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News for Associates and Young Lawyers

Career Development

Preparing For Oral Argument

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Apart from the political and media spectacle surrounding the confirmation hearings of Chief Justice John G. Roberts was the impression he left on attorneys who watched them or read about them in the press. From a purely clinical or practice standpoint, that impression for many was of an appellate litigator at the top of his game; a superstar lawyer who had earned his position as a top member of the U.S. Supreme Court bar.

Some of the more intriguing press coverage of the hearings were reports about some of Roberts' techniques for preparing for oral argument. Many articles repeated the story about how he would write his main arguments on index cards, shuffling them frequently to help him answer questions from the Court in whatever order they arose, transitioning smoothly from one argument to the next.[1]

The Washington Post described Roberts' "compulsive" approach to oral argument preparation, spending countless hours getting ready, including generally running three moot court sessions for each case and on a few occasions actually

visiting client factories and property to better understand the facts underlying a dispute.[2]

Though few attorneys will reach the heights of the new chief justice, reading about his approach to oral argument highlights the need for argument preparation beyond simply rereading the briefs the day before a court appearance, whether the audience is the Supreme Court or an argument on a discovery motion before a trial court judge.

Participating in writing the brief is an excellent way for an attorney who will be presenting the oral argument to learn the case. Though it may not seem economical to have the higher-rate oral advocate heavily engaged in the brief writing process, the client will frequently end up paying less for that attorney to prepare for the argument if she has already read all the factual documents, case law and statutes in the course of preparing the brief.

Preparing the brief will also permit the advocate to give thought to what written arguments may prompt unnecessary questions from the bench or may be hard to explain or defend orally.

Preparing for most arguments will involve more than retrieving the redwell containing the case file and hoping you have time to read it on the subway to court.

Set a schedule for argument prep time, including deadlines to read and summarize the factual record, and the key cases and statutes. Reread the briefs and think about questions the court will have. Make a list of those questions, along with arguments in your client's brief that can benefit from further explanation orally.

Prepare an outline of your argument, paying close attention to your introduction and how, time permitting, you would ideally like to finish your argument so you conclude on a strong note. If nothing else, an introduction should state your appearance for the record and who you represent, the nature of the appeal or motion if you represent the appellant or moving party, your client's position and the main points supporting why the court should award the relief your client seeks.

The remainder of the outline should

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cover those points, with shorthand citations to the factual record, case law and any relevant statutory authority or administrative rules. Consider preparing an argument binder that will hold the outline, key cases and important parts of the record.

Each attorney has his own idiosyncratic method of preparing for oral argument. Some like everything in his argument binder double-sided to minimize the size of the binder and the amount of paper brought to the podium when the argument is called.

Some are content approaching the podium with only a few sheets of paper or a lone legal pad. Others create elaborate outlines in table form, employing no less than three different colored highlighters to distinguish the importance of arguments and supporting authority.

What is important is not the exact method an attorney employs, but finding sufficient time to read the briefs and the key parts of the factual and legal record, to contemplate likely court questions and affirmative points to make, and to prepare an outline.

With an appellate argument or more important trial court motions, consider asking other attorneys to assist you in one or more moot court sessions.

Know Your Court

Though it may seem obvious enough, know the oral argument rules and practices of the court and the particular judge you are going to appear before. Do you have to sign in? How? Where? Where do you stand when your case is called for argument? How much time will you have? Will there be time for any rebuttal argument? How should you address the court when you begin? What is the judge's temperament? What prior cases has the judge or the court decided that are relevant to your argument? How do you order a transcript of the argument if one is available?

Some of these questions can be answered by researching the judge or judges that will hear your argument ahead of time and talking to their courtroom personnel and attorneys who practice before them on a regular basis. Others, such as a judge's personality, or whether an appellate bench is comprised of active questioners, may only be answered by observing the court ahead of time if time permits.

A pre-argument visit to observe the court may not always be necessary, but if the argument is important enough, it may be time well spent, even if it cannot be billed to the client.

Making the Argument

Much of what constitutes proper oral argument style is a matter of common sense. When a judge has a question, stop talking and listen to her question, even if you are in the middle of a sentence.

Make sure you answer the court's question directly, even if that means giving a qualified yes or no response with an explanation. Be candid and do not guess at the answer to a question about a record or case law cite that you simply do not know.

Maintaining your credibility before the court is paramount, not only for the argument you are making, but for future appearances before the same judge or another judge in the same courthouse. Judges talk to one another and a favorite subject is attorneys who have appeared before them.

Trying to convince the court that your client's position is just and fair is fine, but tone down the rhetoric and emotional pleas, and focus on the facts and the law that say your client should win.

Glancing down at your outline periodically is fine, but do not read your argument. Avoid attacking or whining about your opposing counsel. Speak clearly and slowly in a conversational tone and maintain a professional posture.

Though more applicable to trial court arguments, consider whether a visual aid would help illustrate a particular point, even if it is just a checklist of the elements in a cause of action or a chronology of key events.

Conclusion

Though in part attributable to his innate intelligence and talent, more than anything else, the successful oral advocacy skills the new chief justice displayed in his recent confirmation hearings reflect immense discipline and hard work.

Though not every calendar call will require the same degree of preparation, sufficient preparation and planning plays an indispensable role in every oral argument, whether it is an argument on a motion to compel interrogatory responses or an appearance before the U.S. Supreme Court.

1. Tony Mauro, "Roberts Would Bring a New Personal Dynamic to the Court," NYLJ, July 26, 2005.

2. Michael Grunwald, "Roberts Cultivated An Audience With Justices for Years," The Washington Post, Sept. 11, 2005.