

Effective Appellate Argument

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Introduction: The inevitable question concerning oral argument is how much weight does it have in the final result of the case. There is no predictable measurement. In many cases oral argument plays very little in the result. The facts, cases and the policies at work generally dictate the outcome regardless of the brilliance or lack of brilliance in the final argument. However, there are cases in which the persuasion in final argument is decisive. This may be the case when there is a borderline policy issue which has not developed a body of law with clarity and analogous areas must be referenced or the interpretation a body of law has received has not worked that well and the court may consider a change. I always felt that it was in the area of 10 to 15% of the cases before the Supreme Court. It could be more or less. The development of the record in the lower court and the effectiveness in briefing, along with the consistency in the development of the legal structure are critical to the outcome. Eloquence seldom overcomes bad authority or bad facts. But even if oral argument plays a significant part in only a minority of cases, one of those cases may be yours. Consequently its significance cannot be ignored. Additionally, pride in profession and standing in the legal community, as well as an obligation to a client, dictate making the best effort possible.

Before you appear for oral argument it is helpful to know what the court has had for review prior to the argument. When a case is filed in the Supreme Court it is either retained or assigned to the Court of Appeals. The case is then assigned to a particular Justice or Judge on a random basis. A law clerk is given the case to prepare a prehearing memorandum which involves a review of the entire record. The prehearing involves a summary of the factual and procedural record, the arguments of the parties, analysis of the legal authorities and arguments, any additional authorities that may be relevant. Typically the prehearing will have the most significant portions of the record attached – e.g. motions for summary judgment, jury instructions in dispute. Not all Justices receive the entire record, but all have access to it if needed. Therefore, prior to oral argument all members of the court will have reviewed the briefs, the prehearing memorandum and any portion of the record that is necessary for an

understanding of the case. It is critical that counsel, or somebody on their behalf, review the record in detail before oral argument. While not common, in enough cases to be significant some part of the record that counsel wish to argue is not in the record. That may be through oversight at some stage or failure to designate as needed. Regardless of cause it is critical that counsel know at oral argument they and the court have the same appellate record.

Prior to argument it is a good idea to check with the clerk of the court to understand the allocation of time and the location and meaning of the lights that will signal how much time you have for the first presentation and any rebuttal. If there are multiple parties sharing time, reach an agreement as to the allocation of time and advise the clerk.

Under no circumstances begin oral argument without checking decisions that have been filed in the Supreme Court between the time of briefing and the time of argument.

APPEARANCE BEFORE THE COURT

This is a catalogue of things to be aware of before and during oral argument. Some are of limited significance but make life easier. Others are critical to an effective presentation.

a) If at all possible practice your presentation before a critical panel of people, preferably not within your firm. Not all clients can afford this extra expense, and it may be difficult to assemble a panel – no less than two, probably no more than five. Multiple good things can come out of this. It will give you an idea of how much you may be able to say in the time you have. A good panel will alert you to the strengths and weaknesses of your issues. This may cause you to rethink the order of your presentation to make certain that you get your best issues up front and don't find yourself leaving your most persuasive points on the podium. Hopefully somebody on the panel will ask the most telling questions that force you to develop an effective answer.

b) There is no such thing as associate justice in Idaho. Don't start out with the statement, "Chief Justice and Associate Justices." It won't influence the outcome of the appeal, but it avoids a minor irritation in protocol. The chief justice is elected by the court but has no more authority on decisions than the other members of the court. His/her title carries with it increased administrative responsibilities, not judicial. Unlike the U.S. Supreme Court the chief

justice does not make the decision on the assignment of cases. It is a random draw. While a particular Justice may have an extensive background in the area of law being argued, you cannot assume that Justice has been assigned the case. In the Supreme Court it is a one and five chance that any particular Justice will have the case. **Don't tailor your argument to one Justice.** You may believe that the expertise of one member of the court will sway others, but the dynamics are such that the assumption is chancy at best.

c) Do not waste your time with opening chit chat, e.g. you are happy and honored to be here. Your time will vanish quickly, and nobody cares how you feel about being there.

d) Do not waste your time recounting the history of the case or the procedural background, unless there is a point important to an issue upon which you have an appeal or are defending against. Your brief and the prehearing memorandum will have outlined the procedural and historical background or the process that has taken place. The members of the court will have had the opportunity to review the record and understand the procedural history and the facts that seem important to a resolution of the case. Recounting a history that is not critical to the issue you wish to argue takes time away from the important things you have to say. Be prepared, however, to respond if a member of the court has a question on the background or the process that has taken place. Keep in mind that hidden within a question on the procedure that has occurred may be an issue of importance to your case. The Justice may be moving towards a point of significance or may simply be uncertain.

e) Rank your issues in terms of what you believe is most likely to be your strongest issue. Go directly to that issue, then the next strongest, and on. Time can be lost on marginal issues and may run out before you get to what may be your pivotal and decisive issue. Arguing a point of limited concern may diminish the effect of your arguments on more significant issues.

f) Be flexible and ready to respond to questions from the court. It is common for the court to interrupt and go to areas of concern out of the order you propose. Do not be annoyed or act flustered. Under no circumstances say something to the effect of, "I'm going to get to that, or my brief explains that" or any other diversion. At a minimum it will annoy all members of the court. More importantly you forfeit the opportunity to address what may be a decisive or mettlesome issue to the court.

It's not a big deal, but it doesn't add to your argument to comment, "that's a very good question" or the like. It's a fine comment in a speech to a group of citizens at a meeting where you want to flatter your audience, but the egos of judges and justices are such that they don't believe they ask ungood questions. Stroking the ego of a member of the court doesn't gain anything towards the outcome and may annoy another member who silently thinks that was a dumb or irrelevant question.

g) If another member of the office has done the research and/or writing be certain that you have read the cases and fully digested the arguments. Enough times to be significant the court is addressed by a senior attorney who presumably has status but who has not familiarized himself/herself with the record and cases adequately to be able to respond to specific questions about a particular case or the record. One Justice on the court has a persistent habit of highlighting exact language from the important cases or the record and asking questions that are precise quotations from the case or record with a question mark or question to follow.

h) Large illustrations of a time line or a particularly important case or exhibit that may be seen by all members of the court at the same time may be very helpful. They can focus attention and avoid a waste of time and distraction for the members of the court trying to find the material in the record. Be sure that you have alerted the clerk of the court to your need for an easel and a location for the illustration. And, of course, be certain that the illustration is an exact replication of what the record reflects.

i) Power point illustration of an argument is most likely going to be unsuccessful and distracting. The few efforts I observed to setting forth the arguments and illustrating them with power point have not worked well. Almost certainly there will be questions that interrupt the sequence to be presented, and efforts to bounce back and forth are confusing, mostly to the attorney. Key illustrations help. Power point presentations don't.

j) Arguments before the Supreme Court should be presentations of law. They are to be analytical. Many times following arguments members of the court have been known to comment that it was an outstanding argument for a jury but not persuasive for the court. It doesn't mean you should lack passion for your client. Certainly there should be commitment.

But passion and anguish for the perceived wrong in the case does not substitute for a case or statute on point or analysis that indicates why your client's position should be favored consistent with existing or developing law. We have all seen arguments that pleased the client because they branded the other side as scalawags and bottom feeders. But in appellate argument those jury persuasion type presentations don't advance your case and they do consume the time that might be applied to persuasive legal arguments. **Within this context avoid personal attacks on opposing counsel.** Nearly every judge in every court decries breaches of civility. Let the facts and the favorable law speak for you. If there has been misconduct or misrepresentations the facts should reveal that. If the record does not substantiate that, ~~saving it~~ doesn't move your case forward and may hurt.

k) Don't be repetitive. There is teaching in some law schools and practice clinics that if you have a good point "hammer it home." That is often interpreted to mean repeat your good argument over and over in briefing and argument. There are several flaws to this interpretation. It takes up time that could be used to explain other issues or deal with subtleties. There is a former probate judge, district judge, Justice and Chief Justice of the Supreme Court who has on multiple occasions explained to proponents of this tactic that it is in effect calling the judge or Justice stupid. It basically says, "Dummy, you probably didn't get this the first time I said it, so I will repeat it five more times so it sinks into your thick skull!"

l) In general "the sky will fall" type arguments have little impact. Certainly the adverse consequences of a decision are legitimate arguments, but exaggeration of the consequences is not persuasive. Analysis, not tear/of the apocalypse, wins cases.

m) When your time is up, stop. If you are in the middle of a sentence, finish it quickly. The fact that the Chief Justice does not immediately tell you to stop doesn't mean it is okay to continue. You may request the opportunity to finish a thought. Some Chiefs will say yes, others no. But that is the court's decision not yours. Often if you have been diverted by questions from the court you will be allowed more time. Also, if you are answering a specific question from one of the Justices you will be allowed to finish your answer. Don't take this as an open door to go beyond the specific question. A breach of the protocol will not cost you a

decision, but it will annoy the court and diminish your standing a bit. Besides, no one is listening.

n) Miscellaneous. 1) Don't try to psychoanalyze the court or look for insider insights that will give you an edge in dealing with the Justices. The facts and the law are the focus, not the particular quirks of a particular member of the court; **2) Keep the basics in mind** – e.g. the standard of review, where the basics of persuasion reside; **3) Go easy on explosive language.** Unless you have a very clear record of bias or ignorance, argue that the lower court judge misapplied the law or missed elements of the evidence. Much the same thought applies to attacks on opposing counsel, unless you have indisputable evidence of wrong doing. The characterizations of stupidity and guile in grand terms are less effective than the oft repeated theme of this subject – analysis. Idaho is still a small state. There may be a future price paid for intemperate language that does not advance your case; **4) When a Justice speaks, listen very carefully to what he or she is saying or asking.** If a Justice sympathetic to your case has tossed you a setup question, be alert to the opportunity. On the other hand some members of the court make very confrontive comments followed by a question mark. This is your opportunity to overcome an issue that is troublesome to at least one member of the court. You may not satisfy that member's skepticism, but you may persuade others; **5) When the members of the court come down to shake your hand following argument conduct yourself with grace even if you feel like swearing or throwing up.**