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Appellate Oral Argument: The Good, the Bad and the Ugly

The Legal Intelligencer
By Howard J. Bashman
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Upon Further Review

Last week, I received in the mail a copy of a new book titled "A Good Quarrel: America's Top Legal Reporters Share Stories from Inside the Supreme Court." The "stories" these reporters are sharing in the book consist of their accounts of particularly noteworthy U.S. Supreme Court oral arguments. Among the reporters who have contributed essays to the book are Dahlia Lithwick of *Slate* ; Tony Mauro of *Legal* affiliate *The National Law Journal* ; Charles Bierbauer of CNN; Tim O'Brien of ABC News; Nina Totenberg of National Public Radio; David G. Savage of *The Los Angeles Times* ; and Lyle Denniston of "SCOTUSblog."

One of the book's two editors is the creator of the Oyez Project Web site, which makes audio recordings of U.S. Supreme Court oral arguments readily available to anyone with an Internet connection. Thus, it is not surprising that the book has a companion Web site, goodquarrel.com, providing online access to audio highlights and lowlights from the oral arguments discussed in the book.

The day before that book arrived in the mail, I had lunch with two lawyers who recently asked me to work with them on a case in which the Pennsylvania Supreme Court had just granted review. When the topic of discussion turned to what to expect at oral argument before Pennsylvania's highest court, it occurred to me that one thing that distinguishes attorneys who handle appeals frequently from attorneys who handle appeals infrequently was that I view the prospect of arguing an appeal before a panel of seven appellate jurists as something that's fun to do, whereas the typical lawyer would probably view having to argue an appeal before Pennsylvania's top court with a mixture of dread and uncertainty.

What makes appellate oral argument fun for me, and no doubt for many other appellate practitioners, is that it presents the one, and perhaps only, opportunity you have as a lawyer to interact in person with the judges who will be deciding the outcome of the appeal. Writing a persuasive and well-researched appellate brief can provide a great deal of satisfaction, but it is only when orally arguing the case that you as lawyer can observe first-hand the degree to which the brief has been understood by the judges and has or has not convinced them of the correctness of your client's position on appeal.

In order to deliver an oral argument that is both useful to one's client and to the appellate judges, the appellate advocate must be familiar with the appellate briefs, the appendix or reproduced record that has been filed in the case and the caselaw and other legal provisions at issue. It is, of course, also imperative that the attorney check for any newly issued caselaw that may have a bearing on the outcome of the appeal. No matter how remote the odds of a new, directly binding decision from a higher court addressing the precise issue in your case may seem to be, such decisions do issue from time to time, and the only way to find them and be prepared to address them at oral argument is to look for them in the days and hours before the oral argument occurs.

If you represent the party who is taking the appeal, and therefore will be speaking first at the oral argument, you will often have the luxury of being able to provide the appellate court at the outset of your remarks with a short outline of the points you would like to cover. But, regardless of what you might like to discuss with the judges, the most important aspect of oral argument is understanding and addressing the questions that the judges have for you about the case. You may have intended to address three points and spend next to no time on a third of those, but if the judges begin their questioning by focusing on point three, it is simply unacceptable to respond that you had planned to address that issue at the conclusion of your remarks on two other points if sufficient time then remains.

Stated plainly, at oral argument your first priority is answering the judges' questions. Frequently, that means having to adjust the order and emphasis of the arguments you had planned to make, but with experience that becomes easier and easier to do. I have rarely heard experienced appellate attorneys complain that they have received too many questions from the judges who will be deciding the appeal, but appellate attorneys are commonly disappointed if they receive too few questions at oral argument.

When representing at oral argument the party who won in the trial court, your opportunity to address the judges will not arrive until after opposing counsel has made his or her initial argument to the court. Although I tend to prepare for oral argument in much the same manner whether I represent the appellant or the appellee, as counsel for the appellee it is important to observe what issues the judges appear most interested in while opposing counsel is arguing and to be ready to alter or entirely abandon the planned organization of your oral argument in order to better address the obvious concerns

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of the judges who will decide the case.

When representing the party who lost in the court below, it is important to determine before the oral argument occurs whether the court will allow you to save a small portion of your argument time for rebuttal so that you can respond to opposing counsel's argument and have the last word with the judges. Most appellate courts allow time for rebuttal so long as it is reserved at the outset of appellant's counsel's presentation, but some courts — most notably the Pennsylvania Supreme Court — do not allow counsel to reserve time for or present any rebuttal oral argument.

If you represent counsel for the party who won in the court below, and you know that counsel for appellant has not reserved time for rebuttal or is not entitled to rebuttal, you might decide to argue the appeal somewhat differently than if you knew opposing counsel was entitled to have the last word at oral argument.

Beyond becoming as knowledgeable as possible about the case you will be arguing on appeal, another way to prepare for an appellate oral argument, especially if you do not frequently make them, is to watch the court in action in advance of your oral argument date. In addition, the Internet today provides free and easy access to a variety of appellate court oral argument audio recordings. The Oyez Project Web site features both recent and historic U.S. Supreme Court oral argument audio recordings, and a variety of talented and highly experienced appellate advocates frequently appear before that court. Also, unbeknown to many, the Pennsylvania Superior Court's Web site provides a link to a page on the Pennsylvania Cable Network's Web site, where video recordings of en banc Superior Court oral arguments can be viewed online.

The best way to improve at delivering appellate oral arguments, and to become more at ease in making them, is through experience. When it comes to appellate oral arguments, advice from the experienced is a poor substitute for experience itself.

Nevertheless, if I may offer my list of the top three oral argument "dont's," they are: First, don't yell at the judges, but instead speak with a conversational tone of voice; second, don't deliver a jury argument, but instead focus on the facts and the law; and third, and most importantly, answer the judges' questions.

A fourth "don't" is do not oversell the importance of your case to the judges. I remember arguing a case where opposing counsel, who represented the appellant, began his argument by remarking that he was very pleased to be presenting his first 3rd Circuit oral argument in an important First Amendment case in which the appellate court's decision was likely to become a key part of constitutional law casebooks in law school curriculums throughout the nation. A few weeks later, the 3rd U.S. Circuit Court of Appeals issued an unpublished, non-precedential decision affirming the trial court's ruling, and that decision to my knowledge has never been included or cited in any law school casebook.

Opposing counsel in that case, Michael A. Smerconish, has nonetheless found great fame and fortune behind a different sort of microphone in a field where passion, emotion, and dare I say hyperbole, are especially useful tools. •

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