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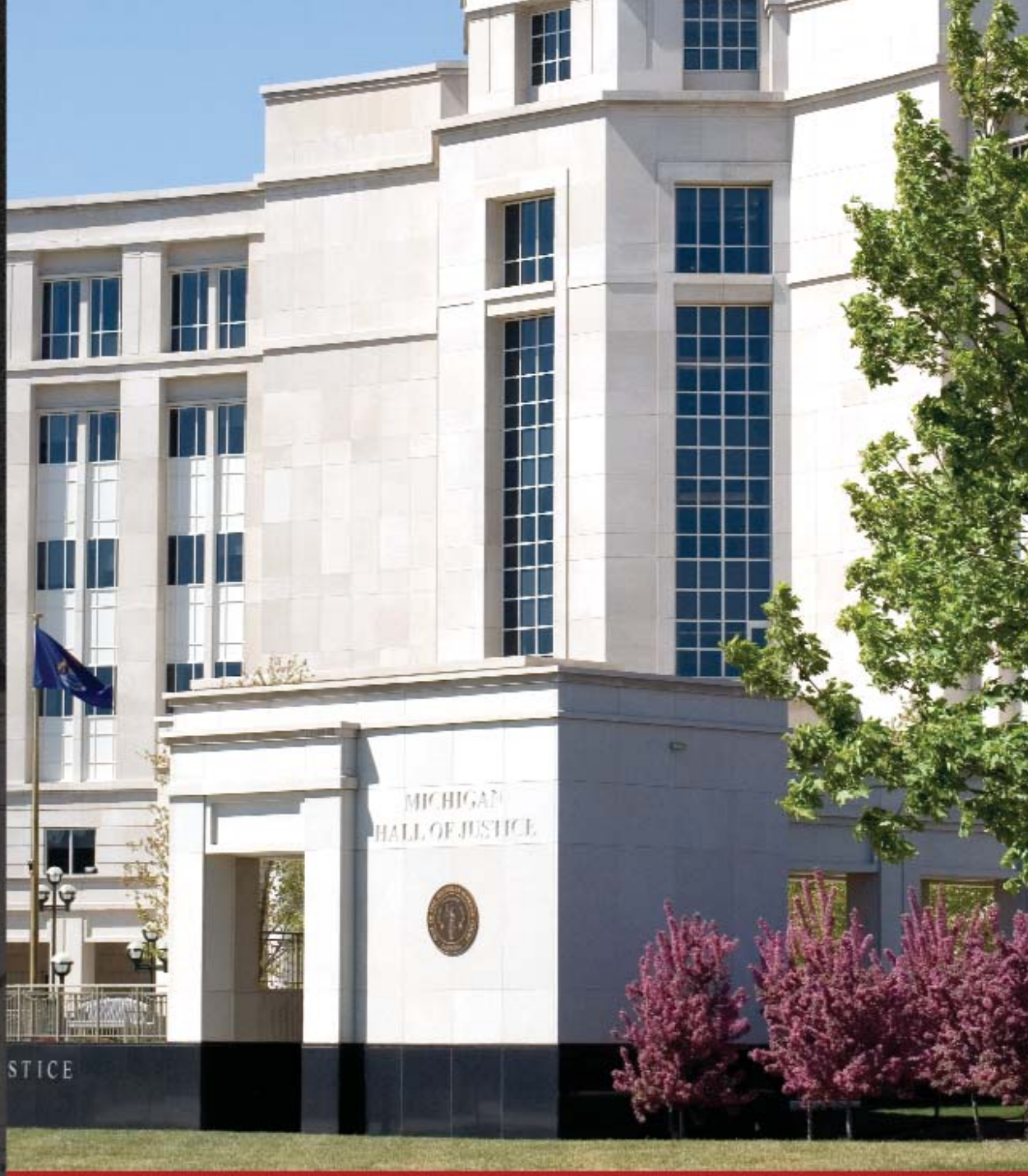


Hon. William C. Whitbeck View from the Bench

Michigan Court of Appeals

part 1: Writing to Win at the Court of Appeals

part 2: Arguing to Win at the Court of Appeals

Writing to Win at the Court of Appeals

Introduction: What You Know and What You Need to Know

Join with me in considering a hypothetical, as our professors were wont to say in law school, usually interrupting a pleasant daydream. Let us assume that, for the first time, you will be writing an appeal brief for the Michigan Court of Appeals. Let us further assume there is a helpful lawyer in your office who has mastered the technical and procedural aspects of filing and pursuing an appeal before the court. Let us finally assume that yours is an appeal by right[1] and that you will not be engaged in any motion practice before the court.[2] Thus, all you have to do is win the case through your advocacy.

This is a daunting assignment. Consider breaking it down into manageable pieces. Start at the beginning: what do you know? You know that you will proceed in two distinct formats: first, in your brief(s) and, second, at oral argument (assuming that you request it and file your brief on time[3] and assuming that the court does not otherwise determine to decide the case without oral argument[4]). For now, put aside preparing for oral argument and concentrate on the brief. You know that the court rules set out the time for filing and service of briefs,[5] their length and form,[6] and their contents.[7] What else do you need to know?

Know Your Audience

Overview

You need to know about the court, its history, its organization, its powers, and its procedures. Briefly summarizing, the court of appeals is Michigan's intermediate appellate court. The court is a product of the 1963 Michigan Constitution[8] and the legislation passed to implement the provisions of that Constitution.[9] The court commenced its operations in January 1965. Through December 31, 2005, the court has disposed of approximately 265,000 civil and criminal appeals, the legislature has expanded the court's membership four times to the current level of 28 judges, the 72 judges who have served on the court have written 268 volumes of the Michigan Appeals Reports, and the court has been recognized as one of the premier courts of intermediate appellate jurisdiction in the country. For most litigants, the court of appeals is the court of last resort, as the Supreme Court grants leave to appeal in less than 5 percent of the cases that the court of appeals decides.

Opinion Case Processing

Dispositions at the court of appeals occur by opinion and by order. The court often disposes of order cases in the early months of the appeal process. Let us assume, however, that the court will decide your case by opinion.

Opinion cases go through four stages of processing at the court: intake, warehouse, research, and the judicial chambers. For purposes of identifying your audiences at the court, two stages are particularly important: research and the judicial chambers. In the research stage, the research attorney prepares a pre-hearing report, a supervising attorney edits the report, and the case is loaded into the court's computer system for random placement on the next month's case call.

The following stage is in the judicial chambers. Each month, the clerk's office assigns available opinion cases to three-judge case call panels using a computerized random assignment program. The court uses three types of panels: regular, complex, and summary.

Your Audiences

When you file your brief, you will not know the composition of the panel that will decide your case. Rather, your initial audience in the vast majority of cases will be a young lawyer in the court's research division. That lawyer will prepare a pre-hearing report that sets out the issues, states the facts, summarizes the positions of the parties, analyzes the issues, and makes recommendations as to the disposition of each issue. Those recommendations may be embodied in a proposed opinion. Note that the lawyer who prepares a pre-hearing report does not know the composition of the panel and, like you, is therefore writing to all the judges on the bench.

You will, however, have a second, and definitive, bite at the apple with the panel that you draw. But remember that sitting, figuratively, at each judge's elbow will be a very bright, very motivated law clerk. That clerk may, depending on the proclivities of the judge and the exigencies of your case, peruse your briefs and the record, prepare analyses and questions for oral argument, engage in further research, or prepare a draft opinion

or dissent. Thus, at least three different audiences will evaluate your case as it progresses: a pre-hearing lawyer, the judges' law clerks, and the judges themselves. The process is a deliberate one—although it takes 30 percent less time than it did four years ago—and it grinds exceedingly fine.

Know What Makes a Good Brief

Overview

The second thing you need to know is what goes into a good brief. Again, we need to break this down. There are two components involved: selecting what to argue and then effectively arguing that which you have selected.

What to Argue

In selecting the issues to argue in your brief, it is vital to be single-minded about your goal. Your goal is to win the case for your client. To do this, you must make what is complicated, clear; what is confusing, simple; what is disputed, understandable. And you must keep it simple—not because those of us who will read your brief are simple-minded, but because we read the equivalent of *War and Peace* every week.

So, let us assume that you are representing the appellant and that you have gotten the case just after the filing of a claim of appeal.[10] You now have 28 days to file a docketing statement that concisely summarizes the issues that the appeal presents, how they arose, and how they were preserved in the trial court.[11] You immediately review the documents available to you, including the parties' trial briefs. You also consult with the trial attorney. Of course, you find that there are a myriad of possible issues for appeal, ranging from evidentiary matters to possible instructional errors to technical questions of venue and jurisdiction.

Now comes the truly difficult part. All your training in law school, as James McElhaney points out,[12] has taught you to take a case apart, not to put it together. Lawyers break legal issues down and deal with them separately; we do not look at them as a whole. But McElhaney suggests that every good appellate attorney must have a theory of the case. That theory must identify the big idea—the theme—that runs throughout the case. You must settle on only those issues that relate to that theme. When you have done this and included them in your docketing statement, you have decided what to argue. By being ruthlessly selective, you have brought clarity, simplicity, and understandability to your brief before you have even started to write it. Now all you have to do is decide how to argue your carefully chosen issues, remembering all the while to tie each of them to your overarching theme.

FAST FACTS:

- At least three different audiences will evaluate your case as it progresses: a pre-hearing lawyer, the judges' law clerks, and the judges themselves.
- Make what is complicated, clear; what is confusing, simple; what is disputed, understandable.
- Keep it simple—not because those of us who will read your brief are simple-minded, but because we read the equivalent of *War and Peace* every week.

How to Argue

Give Us an Introduction or Summary of Argument

Bryan Garner contends that every brief should make its primary point within 90 seconds, but that probably only 1 percent of American briefs actually do so.[13] The place to deliver the goods is in an introduction. A survey by the Civil Appeals Subcommittee of the 2004 Michigan Appellate Bench Bar Conference, entitled "Michigan Appellate Advocacy Preferences," showed that a substantial majority of Supreme Court justices and court of appeals judges strongly agreed that even though MCR 7.212 does not require one, an introduction can be helpful.[14]

Articulate your overarching theme in a concise introduction at the beginning of your brief. Perhaps the four most evocative words in the English language are "tell me a story," and with your introduction, you begin your story. Use plain, simple language. I still remember a brief in a fraud case that began with the statement, "This case is not about deception. This case is about disappointment." With those words, the lawyer had previewed everything he was going to argue. And he had done so in words that busy law clerks and judges could immediately understand.

Consider Using the "Deep Issue" Approach to the Statement of Questions

The court rules require a statement of questions involved, delineating these questions "concisely and without repetition."[15] For some reason, many appellate attorneys interpret this language to require that the appellant state each question in one painfully long, virtually unreadable sentence, all in capital letters, that starts with "whether" and ends with a question mark. There is no such requirement, and such a format simply consigns substance to oblivion. You have selected your issues on appeal with painstaking care; why word them in such a way that no one will read them?

Rather, consider using Garner's "deep issue" approach. Garner, like McElhaney, suggests that you forget everything you learned in law school about framing legal issues. Then you should break the question down into separate sentences. You should weave in enough facts so that the reader can truly understand the problem. And you should write

the question in such a way that there is only one possible answer.[16] Indeed, the "Michigan Appellate Advocacy Preferences" survey indicates that most justices and judges strongly agree that the statement of questions should include information that gives context to the question(s) asked. Garner uses the following example of a "deep issue" statement, and it is a good one:

> *As Hannicutt Corporation planned and constructed its headquarters, the general contractor, Laurence Construction Co, repeatedly recommended a roof membrane and noted that the manufacturer also recommended it. Even so, the roof manufacturer warranted the roof without the membrane. Now that the manufacturer has gone bankrupt and the roof is failing, is Laurence Construction jointly responsible with the insurer for the cost of reconstructing the roof?*[17]

In the Statement of Facts, Convince Us of Your Credibility

The court rules are quite explicit about the statement of facts. The narrative must be "clear, concise, and chronological."[18] All "material facts, both favorable and unfavorable, must be fairly stated, without argument or bias."[19] And yet, many appellate lawyers routinely ignore these requirements. Their rendition of the facts is anything but clear and concise. They wander far away from a chronological narrative. Many of the facts they include are not material, while some that they omit most certainly are, as their opponent will gleefully point out. And they view the statement of facts as a place for argument, often throwing in shards of inflammatory rhetoric.

This is a recipe for disaster. Your statement of facts should do the judge's work in advance. It should be so carefully done, so straight to the point, so scrupulously accurate and devoid of argument that a judge, *even if that judge rules against you,* will be comfortable adopting it, in whole or in part, in that judge's opinion. If you follow this standard, you considerably increase the likelihood that your panel will rule in your favor.

In Your Arguments, Put Clarity Above All

The court rules require that you preface each portion of your arguments by the "principal point stated in capital letters or boldface type."[20] Here, you should let each of your audiences know what is coming. Consider using an outline format and using the delineation of your "principal points" as headlines or signposts.

In the arguments themselves, use short, declarative sentences. Garner suggests that lawyers are afraid of periods. He further contends that the average sentence length of most expository prose should be something less than 20 words.[21] (I note with some pride that my computer's spell checker says that the average sentence in this article is less than 17 words in length.) But vary your sentence length so that you give your prose its own internal rhythm. Avoid the passive voice like the plague; above all, your various audiences at the court, like theatergoers and police officers, want to know who did it. Rather obviously, saying that "mistakes were made" will not satisfy this craving. Put people in your sentences; do not use the standard, and often confusing, references to "plaintiff" and "defendant."[22]

Finally, remember, as Mark Twain said, "The difference between the almost right word and the right word is really a large matter—it's the difference between the lightning bug and the lightning."[23] To find the right word, you must first edit out all the wrong ones. It is hard work, but you must prune each paragraph to eliminate unnecessary sentences, and then weed out the unnecessary words in each sentence. When you are done, look at the important words that remain. Because briefs need not consist primarily of oatmeal, make sure that there is some flash of lightning in your words. Garner says that bad writing makes the reader feel stupid, and your audiences at the court have neither the time, nor the inclination, to feel stupid.

Conclusion

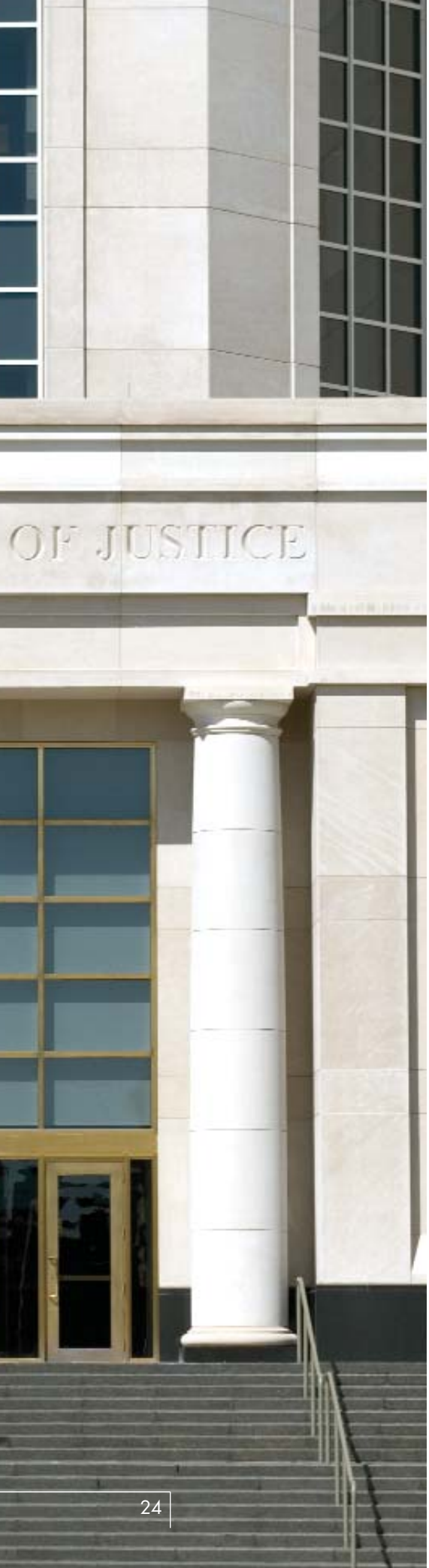
Just as every good brief has a beginning in the form of an introduction, it has an ending in the form of a conclusion. The court rules require you to state in a distinct concluding section the order or judgment requested.[24] This requirement gives you the perfect opportunity to wrap up your story and conclude by telling us the relief that you want. You can neither overcome bad facts nor can you obviate precedent that goes against you. But you can articulate a theme and stick to it. You can pose the questions in a comprehensible fashion. You can fairly state the material facts. And you can write clearly and concisely. If you do these things, you are on the road to winning your first case before the Michigan Court of Appeals. ◆

It is hard work, but you must prune each paragraph to eliminate unnecessary sentences, and then weed out the unnecessary words in each sentence. …Because briefs need not consist primarily of oatmeal, make sure that there is some flash of lightning in your words.

Footnotes

1. MCR 7.204.
2. MCR 7.211.
3. MCR 7.214(A).
4. MCR 7.214(E).
5. MCR 7.212(A).
6. MCR 7.212(B).
7. MCR 7.212(C), (D), (E), (F), (G), and (H).
8. Const 1963, art 6, §§ 1, 8, 9, and 10.
9. MCL 600.301, et seq.
10. MCR 7.204(D).
11. MCR 7.204(H).
12. James W. McElhany, *Story line,* 96 ABA J 26 (April 2006).
13. Bryan A. Garner, *The Winning Brief* (New York: Oxford University Press, 1999), p 48.
14. The "Michigan Appellate Advocacy Preferences" survey is available at http://www.michbar.org/journal/mich_appell_survey.pdf. Because the court of appeals bench has changed since the survey was conducted in April 2004, the anonymous answers recorded may not fully represent the current judges' views.
15. MCR 7.212(C)(5).
16. Garner, supra at 48.
17. Id. at 49.
18. MCR 7.212(C)(6).
19. Id.
20. MCR 7.212(C)(7).
21. Garner, supra at 109.
22. Id. at 150.
23. Letter from Mark Twain to George Bainton (Oct 15, 1888).
24. MCR 7.212(C)(8).

(part 2 continued on next page)



Arguing to Win at the Court of Appeals

Introduction

In part one of this two-part series, I posed a hypothetical that asked you to assume that, for the first time, you would be writing an appeal brief to the Michigan Court of Appeals. Let me continue that hypothetical and ask you to assume that, after timely filing your brief[1] and requesting oral argument on the cover sheet,[2] you have received notice from the clerk's office that you are scheduled for oral argument on a certain date before a certain three judges.[3] Once again, the initial question is: what do you know?

First, and perhaps most importantly, the notice tells you the names of the three judges to whom you will be arguing. This is vitally important information. When you prepared your brief, you did not know *which* judges you were addressing. Now you do, and this knowledge will affect the substance and form of your oral argument in a significant number of ways.

Second, you know from reading the court rules that if both sides of a case are endorsed, each side has 30 minutes, but if only your side is endorsed, you have just 15 minutes.[4] And you know from reading the court's internal operating procedures that there are certain protocols that the court follows before, during, and after oral argument.[5] But what else do you need to know?

Know the Panel

How do you become familiar with the panel to whom you will be arguing? Start with the general and work toward the specific. By using the Michigan Manual or the court's online research tools, you can quickly gain biographical information about the judges that will hear your case. A simple search on the Internet or the use of one of the commercial legal research services may key you in to articles, essays, or other published materials—whether scholarly or not—that the judges have written. Rather quickly, therefore, you will be able to get at least a general overview of the background and judicial philosophy of each of your three judges.

Many lawyers stop here, at their peril. Judges are both human and busy. They each issue hundreds of opinions a year. Being human, they will want to know whether they have been on a panel that has considered any of the issues that you will be arguing. Being

busy, they may not have had time to review their previous opinions and they may have forgotten the details, if not the substance. You must therefore do some of their work for them. Use the court's online research tools or the commercial legal research services to call up *every* opinion, whether published or unpublished, of each judge on your panel that is even tangentially related to the issues that you have included in your brief. Before you start thinking about the substance of your oral argument, read these opinions carefully. You may not actually refer to a single one of these opinions when you make your argument. But when you have finished, you can fairly say that you now know your audience.

Know What to Argue

William Rehnquist, the late chief justice of the United States Supreme Court, said that "inside of a hundred years the written brief has largely taken the place that was once reserved for oral argument."[6] Justice Ruth Bader Ginsburg shares something of the same view:

> *As between briefing and argument, there is a near-universal agreement among federal appellate judges that the brief is more important—certainly it is more enduring. Oral argument is fleeting—here today, it may be forgotten tomorrow, after the court has heard perhaps six or seven subsequent arguments.*[7]

Add to this the conventional wisdom among lawyers that one cannot win one's case at oral argument; one can only lose it.

Given this focus on the written brief and the knowledge that judges at the court of appeals often precirculate proposed opinions or memoranda to their fellow panel members before oral argument, one might easily reach the conclusion that oral argument is largely a waste of time. I disagree.

It may be true that many judges will have made up their minds, at least preliminarily, in a significant number of the cases on which they will hear oral argument. But as a lawyer, you have no way of knowing *which* cases fall into this category. Thus, it may well be *your* case that is the exception to the rule and, consequently, it may well be *your* argument that changes the outcome. Further, in all but a handful of the cases, the panel to whom you argue will make a decision on your case within four to six hours of your argument. I cannot comprehend how a competent lawyer can forego, or sleepwalk through, oral argument knowing, first, that over 95 percent of the time the court of appeals is the court of last resort (since the Supreme Court grants leave in less than 5 percent of the cases for which leave is sought) and, second, that the three judges to whom that lawyer is arguing will in all probability decide the case *that* day.

The root of the problem may well be the approach that lawyers take to oral argument. In part one, I strongly emphasized how important it was to develop an overarching theory of the case around which to array your argument on a limited number of issues. I suggest that you take this advice and square it with respect to oral argument. If you were ruthless in selecting the issues on which to appeal, you must be absolutely brutal with respect to those on which you make oral argument. Indeed, if you argue more than one issue to most panels, you are probably wasting their time as well as your own.

In short, take your strongest argument and make it your *only* argument. Like fireflies losing their spark, lawyers who flit from issue to issue without an overriding theme will lose the panel—and probably their case—within a matter of minutes. The 2004 "Michigan Appellate Advocacy Preferences" survey showed that a substantial majority of Supreme Court justices and court of appeals judges did not expect counsel to present argument on all issues and preferred that counsel focus narrowly on critical issues.

FAST FACTS:

- If you were ruthless in selecting the issues on which to appeal, you must be absolutely brutal with respect to those on which you make oral argument.
- Like fireflies losing their spark, lawyers who flit from issue to issue without an overriding theme will lose the panel—and probably their case—within a matter of minutes.
- Remember that oral argument is an opportunity to persuade; it is not a recital.

Know How to Argue

Prepare an Outline

I am not a particularly good public speaker, so I generally write out my remarks before I make a speech. Resist the temptation to do this in preparation for oral argument, however, for it is a prescription for disaster. Instead, make an outline that faithfully sets out the elements of the broad theme that you intend to argue. If you include any facts at all, include only those that are absolutely critical to your theory of the case. On separate sheets—one sheet for each case—summarize all of those cases that are relevant to your argument, both favorable and unfavorable. Make absolutely sure that your outline builds a bridge from those cases to the one that you are arguing.

Organize your outline into three parts. In the first part, tell the judges what you are going to say by way of an introduction that

articulates your basic theme. Remember that this introduction may be the last chance you will have to make your basic point before the judges begin asking you questions. As in the game of bridge, therefore, lead with your longest and strongest suit. In the second part, make your argument in greater detail but in plain, simple English. In the third part, summarize what you have said and be absolutely clear about the result you are seeking.

If you settle on one basic theme, if you craft an outline that gives you the essential elements of that theme, and if you rehearse with a vengeance, you will be ready to make that argument.

Practice, Practice, Practice

No good actor ever goes on stage without repeated rehearsals, and no good lawyer should ever present oral argument without a number of practice runs. Make your practice sessions as realistic as possible. Use them to become so familiar with your outline that you will need it only as a prop. Be sensitive to your tone and inflection. And be intensely self-critical. If a phrase sounds awkward, drop it. If your analysis of an important case cannot stand up under questioning from your colleagues, go back and re-read it until you not only understand it, but can explain it in a way that relates the holding to the result you are seeking in your case.

Most importantly, as a Michigan Supreme Court justice put it, always remember that oral argument is an opportunity to persuade; it is not a recital. If you have your speaking points firmly in mind, you will find, interestingly enough, that you will not be so wedded to them that you cannot respond to questions and then return to the points you want to make.

Get There Early and Get Comfortable

The panel that hears your oral argument will probably be in session most of the day, with perhaps several brief recesses. This does not mean, however, that you should arrive just 15 minutes before you think your case will be called. First, you can never evaluate the actual pace of oral argument simply by looking at the schedule. Lawyers may waive or simply fail to show up; other lawyers may elect to stand on their briefs and respond to questions from the judges; still other lawyers may elect to cut their arguments short—wisely, in my view—when it is clear to them that they have made their important points. It is highly embarrassing, particularly if your clients are present, to be late for the argument of your case. A sympathetic panel may cut you some slack, but why run the risk?

Secondly, being early for oral argument allows you to evaluate the panel at close range. You have done your homework, you know the judges' backgrounds, and you have read their opinions. But by watching the ebb and flow of the preceding arguments, you will get a sense, almost by osmosis, of the way to argue your case. This is the time to annotate your outline furiously, condensing some parts and expanding on others, so that when the presiding judge calls your case, you are comfortable with your surroundings, comfortable with your revised outline, and comfortable with yourself. With such comfort comes confidence, and it is that confidence that characterizes every good appellate advocate.

Stand Up Straight and Look 'Em in the Eye

Believe it or not, the way in which you argue is almost as important as *what* you argue. Your appearance is important; remember, when you dress in the morning, that you will be standing up in a courtroom, not sitting down on the veranda at the country club. Do not bring a stack of papers to the counsel table; take only your outline and your case summaries to the lectern. When you stand at the lectern, keep your back straight and your head up; look the judges squarely in the eye. Do not attempt to read at length from your brief; the presiding judge will almost certainly cut you off. Use your hands to accentuate important points; judges, like police officers and mothers, want to see your hands. Do not disparage your opposing counsel or the trial court. Forego the emotional rhetoric and explain your position in a calm and rational fashion; appellate judges, I can say with some certainty, do not enjoy being treated like children.

Answer the Questions

Listen carefully to the judges' questions, without interrupting them, and answer those questions forthrightly. First give a simple yes or no answer, and then follow up with a concise explanation. Judges are quite adept at sensing when lawyers are sidestepping questions and are not the least reticent about pressing hard when that occurs. But remember the cardinal rule: if you don't know the answer, don't fake it. A dishonest answer, an incomplete answer, or a misleading answer is far worse than no answer at all.

On occasion, an individual judge may announce his or her view of a case or of a given issue. All too often, lawyers assume that this judge is speaking for the entire panel. This is certainly possible, but it is not terribly likely. Unless the judge indicates that the panel has conferenced on the issue and that he or she is giving you the result of that conference, you will not be at all out of line if you finish up your argument on that point for the benefit of the other two judges. Remember that it only takes two to win.

Further, even if a judge badgers you with seemingly hostile questions, do not assume that you have lost that judge. The judge may be composing an opinion or a dissent on the spot and trying to get your response to a strong point in your opponent's argument. Or the judge may be baiting a trap, hoping that your opposition will overstate his or her position or paint the proverbial corner bright red when it is that lawyer's turn to argue. In any event, give that judge's questions a straightforward answer, without even a hint of hostility; you may actually have an ally without knowing it.

Conclusion

As Kathleen B. Havener points out,[8] the earliest courtroom drama is *The Eumenides* (485 BC), the third play of *The Oresteia* trilogy by Aeschylus. The protagonist, Orestes, is on trial for the murder of his mother. Apollo is Orestes' defense lawyer. Before the trial starts, the Furies torment Orestes, and he seeks some encouragement from his lawyer. Apollo reassures his client: "[W]ith the force of speech, *the spellbinding power in words,* we'll find a way to free you from misfortune."

In a nutshell, that is the job of the lawyer making oral argument. If you settle on one basic theme, if you craft an outline that gives you the essential elements of that theme, and if you rehearse with a vengeance, you will be ready to make that argument. Once you are in the courtroom, you can then use the spellbinding power in words—remembering that the simplest words are the most effective—to tell your client's story to the court. Of course, there can never be any assurance of victory. But when you sit down at the end of your argument, you will have shown the court a way to free your client from misfortune. That is the best you can do, and you will have done it well. ◆

Photo by David Trumpie, Trumpie Photography

William C. Whitbeck is the chief judge of the Michigan Court of Appeals. He has served on the court for over eight years; the Michigan Supreme Court appointed him as chief judge for successive two-year terms in 2001, 2003, and 2005. Chief Judge Whitbeck is a graduate of the Medill School of Journalism at Northwestern University and the University of Michigan Law School.

Footnotes

1. MCR 7.213(D).
2. MCR 7.12(A).
3. MCR 7.214(A).
4. MCR 7.214(B).
5. See http://courtofappeals.mijud.net/pdf/clerkiops.pdf; see in particular IOP 7.214.
6. William H. Rehnquist, *From Webster to word-processing: The ascendance of the appellate brief,* 1 J App Prac & Process 1, 3 (1999).
7. Ruth Bader Ginsburg, *Remarks on appellate advocacy,* 50 SC L R 567, 567–568 (1999).
8. Kathleen B. Havener, *Method acting for lawyers,* 31 Litig 48 (2005).