Preparation for Oral Argument of Your Appeal

By: Hon. Peter B. Skelos, J.S.C. (Ret.)

During my years in the Appellate Division, attorneys would frequently ask: "Why argue the appeal?" "Haven't the judges made up their minds in advance?" My advice has always been direct and simple: Do not waive oral argument. From a selfish perspective, appellate judges enthusiastically consider the oral argument the most exciting part of their work. Counsel should approach oral argument with no less enthusiasm and preparation.

Appellate jurists are different from the trial judges in the sense that they have not been living with the case for months or years. For this reason, the appellate bench is generally more open to the influence of good oral advocacy. Appellate judges come to the argument well-prepared having read the record, briefs and bench memoranda prepared by the law department and their law clerks and they may very well have discussed the case with other members of the panel. An appellate jurist may be leaning in your favor, against you or may yet be wholly undecided. Is the bench split? Is the bench as a whole undecided? The problem is that you don't know the answer to those questions. Oral argument is your opportunity to help solidify the judge who is in your favor, tip the scales of the judge who is undecided, and yes, you may even move the judge who was leaning in favor of the adverse position. During my more than eleven years in the Appellate Division, there were countless times when the first words out of more than one judge's mouth at consultation were: "Can you believe the attorneys did not come in to argue this case?" Do you want to be the lawyer who is the object of that question? I think not. Don't waive the one last opportunity you have to influence the court of the merits of your client's position. And, certainly, don't squander the opportunity.

Of course, as with everything in life, success in appellate advocacy comes with preparation. The ultimate purpose of preparation is to convince the court of the merit of your client's position. Preparation gives you the tools and confidence to engage in a meaningful, lucid discussion with the court. But, the word *discussion* does not connote a two-way street or an even playing field. It is the court's prerogative to ask the questions and it is your obligation to satisfy the inquiry. Your goal is to reach a *conversational tone* during the oral argument. How do you get there?

The attorney who will argue the appeal should be intimately involved in preparing the brief. Although brief-writing is very often a team effort, the attorney who will argue the appeal can best understand the intricacies of the case only by actively crafting the strategy employed in the brief and by involvement in drafting the many iterations leading to the final written product.

As obvious as it sounds, make sure you have preserved the right to orally argue by following the rules of the court for reserving argument time. It is surprising how frequently counsel shows up at the Appellate Division, Second Department without having

properly reserved time by the simple means of placing the amount of time requested and the name of the attorney who will argue in the upper right hand corner of the brief.

In the weeks, not days, before oral argument it is imperative that counsel reads the decision and order or judgment on appeal, counsel's own brief and the adverse briefs. While it is neither advisable nor possible to read the entire record, counsel should pull from the record (or appendix) copies of the relevant documents or transcripts upon which the factual argument was founded. No less important is full familiarity with the portions of the record relied on in the adverse brief. The pertinent statutory and case law authority relied on by both parties should be reread and known inside and out. Of course, the authorities should be updated to identify any changes in the law. If there is a *new* case that you would like to rely on, bring sufficient copies to the court for the panel and your adversary. Some courts may permit you to submit the case in advance with notice to your adversary. Check the local court rules, or call the clerk of the court, to determine whether a written summary is permissible as opposed to mere notice that the case will be relied on.

Move on to the triage part of your preparation. Appellate counsel must identify the meritorious and dispositive arguments. You may very well have meritorious arguments, but if they are not dispositive points then they should not be the focus of your preparation oral argument. You must direct your attention to the two or three points that you must get the court to listen to and focus its attention on, in order for you to win the case. No less important than the strengths of your argument are its weaknesses and the strengths of the adverse party's position. Remember, the chances of the court throwing you softballs during oral argument are slim. You must be ready for the hard questions, the questions which, if not satisfactorily addressed, may undermine the success of your appeal.

Having completed the triage, move on to the preparation of a more detailed outline – this should be the road map of your argument. Where do you want to go and how are you going to get there? Prepare your opening statement – a concise sentence or two by which you identify exactly what it is that you want the court to do – the destination – tell the court where you want to go. Then prepare the words to describe concisely and forcefully the route you are going to use to get the court to your destination – these are the two or three reasons why the court should grant the relief requested. Also, prepare your concluding words – which will not be that different from your opening – the words that again describe the specific relief requested. Reading from your outline is not recommended – but the opening, road map and closing should be delivered as close to verbatim as prepared. There is one other exception to the *do not read from your outline* rule. If there are specific record references or lines from cases that you feel you need to read verbatim to the court, these should be included in your outline for ready reference rather than fumbling through the record at the lectern.

The balance of the outline should include the facts and the law that support the relief requested and the reasons advanced. Needless to say, the oral argument is not likely to follow your outline and wedding yourself to the words used in the balance of the outline will not result in the *conversational tone* you want to have with the court. The best way to reach that conversational tone is to moot your oral argument. Former appellate judges and

appellate practitioners familiar with the court should be selected to be members of the moot panel. While it may be easier to put some members of the appellate team on the moot bench that will not be as effective in presenting an experience close to live as having moot panelists who are no more familiar than the live panel. The moot panelists should be asked to read the briefs and the cited portions of the record just as the live bench would.

Moot preparation can be a three-tiered process. There are occasions when a live panel will be soft or cold and not ask many questions. Appellate counsel's first moot may be a run-through with very few questions asked a cold moot panel. The second tier is the hot moot bench. This panel should be prepared with questions on issues that bother the panelists – those issues that they perceive may prevent the court from granting the relief requested. This may be done in a series of sessions each timed to meet the time reserved for oral argument or in one long session wherein the areas of concern are vetted until conversation on those issues is exhausted. The attorney should try different ways of addressing the issues. After a day or so away from the case, the attorney, the appellate team and the members of the panel should join together for a critique. This discussion should focus on identifying the pros and cons of counsel's argument and suggestions for improvement. The critique should foster adjustments as needed. However, the appellate team should be mindful of the needs of the advocate and what best fits the advocate's personal style because we cannot remake an attorney's DNA overnight.

Having properly prepared, the appellate advocate should approach the most stimulating day of oral advocacy with confidence and enthusiasm.

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