Words with Conviction: Effective Appellate Oral Argument

by: William B. Stock, Esq.

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Busy appellate courts have adopted rules that allow them to dispense with oral argument if they see no need for it, and many appellate judges have said that argument only "occasionally" changes their mind. But what if your appeal is one of those "occasional" ones? Here are some suggestions for making your best oral argument after you have locked your finest written efforts into print.

1) **Know the record and the briefs**. It is not enough to simply read them beforehand. You must know and understand the arguments on all sides to the controversy. Read and Shepardize all the cases cited in a brief, even the string cites. Also, remember to research the latest word on the law immediately before the oral argument: nothing is worse than being told by a hot bench that a higher tribunal has just handed down a decision that eviscerates your case.

A practice point: when you are either writing a brief or reading your adversary's, prepare a list of all the cited cases with a one-sentence description of each one. For your adversary's cases, explain why the cases are inapposite to your position. The list will be of value when preparing for oral argument.

2) **Know the entire case**, not just the brief and record. Most lawyers tend to know the brief and record cold, but a jurist whose interest is piqued by your case has the right to ask about any aspect of it, including any facts, its procedural history, and any subsequent development after the appeal was filed that may affect the final decision. Be prepared.

3) **Do not take any point of law for granted**. There is a mistaken belief that judges only focus on the "big" issues in the briefs. Judges ask question on points of law that are not clear to

them. Be ready for anything, even to define a point of law that you thought was universally known.

4) **Understand the purpose of oral argument**. It is to convince the court that your position is correct. Any extraneous remarks should be avoided. Certainly, slandering your adversary, telling a joke or quoting literature would be completely inappropriate. Instead, when it is your turn to speak, you should (a) greet the court, (b) identify yourself, and (c) briefly state the relief you seek and why your party is entitled to it. Then proceed with your argument.

5) **Welcome questions**. Questions show that a court is interested in what you have to say. Welcome them. Go into oral argument with "talking points," rather than a rigidly laid-out speech. "Talking points" allow greater flexibility when the bench interrupts you to ask questions. Having such "talking points" raises the question of what type of notes, if any, you should bring to appellate argument. That question is addressed below.

Practice point: your priority during oral argument is to answer questions from the bench, not to deliver your comments uninterrupted. Never deflect a question by saying you will be getting to it. Answer promptly.

6) **Use appropriate notes**. This point is best illustrated with an anecdote. This writer witnessed an argument before the Supreme Court of the United States. One advocate had a tabbed, loose-leaf notebook on the lectern. When he was asked a question, he would immediately flip to a particular page in his notes and then give an answer that seemed to please the Justices. His adversary had two sheets of notes on lined paper. Guess which lawyer made the better impression?

7) **Keep it concise**. Appellate courts are very busy. Say what you need to say to put your case across, answer any questions the bench has, and then thank the judges for their time and sit

down. The author of the quote, "Less is more," Ludwig Mies van der Rohe, was an architect, but his words also apply to lawyers.

A practice point: If your adversary does not show up for oral argument, advise the court that you are prepared to answer any questions the bench may have; but if there are none, you will submit your brief without argument. You will be making less work for the court. (Some seasoned appellate attorneys opine that, even in this circumstance, you should at least set forth the salients of your case.)

8) **Practice your argument**. Whether asking a group of colleagues in your office to read your briefs and question you or going to a specialized clinic, you should always attempt to have a practice run before argument. Law is a collaborative experience, and the mature advocate can only benefit from having the critical input of his or her peers. For example, the Committee on Courts of Appellate Jurisdiction of the New York State Bar Association offers a free moot-court argument for NYSBA members whose cases have been selected for argument by the Court of Appeals in Albany. Contact Patricia Wood at pwood@nysba.org for more information.

9) **Expect to be "blind-sided" by the court**. If you argue appeals, it will surely happen at least once in your career. A judge will ask you a question for which you simply do not know the answer. When that occurs, politely ask the bench for a page reference; it will at least buy you some time to think. If this does not help, then candidly inform the court that you cannot answer the question as you stand, but ask leave under the court rules to make a post-argument submission.

10) **Consider the impression you make**. Critically evaluate your performance as a speaker, as well as your "stage presence." Be objective: everything can be improved. There are acting and public speaking classes for lawyers, as well as fashion consultants.

11) **Be at your best on the day of argument**. Some advocates stay up late before an oral argument attempting to "cram" in every iota of an appeal. This is not productive. You need a good, restful sleep the night before in order to be clear-headed for your argument. With proper preparation, there should be no need to run late the night before.

12) **Don't be late**. Allow plenty of extra time to get to the Appellate Division, Court of Appeals or wherever your argument will occur. If you are arguing out of town, and your budget allows for it, spend the night in a comfortable local hotel, rather than traveling a long distance on the day of the argument.

13) **Have the clerk's phone number handy**. If you do run late for reasons beyond your control, let the court know as soon as possible. They may be able to accommodate you, if given notice early enough.

14) **Know the court where you are arguing**. Every court has its own procedures and traditions. (For example, in the Supreme Court of the United States, there are precise words of greeting to the bench that an advocate is expected to say.) If you take the time to know the applicable rules, you will be at ease when you begin to argue. You can call the clerk of the court, speak to someone who has argued there, or, in many cases, view sample arguments on the court's website.

15) **Bring key papers to the podium**. When arguing, have with you the entire record, all the briefs, and your notes. If these papers are voluminous, have an associate there to assist you. This is not for show; as has been said, you should know the entire record "cold" going into oral argument, but you should have it at hand in order to be able to refer to it.

16.) **Take notes**. Whether you are the appellant or the respondent in an oral argument, you should take notes on your adversary's arguments and any comments from the bench. Few

things are more effective in a responding or reply argument than to quote your adversary's words and show that they have no application to the case at hand.

17.) **Relax and good luck.**

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