Expert Q&A on Best Practices and Potential Pitfalls in Oral Argument

Oral argument often presents counsel with one final opportunity to resolve any questions left open by the briefs, distill arguments to their essence, and address any lingering concerns the court may have about the case. Practical Law asked *Mark Yohalem* of *Munger, Tolles & Olson LLP* to discuss best practices for counsel and pitfalls to avoid when preparing for oral argument at the trial or appellate level.

MARK R. YOHALEM
PARTNER
MUNGER, TOLLES & OLSON LLP

Mark specializes in appeals and complex civil litigation. He has argued dozens of appeals, including two before *en banc* panels of the Ninth Circuit. Previously, he served as Deputy Chief of Appeals in the Los Angeles US Attorney's Office and clerked for Justice Anthony M. Kennedy of the US Supreme Court and the late Judge Pamela A. Rymer of the Ninth Circuit. Mark has taught appellate advocacy at the Department of Justice's National Advocacy Center and delivered lectures at the US Supreme Court and the Supreme Court of Thailand.

What role does oral argument play in appellate litigation?

At its best, oral argument presents an opportunity for judges to resolve any questions left open by the briefs, including:

- The limits of a party's proposed rule of decision.
- The intricacies of a complex factual scenario.
- Ambiguities in the trial court record.
- The tension between policy and doctrine.

In cases involving institutional litigants or highly technical areas like administrative law or patent litigation, the judges may want to explore the case's significance or potential impact in a broader context.

Sometimes, oral argument has a more cathartic quality and one or both of the advocates may be on the receiving end of the bench's concerns or frustrations with the case. Even then, oral argument serves an important role because it offers the

sole opportunity for the judges to speak with the parties at a personal, rather than institutional, level.

From the parties' standpoint, oral argument presents an opportunity to:

- Distill arguments to their essence.
- Respond to new points an opponent raised or recent developments in the law.
- Address the court's concerns and lingering questions.

Although these goals may require counsel to give the panel guidance on the record or legal issues, they also may compel counsel to demonstrate the seriousness and sincerity of a party's position. For parties embroiled in contentious litigation, particularly individual litigants, oral argument may also present a rare opportunity to plainly express a party's yearning for a just and proper result.

At its most dysfunctional, oral argument serves no purpose at all. Advocates may be heedless of the panel's questions or cues, or the panel may be so set in its position that argument is a mere formality.

While oral argument serves an important role, its function should not be overstated. When I clerked for the late Judge Pamela Rymer, she often said she was very confident that oral argument played no role in the outcome of 99.7% of cases, and of the remaining .3%, she was pretty confident it played no role either. This was surely an exaggeration (if nothing else, lawyers appearing before her lost cases at oral argument through ill-conceived concessions), but it contains a valuable truth, which is that most appellate battles are won or lost before the first shot is fired at oral argument. The substance of effective appellate advocacy is the record mastery, legal research, and brief writing that counsel develops before argument.

How does oral argument differ in appellate and trial court proceedings?

Appellate arguments are often extremely short (for example, the Ninth Circuit typically grants ten minutes per side) and structurally rigid (appellant's argument, appellee's argument, reply from appellant). They rarely involve the use of any media or props. And, of course, they are typically made before a panel of multiple judges. Additionally, appellate arguments usually (though not always) happen only once in a case before a given panel. An experienced appellate advocate may know the panel well from previous cases and may surmise the judges' views, but counsel generally will not have previously discussed the case with them.

By contrast, trial court arguments tend to have a freer flow. Trial judges have leeway to follow an argument as far as it interests them, and arguments may last hours. Skillful trial lawyers use not only the spoken and gestural communication of appellate lawyers, but also a host of props ranging from physical exhibits and audio recordings to demonstrative charts and the ubiquitous PowerPoint deck.

Trial court arguments also have an iterative quality. By the time a lawyer is arguing jury instructions, counsel likely has an understanding of the judge's views on the case from previous hearings and can tailor arguments based on this case-specific experience. If trial court argument is like episodic television, in which a theme or narrative develops over a long season even if each episode has its own focus, appellate argument has the all-or-nothing quality of a short feature film.

What are some hallmarks of an effective oral argument?

Not every successful oral argument is alike. At least part of effective oral advocacy is comfort, and an advocate is usually most comfortable speaking in her own way and in her own voice. Suggestions to "be more like that lawyer" are more likely to yield stilted, stressful advocacy than to provide helpful guidance.

That said, a good oral argument always should focus on the question, "How can I help the judge (or a majority of the judges) understand that my position is correct?" Refusing to answer hard questions, bickering with the panel, and focusing on what interests the advocate rather than what interests the bench generally distract from effective advocacy.

Yet these are not hard-and-fast rules. Sometimes, a difficult question is designed to elicit a give-the-case-away concession (the late Judge Stephen Reinhardt of the Ninth Circuit was known for putting such questions to prosecutors). Sometimes, the appropriate answer to a hostile judge is a confident and clear correction ("No, your honor, that is not correct."). And sometimes, counsel needs to get an errant argument back on track. However, these exceptional maneuvers are not the norm and counsel must undertake them consciously, rather than out of mere frustration or anger. Counsel's role is to help the court, not hinder it.

What common pitfalls should counsel avoid?

As noted above, cases are more often lost than won at oral argument. That can happen because counsel:

- Makes a fatal concession.
- Overreaches in a way that reveals the danger of counsel's proposed rule of decision.
- Alienates the panel with a lack of candor or competence.

Counsel cannot always control for these incidents, but counsel should think about ways she could possibly lose the case at oral argument and then prepare to prevent that from happening. For example, if counsel can anticipate a question from the bench seeking a concession ("Surely you cannot mean ... ?"), counsel should consider an answer that is neither a fatal no nor a hubristic yes.

What should counsel focus on when preparing for oral argument?

Although every case is different, counsel always should take steps to:

- **Streamline voluminous briefing into a succinct argument.** Counsel must determine how best to distill extensive briefing into a few minutes of argument. In writing the briefs, counsel likely has already thought about the themes, narrative,

and issues in the case, but even a concise introduction or statement of the case can seem bloated at a short oral argument.

- **Avoid case-ending missteps or concessions.** Counsel must clearly identify the key points on which legal and factual arguments turn to avoid offering concessions in a hypothetical or leading question that could gut counsel's argument.
- **Identify a silver bullet argument.** Though it is rare for oral argument to proceed perfectly, counsel should identify that one, hit-it-out-of-the-park question or answer, and consider how argument might be steered to increase the likelihood of such a moment.

Counsel also should consider the asymmetry of oral argument. A trial court judge or appellate panel must prepare for many arguments that day, and are unlikely to have the same depth of understanding as counsel. However, as the questioners, judges must prepare only for the issues they care about. Counsel must prepare to defend her client's case at every point, knowing a judge may attack only at a single spot, and she must be ready to defend the case to a court that may not fully understand it. Because counsel cannot know what issue or nuance the court will seize on, she must be equipped to address the universe of problems a case presents.

Given this reality, counsel should prioritize the issues that are likely to come up at argument, but she must know the case thoroughly. To prepare for such a grueling examination, there is no substitute for a careful review of the record, the cases, and the briefs. In an appellate argument, the single most important of these materials is the decision being appealed. Counsel should read the decision over and over again, because there are few things more annoying to an appellate judge than an advocate who misstates or misconstrues the trial court's actions.

How useful are argument outlines or roadmaps?

By way of analogy, most drivers have become accustomed to navigating with specific, linear directions (for example, using GPS) rather than relying on their familiarity with an area and paying careful attention to road cues and traffic. The former is easier and permits drivers to get anywhere, almost always without getting lost. However, by being beholden to step-by-step directions, drivers might miss an extraordinary opportunity (such as a roadside attraction) or an unaccounted-for danger (like a dead-stopped freeway), or unthinkingly waste time on needless turns dictated by some mechanistic logic in the software.

The same costs and benefits are true when tethering a presentation to rigid directions before oral argument. Although it is essential to study the maps and learn the terrain (the record, the relevant law, the key inflection points in the parties' arguments), once on the road, it is much better to make decisions on the fly based on the current conditions.

My own approach, which I owe to my mentor and law partner Fred Rowley, is to staple two manila folders together into a trifold and include very high-level, large-font modules. These modules are not a linear progression to be read left to right, top to bottom, but instead reflect a few important points in each area. This way, whatever route oral argument takes, I can refer to key points easily. I seldom use these notes, but they serve as a useful safety net, and the process of distilling the issues in the case into soundbites is always valuable.

How important are moot court sessions when preparing for an appellate argument?

Moot court sessions are extraordinarily important and offer the most effective means of preparation. However, moot court sessions are typically much longer and more detailed than the actual argument, and do not offer a realistic simulation of an oral argument. The particular things that fascinate and provoke the moot panelists will likely be different from what touches the actual judges. Still, there is often overlap that arises in an unexpected line of questions or point of concern that counsel had not considered. Moot court sessions can help counsel craft a specific, persuasive response to these types of questions, which may later be posed at oral argument.

Even aside from this direct benefit, moot court sessions force counsel to begin preparing early and to test different approaches in a controlled environment. These two factors can help calm nerves on argument day.

Additionally, in certain high-profile cases, moot court sessions serve as a way to bring in other stakeholders in the industry or "cause community." This presents an opportunity to draw on the wisdom of others and solidify an alliance that may be important over the long haul.

Because moot court sessions are so important, counsel should assemble a strong moot court panel. In particular, counsel should:

- Recruit colleagues and friends who will ask tough questions, rather than those who will throw softballs.

An advocate who does not know the names of key precedent, the record pages of the best facts, or the details of important events in the case may convey a lack of seriousness that calls the whole case into doubt.

- Make sure to give the moot court judges the briefs early enough to thoroughly prepare.
- Have a teammate take notes during the moot court session and the debriefing afterward, so that counsel can focus on listening and watching the panel.

How can counsel most effectively use cases and the record during argument?

Case law and the record are often most useful as tools to boost counsel's credibility. Realistically, a judge or her law clerks can find a case name or pin cite on their own. After all, they have access to Westlaw and text-searchable electronic records, often during argument itself via a tablet computer.

But even if the court does not require counsel's assistance, counsel always should be prepared to provide it. An advocate who does not know the names of key precedent, the record pages of the best facts, or the details of important events in the case may convey a lack of seriousness that calls the whole case into doubt. Conversely, an advocate who knows these points fluently shows reliability and expertise. Ultimately, when two advocates are competing to serve as a court's guide, the court is more likely to follow the lead of a reliable expert than someone who seems unfamiliar with the terrain.

Cases and the record are also, ultimately, the only authority counsel has in relation to the bench. An advocate is unlikely to sway a skeptical judge merely by stating that the court has misinterpreted case law ("No, your honor, that is not the law."). By contrast, when counsel engages directly with the precedent, she can use the court's own strength to influence it ("Your honor, such a rule would contravene *Smith*, and I direct the Court to page 721 of that opinion, where this Court held ...").

Similarly, an advocate who simply disagrees with a court's characterization of case law or the record may do little more than raise the judge's eyebrow or ire ("Well, your honor, I disagree that that's what happened."). Instead, counsel can ground an argument in the facts with specific information and citations ("Your honor, if you will turn to ER 741, you will see that Detective Johnson testified, and there is no contradictory evidence, that ...").

Here, as elsewhere, lawyers should bear in mind that their facility with the facts and law are a means to assist and advise the court. An advocate who presents her knowledge as a signpost for the court, rather than as a roadblock, is much more likely to find a receptive audience.

What are some tips for conveying key aspects of a lengthy or complex factual record?

Written briefs offer a far better vehicle to organize and clarify a complicated factual record than oral advocacy. A good brief, like a good history, turns the messiness of the documents, testimony, findings, and inferences into a coherent and thematic narrative. That work should already be done by oral argument. Attempting to give a Homeric oral epic to a trial judge or an appellate panel is an inefficient and ineffective use of limited time.

PRACTICE NOTES

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Instead, counsel should focus on the points in the factual or legal record that are:

- Material to the key issues in the case.
- Directly disputed by the parties.
- Prone to misunderstanding.

Where at least two of these factors are present, counsel should plan to address these points even if the panel does not ask. But where any one of these factors is present, counsel should think about how to help the judges should they ask about the subject. In a fact-intensive case, it can be useful to develop modules on the key points of factual disagreement, accompanied by the relevant record pages. This allows counsel to begin an answer with a concrete direction on where the issue can be found ("The relevant pages of the record are ER 578, 621 through 624, and 733, and what those pages reveal is ..."). By starting with the record and moving to a concise explanation, the advocate gives the court a clear, trustworthy answer to help resolve any dispute or confusion.

Are there any circumstances where a party should consider waiving oral argument?

Absolutely. Oral argument is expensive. It requires preparation, moots, possibly travel, and the costs of the argument itself. For public agencies that automatically cover these expenses or well-funded clients in high-stakes litigation, this is not necessarily a factor. But for many parties, the game is not worth the candle. That is particularly so given Judge Rymer's maxim, a point that may be especially relevant in courts like the California Court of Appeal, where written opinions are typically prepared before oral argument.

Most of the time, where cost is not an issue, having one last opportunity to persuade the court is too important to forgo. Of course, many appellate courts (like the Ninth Circuit) decide for themselves whether or not to hear argument, regardless of the parties' wishes.

When an advocate is well-prepared and responsive to the panel's interests and concerns, oral argument can shift or even transform the outcome of a case. But even when oral argument does not affect the bottom-line result, it remains a climactic event in appellate litigation and a key component of a successful appellate practice. For that reason, it remains one of the law's most important rituals.