnings of their position. In presenting oral argument, here are what I consider best practices for effectively using the opportunity.[1]

Prepare, prepare, prepare

Benjamin Franklin said, "By failing to prepare, you are preparing to fail."[2] Those words provide a warning and incentive to set aside time to prepare for every oral argument. This process requires figuring out what you need to do and finding time to do it. It should include the easy but important tasks like updating the authorities in the briefs, and the more difficult ones like anticipating difficult questions about the weak points in your argument.

Sometimes clients question the amount of time required to prepare for oral argument. Try to explain that precisely because the time allotted for the appeal is short, advocates must be well-prepared so they can respond concisely with references to precedent and to the record. And if necessary, spend the requisite time preparing for the argument, but write it off your bill.

Know your audience

Every court has its own formal rules, informal practices, and culture. Oral argument in some courts, such as the United States Supreme Court, is highly formal, with strictly enforced time limits and the time spent in rigorous questions and answers, and no colloquy except as it pertains to the issues before the Court. Oral argument in other courts may be informal, with the opportunity for more back-and-forth between the lawyers and the court. You need to know your court. Part of that is knowing the judges or justices who sit on that court. In a court of last resort and in intermediate appellate courts where the judges assigned to the case are announced before the argument, you can study them by checking for decisions they have previously issued that pertain to your case.

Know the record

Although arguments before courts (even at the trial court level) tend to focus on legal issues, these issues are often decided based on the application of the law to the facts. You need to be familiar with the facts of the case, and you need to have thought through the inferences that can be drawn from them. Cases are often won or lost on the basis of the record facts; don't miss the opportunity to prevail by fumbling about the facts at argument.

John W. Davis, a renowned authority on appellate practice, explained that "in an appellate court the statement of facts is not merely a part of the argument, it is more often than not the argument itself."[3] While Davis's statement focused on the brief, it offers key insights for appellate argument. Appellate judges do not want advocates to read their statement of facts at oral argument; if your brief has done its job, the court will already understand the chronology of the historical and procedural facts in the record of the appeal. The appellate court wants argument focused on those facts that are the fulcrum for determining the applicable law and how it applies to this record.

Develop a theme

A focused argument built around a theme is far more likely to succeed. Your theme can be based on why the precipitous granting of summary judgment wrongly denied your client the opportunity to present his or her case to the jury. Or it can be based on the importance of interpreting contract language in accord with its unambiguous language so insurers and policyholders can

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predictably understand their rights and obligations under a policy. Or it might be based on the need to expand the law providing a remedy for fraud in the inducement of contracts to discourage contracting parties from lying at the outset of their agreement. Whatever it is, make sure you understand it at a deep level, and then use that theme to answer hypothetical questions and focus and organize your presentation. Repeat it as part of answers to questions—just as a composer repeats a theme in slightly varied ways throughout the movements of a symphony.

Distill the argument to key points

Time during an oral argument is limited. Trying to present a laundry list of minor points is likely to lose the court's attention, confuse the judges, and weaken your argument. Pick the linchpin and make the points necessary for the court to resolve the matter in your favor. Do not lose your audience by trying to argue every point. A Wisconsin appellate judge and author advises advocates not to get bogged down in either extensive citations or the attempt to distinguish cases from one another or from your case.[4] The brief is the place for those detailed discussions. At argument, you want to make your most important points and leave the rest to what you have already done in your brief. British barrister Iain Morley said, "For reasons which are a mystery, supporting a point with three reasons sounds great, and carries weight, even if it shouldn't."[5] Think about distilling your argument to three key points.

Rehearse answers to anticipated questions

The most difficult part of oral argument is refuting your opponent's strongest arguments. You may be able to obfuscate or avoid difficulties with your position in the brief (though that may not be a good strategy). But at argument, questions are likely to be focused on the weakest points of your position. If you don't have good answers, the court will lose interest in whatever else you have to say. If you can hold a moot court for important arguments, do so. Practice your answers—out loud if you can. It will help you hone the answers and increase your confidence at argument.

Go for the jugular in the opening statement

You have the most focused attention of the court as you begin. Don't waste this time by offering a dull recitation of the procedural history of your case. Pick the strongest and most important point you can make and make it concisely. Use vivid language. Introduce your theme as an intrinsic part of your opening statement. This is your chance to make a good first impression; if you open with no clear direction, you risk losing the court's attention and never getting it back.

Give a road map for your argument

Early in the argument, you can let the court know the key points that you plan to address. Telling the court of the issues you plan to discuss and the issues you plan to leave to your briefs lets the judges or justices anticipate where you are going. It also allows them to bring you back to your other points if questions from a judge take you off track. And it enables the judges to bring up questions they may have about issues you choose not to address.

Morley urged the use of maps: "Judges love maps. With a map, they will understand where you are going and why."[6] In his view, this makes you more likeable and potentially irresistible.[7] But some advocates disagree with this strategy. Alan Morrison, for example, urged against it because it can interfere with the flow of the argument as dictated by the questions of the judges or justices on the court.[8] At a minimum, have your own road map of essential points and ways to lead from one point to the other in case you get diverted by questions.

Answer questions immediately, directly, and concisely

Nothing irritates judges or justices more than the sense that an advocate is jousting with them rather than answering their questions. If the question seeks a yes or no answer, answer it, and then add any explanation that is needed to limit or qualify your response. This can be difficult if you are not sure of your theory of the case or the facts in your record. So again, prepare, prepare, prepare. Oral argument should be conversational—not rhetorical. Flourishes of rhetoric are unlikely to persuade, but answering questions in a professional, conversational tone can help the judges see you as an asset in their search for the right answer. If you are accepted because of your demeanor, precision, knowledge, and candor in response to their most difficult questions, you are far more likely to persuade them to the rightness of your position.

Advocate reasonable positions; acknowledge weaknesses

When you acknowledge the difficulties of your position, you gain credibility with the court. This is why Bryan A. Garner and Antonin Scalia advised advocates to concede the "indefensible terrain—ostentatiously."[9] Overstatement and obfuscation are not effective in appellate tribunals.

Be enthusiastic; maintain eye contact

Oral argument is an opportunity for you to have a conversation with the judges or justices who will decide your case. You want to keep their attention and make your points (even if you disagree with an assertion that they make) in a respectful, energetic manner. Speaking in a monotone—or, worse still, reading from a prepared text—will lose their attention quickly.

Your appearance matters. Wrinkled suits, scuffed shoes, and uncombed hair are all distractions. This is not the time to make a fashion statement or to wear dramatic jewelry or clothing. Present a poised, professional appearance and try to look relaxed, confident, and focused. Practice in public speaking can help, as does experience in court.

End with essentials; crystallize your strong points

The ending, like the opening, is important. Try to prepare something you can turn to as you see the time is almost up that will remind the court of your strongest arguments. Remind them of the rule you urge and why it is the best outcome. Tell the court explicitly what you think it should do.

Conclusion

Arguments do not always proceed as expected. But if you follow these best practices, even in the toughest appeals, you will be able to present your best arguments. And over time, your skills and confidence will grow. ■

Mary Massaron's appellate skills are widely known and have resulted in her membership in the American Academy of Appellate Lawyers, the American Law Institute, and International Association of Defense Counsel. A regular before the Michigan Supreme Court where she clerked for Justice Patricia J. Boyle, she chairs its Advocates Guild. She has twice received WMU–Cooley Law School's Distinguished Brief Award. She currently chairs the Amicus Committee of Lawyers for Civil Justice.

ENDNOTES

1. The tips I elaborate on were first prepared by Sharon Freytag, a terrific appellate lawyer who shared them during a program on appellate law that I attended years ago. She is now retired, but Sharon was a great friend with whom I worked in the American Bar Association's Counsel for Appellate Lawyers.
2. *By failing to prepare, you are preparing to fail*, philosiblog (March 4, 2013) <https://philosiblog.com/2013/03/04/by-failing-to-prepare-you-are-preparing-to-fail/> (accessed January 14, 2020).
3. Davis, *The Argument of an Appeal*, 26 ABA J 895, 896 (1940), available at <https://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1183&context=appellatepracticeprocess> [https://perma.cc/NM8Z-UVK8] (accessed January 14, 2020).
4. Fine, *The How-To-Win Appeal Manual* (3rd ed) (Huntington: Juris Publishing, 2015), p 84.
5. Morley, *The Devil's Advocate: A Spry Polemic on How to be Seriously Good in Court* (2d ed) (London: Sweet & Maxwell, Ltd, 2009), p 205.
6. *Id.* at 99.
7. *Id.*
8. Morrison, *The Opening Argument Really Matters; The Closing Argument Does Not*, in Axelrad, ed, *Appellate Practice in Federal and State Courts* (New York: Law Journal Press, 2018), p 11-10.
9. Garner & Scalia, *Making Your Case: The Art of Persuading Judges* (New York: Thomson West, 2008), p 20.

Interest Rates for Money Judgments

Under MCL 600.6013 (Revised January 1, 2020*)

I. [MCL 600.6013(8)] FOR ALL COMPLAINTS FILED ON OR AFTER JANUARY 1, 1987 UNLESS SECTION II, III, or IV APPLIES:

Interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. See interest rate chart below.

II. [MCL 600. 6013(7)] FOR COMPLAINTS FILED ON OR AFTER JULY 1, 2002 THAT ARE BASED ON A WRITTEN INSTRUMENT WITH A SPECIFIED INTEREST RATE:

Interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. If the rate in the written instrument is a variable rate, interest shall be fixed at the rate in effect under the instrument at the time the complaint is filed. The rate under this subsection shall not exceed 13% per year compounded annually.

III. [MCL 600. 6013(5 and 6)] FOR COMPLAINTS FILED ON OR AFTER JANUARY 1, 1987, BUT BEFORE JULY 1, 2002 THAT ARE BASED ON A WRITTEN INSTRUMENT:

Interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. In that case, interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.

Notwithstanding the prior paragraph, if the civil action has not resulted in a final, nonappealable judgment as of July 1, 2002, and if a judgment is or has been rendered on a written instrument that does not evidence indebtedness with a specified interest rate, interest is calculated as provided in Section I above.

IV. ADDITIONAL CONSIDERATIONS:

If the complaint was filed before January 1, 1987, refer to MCL 600.6013(2)–(4).

Interest is not allowed on future damages from the date of filing the complaint to the date of entry of the judgment. [MCL 600.6013(1)]

The amount of allowable interest may be different in certain settlement and medical malpractice case scenarios. [MCL 600.6013(9-13)]

Effective Date	Average Certified by State Treasurer	Statutory 1%	Interest Rate
Jan. 1, 2000	5.7563%	1%	6.7563%
July 1, 2000	6.473%	1%	7.473%
Jan. 1, 2001	5.965%	1%	6.965%
July 1, 2001	4.782%	1%	5.782%
Jan. 1, 2002	4.14%	1%	5.14%
July 1, 2002	4.36%	1%	5.36%
Jan. 1, 2003	3.189%	1%	4.189%
July 1, 2003	2.603%	1%	3.603%
Jan. 1, 2004	3.295%	1%	4.295%
July 1, 2004	3.357%	1%	4.357%
Jan. 1, 2005	3.529%	1%	4.529%
July 1, 2005	3.845%	1%	4.845%
Jan. 1, 2006	4.221%	1%	5.221%
July 1, 2006	4.815%	1%	5.815%
Jan. 1, 2007	4.701%	1%	5.701%
July 1, 2007	4.741%	1%	5.741%
Jan. 1, 2008	4.033%	1%	5.033%
July 1, 2008	3.063%	1%	4.063%
Jan. 1, 2009	2.695%	1%	3.695%
July 1, 2009	2.101%	1%	3.101%
Jan. 1, 2010	2.480%	1%	3.480%
July 1, 2010	2.339%	1%	3.339%
Jan. 1, 2011	1.553%	1%	2.553%
July 1, 2011	2.007%	1%	3.007%
Jan. 1, 2012	1.083%	1%	2.083%
July 1, 2012	0.871%	1%	1.871%
Jan. 1, 2013	0.687%	1%	1.687%
July 1, 2013	0.944%	1%	1.944%
Jan. 1, 2014	1.452%	1%	2.452%
July 1, 2014	1.622%	1%	2.622%
Jan. 1, 2015	1.678%	1%	2.678%
July 1, 2015	1.468%	1%	2.468%
Jan. 1, 2016	1.571%	1%	2.571%
July 1, 2016	1.337%	1%	2.337%
Jan. 1, 2017	1.426%	1%	2.426%
July 1, 2017	1.902%	1%	2.902%
Jan. 1, 2018	1.984%	1%	2.984%
July 1, 2018	2.687%	1%	3.687%
Jan. 1, 2019	2.848%	1%	3.848%
July 1, 2019	2.235%	1%	3.235%
Jan. 1, 2020	1.617%	1%	2.617%

*For the most up-to-date information, visit http://courts.michigan.gov/Administration/SCAO/Resources/Documents/other/interest.pdf.