

# Who Should Do the Oral Argument?

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This article grew out of a collaboration between the authors on a case recently concluded. One of us is a trial lawyer who handled the case in the trial court; the other is an appellate lawyer who argued the matter in the Seventh Circuit. (We won at both levels. *See Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. 2011).) This experience led to a broader conversation about who should argue the case and when. When should the lead lawyer on the matter argue? Or an appellate lawyer? Or local counsel? Or a less experienced, more junior lawyer?

We thought we would broaden our conversation by writing this article. It turns out that there is a good deal of scholarship on these issues already, and we were fortunate enough to talk with numerous individuals deeply interested in the subject, including judges from all levels of the state and federal judiciary. We unearthed more issues than we resolved, so what follows does not provide much in the way of conclusions. We hope to at least have identified the relevant issues for further discussion among teams and clients on this crucial, and potentially outcome-determinative, issue.

Litigation often works now just like it did back in the time of Abraham Lincoln. A litigator takes on the case; he or she becomes the lawyer for all purposes. That includes, when the need arises, oral arguments. Some see it as almost a presumption. Judge Robert Miller of the U.S. District Court for the Northern

District of Indiana says that, while “I have had some motions where it was a junior partner or an associate who worked on the brief that argued, and I have had some where they tried to split the time, for the most part it’s just the lead attorney who comes in and argues.”

Lead trial lawyers who have lived with a case and the record are often best equipped to argue things like motions to dismiss or summary-judgment motions. “To be successful, the trial lawyer must build a convincing argument from an amorphous mass of testimony and create an aura of righteousness around client and cause.” Jennifer S. Carroll, “Appellate Specialization and the Art of Appellate Advocacy,” 74 *Fla. B.J.* 107, 107 (2000). The better the lawyer is acquainted with the record and facts, the better positioned that lawyer will be to do that. And at the trial stage, there is likely no compelling need to incur the cost of bringing in a specialist to learn the record. Judge Charles Breyer of the U.S. District Court for the Northern District of California put it this way: “If a motion does not present a close question, then it really doesn’t matter who argues, because it won’t move the court one way or the other.” But if the motion does present a close question, “the argument becomes extremely important and should be handled by the person who best understands the argument and the issues.”

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## The Appellate Specialist

It can make sense for the lead lawyer to argue an appeal as well, especially where the questions presented require record-intensive knowledge. Glen Nager, who leads Jones Day's issues and appeals practice, noted:

While frequently an appellate specialist is the way to go, you can have a real advantage for your client having the lead trial lawyer argue the appeal where the issues on appeal are subject to clearly erroneous or abuse-of-discretion review because that lawyer will necessarily have a better grasp of the record. That's probably even more true where you're seeking affirmance rather than reversal. In those circumstances, since what you are doing is trying to defend the trial court judge, the lawyer who presented the arguments to that trial court judge may have an advantage. An appellate specialist can do that, but will have to put in the time to learn the record, and that may not be cost-efficient.

Many members of the judiciary agree that, in some cases, lead trial counsel is the best oral advocate before the court as well as the jury. It is interesting, though, that they reach that conclusion for a variety of reasons. Justice Jan Patterson of the Third District Court of Appeals in Texas seems to prefer what she perceives as the more holistic viewpoint of trial counsel:

I am in favor of the retention of the role of that last great generalist of the trial counsel—the ideal lawyer, the trial lawyer and litigator with robust knowledge of the seamlessness of our system of justice, not parsed by an overly narrow view of a particular aspect of the system.

Symposium Transcript, “The Rise of Appellate Litigators and State Solicitors General,” 29 *Rev. Litig.* 545, 606 (2010).

Justice Randy Holland of the Delaware Supreme Court reaches the same conclusion but for different reasons. He values the in-depth knowledge of the record that trial counsel can bring:

In Delaware we think it is a good idea for the trial lawyer to argue when record knowledge is important. That's why, for example, in criminal cases, we don't let you challenge the effectiveness of your trial counsel in the direct appeal—because that would eliminate the trial attorney from doing the appellate argument. So we make you save that for post-conviction relief, and that means your trial attorney in a criminal case is usually doing the argument on appeal.

Judge Raymond Fisher of the U.S. Court of Appeals for the Ninth Circuit summed it up well: “The attorney who knows most about the case is usually the best to argue on substance.”

Besides, there is the practical point that general practitioners



Illustration by Lisa Haney

need to make appellate arguments, lest they cede the field entirely. For example, “[i]f general practitioners do not go before the Supreme Court, the already high costs charged by the experienced advocates, who would be in greater demand, could become even more expensive.” Christine M. Macey, “Referral Is Not Required: How Inexperienced Supreme Court Advocates Can Fulfill Their Ethical Obligations,” 22 *Geo. J. Legal Ethics* 979, 995 (2009).

Sometimes, though, it makes more sense to bring in a specialist to do an argument. In a trial court, when speed is important, topic specialists should argue a case, as specialized knowledge facilitates a quick response. Margaret Raymond, “The Professionalization of Ethics,” 33 *Fordham Urb. L.J.* 153, 158 (2005). In certain areas of law, it may be best for a specialist to argue a case because of the intricacies and complexities of the area of law. For example, medical malpractice claims are “complex, risky, and expensive to prepare, and many lawyers working on a contingency fee do not have the expertise or resources to handle such cases.” Stephen Daniels & Joanne Martin, “Plaintiffs’ Lawyers, Specialization, and Medical Malpractice,” 59 *Vand. L. Rev.* 1051, 1061 (2006). Indeed, studies show that attorneys who specialize in medical malpractice cases are more successful, win higher awards for their clients, and develop a strategic advantage over attorneys who are not specialists in this area of law. *Id.* at 1056, 1060.

Bringing in a specialist is especially common for an appellate oral argument. Scholars have remarked on the emergence of a private appellate bar in recent decades. Thomas G. Hungar & Nikesh Jindal, “Observations on the Rise of the Appellate Litigator,” 29 *Rev. Litig.* 511, 512 (2010). Beginning in the 1980s, large law firms began to establish appellate practice groups to distinguish themselves from other firms. *Id.* at 521–22. “As appellate representation has evolved as a specialty practice area, even general litigators find that it is good practice to enlist experienced appellate specialists, or at the very least experienced appellate co-counsel, when a case is appealed (if not before).” *Id.* at 524.

Other considerations might prompt a change to an appellate specialist. For example, one federal appellate handbook suggests that trial counsel should turn over the argument to an appellate specialist where a personal stake in the appeal is clouding the trial attorney’s objective judgment, the trial attorney despises opposing counsel, or the trial attorney is unaware of appellate procedures, particularly if the client can afford the costs associated with retaining an appellate specialist. “Should Trial Counsel Handle the Appeal?,” *Federal Court of Appeals Manual* § 1:14 (2011). Some see the change as permitting more flexibility on the appeal. As Justice Arthur Gilbert of California’s Second District Court of Appeal points out, it gives the appellate advocate the ability, when asked about

strategic decisions at trial, to answer honestly, “I wasn’t there.” Perhaps less charitably, some lead trial lawyers are happy to give up appeals so that they have someone else to blame if the trial court victory is not affirmed.

An appellate specialist can offer clients unique value because the skills required to be an effective appellate advocate are quite different from those required to be a good trial attorney. Hungar & Jindal, *supra*, at 530. An appellate specialist can also provide an independent and objective perspective when considering whether to proceed with an appeal and which issues to raise on appeal. *Id.* at 531; Jill M. Wheaton & Lauren M. London, “The Who, What, When, Where, and Why of Appellate Specialists,” 87 *Mich. B.J.* 18, 19 (2008). Judge Tom Ambro of the U.S. Court of Appeals for the Third Circuit stressed that important role: “On the appellate level, the attorney that was the lead in the trial court oftentimes does not have enough time or enough experience to know what issues to lay out correctly. The appellate practitioner does, and what the appellate practitioner clearly has is the ability to be more discerning.”

The appellate specialist, with proper preparation, may also know the record better than the trial lawyer—trial lawyers do occasionally fall victim to remembering the record as they wanted it to be, rather than as it went in. Chief Judge Kozinski of the Ninth Circuit observes:

We judges generally know the law; we may well have written it. What we need help with is the record in your case. So where the stakes justify getting a second lawyer up to speed, it makes sense to have someone learn the record cold, as we do. That lawyer can then teach us the record and mesh it with the law at argument. That can be a real benefit to the client.

And then there is the knowledge that can only come from specialization, as Justice Patterson noted:

I am silently in favor of the excellent appellate specialist with nuanced knowledge of the appellate system and insights into the proclivities of each and every justice who sits on the court. And indeed they are the lawyers who have looked at the statistics and they know the issues, whether it is standard of review or what the issues are that are going to be decided by the court. And they know that some issues are much more marketable to the court than other issues are. What issues is the court interested in and how can we grab their attention? I think that is one of the great cases for the appellate lawyer and a great use of an appellate lawyer.

“The Rise of Appellate Litigators and State Solicitors General,” *supra*, at 606.

Greg Castanias, who leads Jones Day's Federal Circuit practice and specializes in appeals before that court, agreed that local knowledge can be key:

Particularly in a court like the Federal Circuit, where you have an hour between when you find out who is on the panel, and when you present the argument, having recent and perhaps repeated experience with the judges, a general understanding of their personalities, of their likes, dislikes, pressure points, etc., is probably as valuable, if not more valuable, than 40 years of overall experience.

And "it really helps to have a feel for what matters to the court, what's going on in the court's development of the law, what recent decisions have come down from the court and the like."

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## Bringing in a specialist is especially common for an appellate oral argument.

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Appellate specialists bring another valuable skill set to the table: They are well familiar with the unique argument style that is most effective in appellate courts. Justice Douglas S. Lang of Texas's Fifth District Court of Appeals put it bluntly: "It can be a mistake to let a talented trial lawyer, who has little or no appellate experience, argue an appeal. That sounds harsh, I know. However, I have seen excellent trial lawyers appear who have little or no appellate experience, and they from time to time make impassioned jury arguments." He explains that "some of those lawyers fail to focus adequately on the bullet points that must be addressed to try to persuade the appellate panel" and that, in addition, "it can be tough for the trial lawyer to focus on points that may relate to potential omissions on their part. That may just be human nature. An appellate specialist, not involved in the trial, may be able to take a more objective approach."

Judge Ruggero Aldisert of the U.S. Court of Appeals for the Third Circuit agrees, observing that "appellate advocacy is specialized work. It draws upon talents and skills which are far different from those utilized in other facets of practicing law." Hungar & Jindal, *supra*, at 517. Justice Gilbert said quite simply:

After 30 years on the appellate bench, my strong view is: Never use trial counsel for an appeal. Appellate courts don't lend themselves to jury arguments. And trial counsel are

often so close to the case that they slip into that mode, even if they know better. It doesn't help. Appellate judges want to engage sophisticated, knowledgeable counsel who can help them write better opinions.

Judge Ambro notes that, when a trial attorney is arguing the appeal, "especially if it's plaintiff's counsel and they lost at trial, they may start talking to you as if you are a juror. You will say to them, 'Hang on, that is not going to work here because we don't decide facts. That's what juries do.'"

Research even suggests that, for perhaps some or all of these reasons, appellate specialists achieve better results on average, particularly in the U.S. Supreme Court. A recent case study of arguments at the Court found that from "October Term 1980 to October Term 2006, there has been a general decline in the percentage of Supreme Court arguments given by first-timers as well as an increase in the percentage given by advocates who had made ten or more prior Supreme Court arguments." Macey, *supra*, at 983. Research has shown the benefits of this, and the statistics show that "attorneys who litigate before the Court more frequently than their adversaries 'prevail substantially more often.' Experience is not determinative, but it significantly alters the probability of a party's success." *Id.* at 982; *How to Handle an Appeal* § 9:8.1 (Who Should Argue the Appeal?: Should the Specialist or the Appellate Attorney Argue?) (Practising Law Inst. 2010).

Those who have studied the rise of the appellate bar argue that "the [Supreme Court Bar] is also influencing the Court's rulings on the merits." Richard J. Lazarus, "Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar," 96 *Geo. L.J.* 1487, 1522 (2008). Not only do these advocates win more often, but they arguably "influence the content" of the Court's opinions, "including the words used and the breadth of the ruling or, conversely, the lack thereof. In the longer term, it is the words that the Court uses throughout its opinion, rather than whether the opinion nominally ends with an 'affirmed' or 'reversed,' that tend to have the most significant impact." *Id.*; see Macey, *supra*, at 995-96 ("[A]n elite Bar can affect what the Court places on its docket and what content is or is not included in its opinions."); Hungar & Jindal, *supra*, at 528.

None of this is to say, of course, that when an appellate specialist is tapped, the trial lawyer should disappear from the scene. Even when there is to be a handoff, that lawyer has a crucial role to play, as Justice Lang explained:

It is imperative for the lead lawyer to work with whoever is doing the oral argument from the beginning of the process. I have seen too many cases where the trial lawyer is on to the next big catastrophe to get ready for trial and the specialist



is kind of left by herself, with the hope that she gleaned everything from the record. Without that partnership, I think the specialist will likely have some problems.

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## Local Counsel

Geography can play a role, too. Especially in state courts, it often makes sense to tap a local lawyer for the argument. Justice Holland observed that local lawyers can bring important familiarity with local law.

When you are arguing an appeal in a corporate case in the Delaware Supreme Court, we frequently refer to the cases by name. When we use the name of a case, we expect everyone to know the facts and the holding, and to be able to distinguish it from the present case or another case someone brings up. Consequently, you will be at a disadvantage in arguing a corporate case in Delaware if you are a non-Delaware lawyer and weren't immersed in our jurisprudence. You can see that in a merger or a hostile take-over, you'll have the court say, why is this *Revlon* and not a *Unocal* case. If it's a *Unocal* case, why isn't it like *McMillan* or *Ivanhoe Partners*. If you don't know those cases off the top of your head, you really are at a disadvantage.

He added that the Delaware Supreme Court has heard cases argued by out-of-state counsel "sitting next to a Delaware lawyer who moved their admission pro hac vice and who we know is a superstar. And we are thinking to ourselves, why isn't that lawyer arguing this case? We are looking for help. The people who know the cases can be most helpful."

There are basic practical reasons for choosing local counsel as your oral advocate as well. Justice Lang notes that one problem the court may encounter "with lawyers from out of state and region is that they may speak entirely too fast. They need to tone it down. Fast tempo of speech is not what one usually hears in the southwest. I grew up in the north and it can be off-putting to me." Justice Holland adds, "In the Delaware Supreme Court, we expect attorneys to wear white shirts, and to stand and respond when the chief justice greets them. If you're from out of state and don't know these things, well, it can be hard to make a compelling argument moments after being admonished by the chief justice for not knowing our customs."

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## The Junior Lawyer

Many of us have seen this happen. You are the talented associate or junior partner who knows the case much better than the senior partner. You've spent weeks crafting the perfect motion or

appellate brief, sweating every detail. You know the considerable strengths and secret soft spots of your arguments. Now the time is approaching to start preparing for the oral argument. You've kept the date available on your calendar, thinking that the senior partner will want you by his side or even ask you to handle the argument. But as the day approaches, the senior partner informs you that, despite his best efforts on your behalf, the client wants him to argue.

Usually, despite your disappointment, it will turn out just fine. You will have prepared the senior lawyer to give a creditable argument. But consider what happened in one Ninth Circuit argument before a particularly "hot" panel. Peppered with tough, aggressive questions from the panel, the senior lawyer kept looking over his shoulder to his junior colleague sitting at the counsel table, hoping in vain for some help. Finally, Chief Judge Alex Kozinski, presiding on the panel, suggested that perhaps his client would be better served by letting the younger lawyer take over the argument midstream.

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## In state courts, it often makes sense to tap a local lawyer for the argument.

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Perhaps the most frequent theme we've heard (especially from judges) is that a party is best served by having its most knowledgeable lawyer argue. An important, but often overlooked, corollary is that, if that person happens to be junior—either a partner junior to the lead lawyer on the case or even an associate—that alone should not get in the way. *How to Handle an Appeal* § 9:8.2 (Who Should Argue the Appeal?: The Senior Versus the Junior Attorney) (Practising Law Inst. 2010); Charles B. Blackmar, "Representing Death Sentence Appellants," 5 *J. App. Prac. & Process* 275, 293 (Fall 2003). There will certainly be exceptions where the most knowledgeable lawyer is young and with no experience, and the case is too important for a rookie, but those instances will be rare, almost by definition. The more important the matter, the more senior the most knowledgeable lawyer is likely to be.

Judge Breyer recounts a story from his days in private practice, when he was on his way to argue a fairly routine motion. He was accompanied by an associate from the firm who had done most of the work. She was explaining certain things to him, and he realized he wouldn't be able to understand the issues as well as she did given the limited time to prepare. So he

told the associate, mid-sentence, that she would argue the motion. “It was the right thing to do,” he said. “And the way she handled it, well, she probably got a better result than I would have been able to get.”

In rare instances, express judicial preference can play a role. Judge William Alsup of the U.S. District Court for the Northern District of California has a standing order that provides: “The Court strongly encourages law firms to permit young lawyers to examine witnesses at trial and to have an important role. It is the way one generation will teach the next to try cases and to maintain our district’s reputation for excellence in trial practice.” One of your authors recently appeared before Judge Alsup, asking the court to combine the hearing on two motions set for different dates. He agreed, but only on the condition that the junior lawyer continue with the assignment of arguing the motions.

Chief Judge Kozinski states:

Experience, number of arguments, the ability to think on your feet, those all count for something. But the most important thing, I think, is knowing the record. You need to have an advocate who can put in the time to learn that record as it is, and as we judges will read it, not as the trial lawyer remembers (or occasionally misremembers) it. Senior partners often don’t have that kind of time—they have other responsibilities, other clients, and running the law firm to worry about. Or a case may not justify spending senior partner rates on the time required to prepare. But there’s just no getting around putting in that time. So often, it makes more sense for a junior lawyer to argue.

Doing otherwise can lead to bad results. Judge Robert Gettleman of the U.S. District Court for the Northern District of Illinois put it this way: Judges “know when a senior advocate hasn’t done the work and is just going through the motions. We figure that the other members of the team probably just poured the argument in his ear the night before.” Judges also know, he said, “that the lawyer who wrote the brief, whoever that might have been, would have done a much better job.” On the other hand, “when the senior lawyer has the courage to get out of the way, I think that judges are impressed by that, and they understand exactly what’s happening,” Judge Gettleman noted.

When you see a senior partner sitting at the table and smiling and nodding and encouraging and collaborating when the other side is arguing, I think that most judges appreciate that giving the younger lawyers a chance to argue the case that he or she is most familiar with is really a good thing for the lawyer and for everybody else.

Judge Fisher concurs:

I’ve seen as many partners screw up an argument because they don’t really know the case as any stumbling youngster blowing it due to inexperience, butterflies, or the like. Indeed, I can think of one striking instance where the partner was arguing but plainly didn’t know the record, and kept looking to his associate at counsel table for help. He fulminated and obfuscated so much for lack of information on facts and key cases that all three judges in conference laughed out loud at his ineptness, noting the obvious, that the client had insisted on his arguing the key case (or his ego did)—to the client’s detriment!

It seems that the advocate’s age alone is not likely to provoke a judicial response one way or the other. Justice Holland emphasized that the Delaware Supreme Court has “no problem with younger lawyers making arguments. We have young lawyers who have made great impressions notwithstanding their nervousness and because they had good support in preparing them.” Judge Gettleman was more blunt: “People, sometimes clients, think that having a senior lawyer argue is going to influence us, even if they don’t know the material as well. In fact, it doesn’t. Nobody is fooling anybody when you do something like that.” Justice Gilbert quipped, “We don’t care about things like that. That doesn’t give the California Court of Appeal enough credit.” And Jones Day’s Nager echoed, “experience can be overrated. It’s insight that matters. Frequently there are younger lawyers with fewer appellate arguments who would make much better appellate advocates than a more senior lawyer with more appellate arguments.” To the contrary, rather than being put off, judges might actually go easier on a younger advocate. Judge Gettleman says, “I would probably go lighter on the younger lawyer than I would on the older lawyer. For example, I get impatient when seasoned lawyers make silly mistakes.”

For this to work, often a more senior lawyer will have to get involved and sell the client on the idea. Judge Gettleman remembers from 25 years of practicing law that

you don’t want to be in a position where, if you lose, the client is going to blame the firm for not having the big shot argue the case. So you have to try and educate your client. I think it’s the job of the firm, and the job of the senior partner who may have a relationship with the client, to say, “I think, the younger lawyer ought to argue this case because he or she is most familiar with it and I have confidence and think that he or she can do it.”

Nager adds that, with the right approach, “clients can appreciate the fact that a lawyer who has written the briefs and

fought for the arguments at a certain point is a better candidate for arguing their case than a person who is more senior and has argued lots of other cases.” And Castanias echoes this thought:

What you need are generous partners, mentors who will fight for you with a client or clients who are willing to take a risk and hand over your cases to a young lawyer who is eager, hungry, smart, and immersed in the case. Ultimately, you have to have partners who are not just going to presumptuously say I am going to be the guy arguing this case all the time.

Indeed, perhaps the most often heard reason given for trial or senior counsel to argue is that the senior lawyer has a great relationship with the client, and the client wants the senior lawyer to argue. One wonders why, if that lawyer commands such respect from the client, he or she can't persuade the client that a junior, more knowledgeable lawyer should get the nod. A counter is that, in some high-stakes cases, general counsel needs to make a choice of advocate that is unassailable by the board of directors. In those circumstances, age alone can be a deal breaker.

If the client can be convinced, the junior lawyer will have to be prepared. That can happen through mock arguments. It can come through having been in a clerkship or having served in a government agency and having seen or done arguments. It can come from going to the court the week before and watching other advocates to get a sense of the rhythm, the customs, and

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the idiosyncrasies of the court. And it can come from working on pro bono cases. Justice Lang points out that “one way to get a beginning lawyer appellate experience to the point where they have confidence and they have a list of things that they can show to the firm and most clients about what they have done is getting them on the appointment list for indigent appeals in criminal cases.” As Judge Ambro put it, “If you have a bit of talent, and you take that talent and hone it with hard work and preparation, you can be every bit as good as a more experienced lawyer.” See generally Brian J. Murray, “The Importance of Pro Bono Work in Professional Development,” 23 *Verdict: The Journal of the Trial Practice Committee* 1 (Summer 2009).

Finally, Justice Lang observed that while it's fine to bring in a younger lawyer, it has to be done for the right reasons—because he or she is the best person for the argument. “I think that a lot of clients, even the very substantial ones with extensive resources,” he observed, “don't want to spend a lot of money on the appeal. They think they won the trial, we came back after the jury came in and we had a big party. So, you just need somebody to be in place. That's really dangerous.” And he explains why:

You can win the battle in trial court and lose the war in the appellate court if your lawyer arguing is rolled over by the other side. If you are the appellee taking a low key approach and the appellant comes in well prepared and strong, the appellant could get the attention of the panel and cause them to ask the appellee's lawyer questions for which she is not prepared. The result could be less than positive.

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## No Universal Prescription

So where does all of this leave us? It seems that, as to who should do the oral argument, there is no single, universal prescription. There is general agreement that the best lawyer for the situation should argue, but who that is in each case and, indeed, in each argument opportunity in a case, is likely to depend heavily on the circumstances. Sometimes it will make sense to have the lead lawyer on the case argue. That is particularly true for situations in which a quick and facile command of the record is needed and where that lawyer is up to speed. At other times, it might make more sense to bring in someone else. Sometimes that can be a local lawyer. Sometimes it can be a subject-matter specialist. And sometimes it can be an appellate specialist. Finally, sometimes the best lawyer is the one most prepared, even if that person is more junior. With that will come a responsibility on the part of a more senior lawyer to make the client comfortable and to make sure that the junior lawyer is mooted and helped so that the substance can come through unimpeded in the presentation.

As in many aspects of litigation, there are no clear, one-size-fits-all answers. But we hope that, with these considerations in mind, our readers are at least better equipped to find the best answer for their situation. ■