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Ben Franklin's Advice Put to Use

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One of the great joys of appellate advocacy is the opportunity to engage in the back and forth of oral argument in a way that allows you to drive home the key points of your argument in a persuasive and compelling manner.

One of the great fears is that you will be caught at the podium unable to answer a question from the bench, or worse still, you will offer an answer that results in defeat instead of victory. The best way to avoid that moment is to prepare. But learning how to prepare for oral argument is difficult, and not always a focus of law school classes. Many of us stumble along until we find some method that seems to work for us. Still, guidelines exist that can offer help with preparing. No one wants to fail at oral argument. The more you learn to prepare effectively and efficiently, the more the judges or justices on the court and your clients will be impressed with your advocacy, and the more likely you will get a good result.

Develop a Schedule to Prepare for Argument with Discrete, Identified Tasks

The initial step in my preparation is to develop both a list of tasks and a schedule for their completion. Some tasks can be delegated to a paralegal or legal assistant. For example, as soon as an argument notice arrives in my office, my assistant books a hotel room and flight if the argument requires travel. In addition, she works with a paralegal to prepare information that I will need and to upload it onto an iPad. For many years, I used binders for this material. But now, unless I am appearing in a court that does not allow use of an iPad, I have a folder dedicated to the case. It has sub-folders that include copies of all the cases in alphabetical order, copies of all briefs filed in the appellate court, including any amicus curiae briefs, and copies of the lower court record or key portions of it, in a logical order. The program that I use, Trial Pad, provides an index to the items in a subfolder. So I can easily locate anything I need quickly. This folder is prepared right away so that I have it available and can use it for my argument preparation. An important part of this preparation is to check the authorities cited in the briefs to see if they have been overruled or modified or if any new authorities have been issued that are important to the appeal. These steps can readily be accomplished by my legal assistant and paralegal, which saves time and expense.

Learn About the Court and the Judges or Justices Who Will Decide Your Appeal

Early preparation also includes finding out as much as possible about the appellate court before which you will argue. This can entail a visit to the court's website for helpful information for practitioners. Many courts have on-line guides, such as the Seventh Circuit's "Practitioner's Handbook for Appeals," or the Michigan Supreme Court's "Guide for Counsel in Cases to be Argued in the Michigan Supreme Court." Often, courts will have a set of internal operating procedures that can provide valuable insight as well. The court website will often provide basic information about where the court is located, the length of time for argument, the place to check in, the layout of the courtroom, and any rules concerning use of electronic equipment such as iPads or cell phones. You may also want to contact the clerk's office to confirm information about the argument or to ask questions about procedures that are not set out on the website.

If you have not appeared in that court before, it can be useful to visit in person or to observe arguments through video archives that may be available. Only through watching arguments can you truly get a sense of the culture of the court. Some courts are very formal while others have a more relaxed atmosphere. In addition, you can generally figure out whether it is a hot or cold bench, that is, whether the judges arrive for argument well prepared and having read the briefs and record and authorities, or whether they arrive with only a general sense of the case. If you know attorneys who regularly practice before that court, you may want to contact them to gather additional information about the court's culture and informal practices.

You will know the justices on a court of last resort from the inception of the appeal. For intermediate appellate courts, learning about your judges may be more difficult. In many appellate courts, the names of the panel of judges assigned to your appeal are provided along with the oral argument notice. In other courts, they are released closer to the argument date. The Seventh Circuit posts the names of the judges on the morning of the argument. Researching information about the judges is helpful. Learning about their legal experience can give insight into how they will approach a case. A former prosecutor is likely to view a criminal case differently than a lawyer whose pre-judicial career involved trusts and estates or banking law. A former trial judge may view discretionary calls by the trial court more favorably than someone without that experience. Often the internet will provide other information about their interests, hobbies, charitable activities, and perspectives on particular issues.

In addition to their legal background and experience, research into decisions that they have written on the issues in the appeal is important. You will want to know each judge or justice's views on the issues as revealed in their prior opinions. Read the opinions not only for the result that they reach but to learn the tools of judicial reasoning that they have employed. This can be extremely helpful in framing your arguments to them. A Chicago-school-of-economics pragmatist will approach a common law rule of negligence differently than a Federalist-Society-limited-judicial-policy-making judge. These threads can be discerned in judicial opinions if you read them carefully. The more you know about a judge or justice,

"the more likely it is that you can touch a responsive chord." Samuel E. Gates, *Hot Bench or Cold Bench: When* the Court Has Not Read the Brief Before *Oral Argument*, in Counsel on Appeal, 107, 112 (Arthur A. Charpentier ed., 1968).

Study the Record to Identify the Key Issues, Legal and Factual

Every article or speech that I have ever read or heard on oral advocacy speaks first about mastering the record. This is imperative. But as David Frederick pointed out, some "records are staggering, running to thousands of pages (or more) of factual material." David C. Frederick, *Supreme Court and Appellate Advocacy* 54. A "typical Supreme Court case requires mastery of as many as 250 pages of legal briefs and perhaps the same number of appendix material." *Id*. And this does not include the many pages of "authorities, including cases, statutes, regulations, treatises, and law review articles." *Id*. Not every case warrants the weeks of full-time study and multiple moot courts that a bet-the-company appeal in the United States Supreme Court calls for. Efficiently focusing the preparation on the key points is even more important in cases in which the amount at stake does not warrant such extensive time and expense or when the client cannot afford it.

To master the record, you will need to consider and decide carefully the scope of what to study and prepare. This requires reviewing the briefs and record to determine the linchpin of the case, that is, the key issue on which the argument depends and on which the judges or justices will most likely focus their attention. Over and over again, I see lawyers spending valuable time at argument discussing tangential issues or reviewing facts that are not critical to the outcome. This is not helpful to the appellate court. Aimlessly reading the record or the authorities cited in the briefs is not likely to result in a focused presentation; rather, you must identify the most difficult points that are essential to your client's position and focus on those.

My own record review typically begins with reading all the briefs, stopping to read the cases and authorities cited, and to look up record portions, as I go. This allows me to test the support for legal and factual arguments and to take note of problem areas or gaps in either side's analysis or support. It also enables me to make a list of potential questions that may be directed at either side during the argument. As I read, I try to identify the key point or points that I may want to make affirmatively and those that I anticipate that my opponent will advance. I look for my opponent's best case and best facts. Weak points often can be deliberately obscured or glossed over in the briefing process. As I review the opposing party's briefs, I look for any aspect of the legal or factual issues that my opponent has not addressed or has glossed over. This is often a clue to the weak point in an opponent's case that can be exploited during argument. Former Chief Justice William Rehnquist warned that advocates who fail to go beneath the surface of the briefs to understand the argument in-depth will find argument difficult:

> The questions you get at oral argument are often the ones that are not squarely covered in the brief—indeed that is probably the reason for the question from the bench. So an advocate who

> has not gone beneath the surface of the brief to understand how its parts fit into a coherent argument will be at a considerable disadvantage.

Hon. William A. Rehnquist, *From Webster* to Word-Processing: The Ascendance *of the Appellate Brief*, 1 J. App. Prac. & Proc. 1, 5 (1999). Justice Rehnquist's point cannot be overemphasized as a basis for approaching your argument preparation. It is these glossed over questions that are likely to arise—and that can take an argument completely off track if the advocate is not prepared.

Distill the Argument into Key Points

Once you have completed this review, you will need to distill the argument into the two or three key points that you must make. As you think about this, consider which points to make. You do not need to stress points that your opponent concedes or points that are in dispute but that are relatively unimportant to the outcome. You may want to amplify points that were given insufficient attention in the briefs but are important to the outcome. The outline of your argument should be relatively simple and focused on one or two key issues or else it will leave a hazy impression with the court. This distillation process is a matter of judgment, and even though you may find it hard to decide what to leave to the briefs, your presentation will be substantially stronger if you are able to get to the heart of the matter: "[T]he most important single element of successful oral argument is the ability to select the heart of your case—the hub—the core, upon which all else depends." H. Graham Morrison, *Oral Argument of Appeals*, 10 Wash & Lee L Rev 1, 6 (1953). Failing to do this means that your critical points may become buried under a mass of marginally relevant details. As Judge E. Barrett Prettyman explained, "[i]n oral argument[,] stern, courageous selectivity is a necessity, diffusion is fatal." Hon. E. Barrett Prettyman, Some Observations Concerning Appellate *Advocacy*, 39 Va. L. Rev. 285, 294 (1953).

As you decide on the key points, organize them logically so that they can be presented in an orderly flow. Think about how to connect one with another so that you can get back to points that you need to make if questions divert you from the outline that you prepare. Take the time to summarize these points in as few words as possible while still maintaining clarity.

Include an Opinion Kernel or Statement of the Rule You Seek

Karl Llewellyn urges appellate advocates to include an "opinion kernel" in their appellate briefs. This is a statement of the holding, which the court can adopt and use to rule in your favor. If you have carefully done this in your brief, you simply need to be sure that it is included in your argument outline. If you have not, you need to consider the breadth of the rule that you urge. Sometimes, you may want to offer more than one version. If your client would love to get a broad rule that would help in other future litigation, you can frame the rule broadly. But you will then want to figure out what is the narrowest iteration of the rule that would still allow your client to win. Tell the court that you believe that the broader rule is best jurisprudentially and why. But then explain that the court need not adopt this broad rule for your client to win; the court could adopt a particular narrower formulation if the court does not

want to go that far. Such a concession will earn you credibility points and may save you from a loss if your opponent's policy arguments against the rule have force.

Review and Revise, Following a Few Principles

Take the time to revise your key points so that you can present them in a lively and attention-getting way that is consistent with the decorum of the court and your own personality. At the same time, think about how to articulate your points in a manner that is lively and interesting. All advocates develop a style of argument over time. Some are professorial, some are bombastic, some are pedantic and dull, and some are conversational. What we all want is to be lively and focused in an energetic way that is both consistent with the decorum of the court and with who we are as people. The ability to develop a style that makes us likeable to the judges or justices and grabs their favorable attention to our legal argument is the mark of a great advocate. This is not easy, but there are some pointers to consider.

As you prepare your outline, think about catchy phrases, vivid language, illuminating metaphors, and ways in which you can encapsulate points concisely and concretely for the court. Making this a separate step in your preparation will enable you to focus on the word choice and images that you want to use, and not just the legal or factual concepts that you want to convey. Consider that "general propositions are generally dull. A catchy restatement in the form of an aphorism, epigram, or slogan wins attention and helps to ensure recollection of the speaker's points." Wayne C. Minnock, *The Art of Persuasion* 65 (2d ed. 1968). Nothing is more tedious than to listen to an advocate read or reiterate from memory lengthy boilerplate language about the issue in the case or the standard of review. Think about a better way to convey these points.

Use of a pithy quotation from a prior judicial opinion, or a "dignified slogan," can catch the judges' attention. Frederick Bernays Wiener, *Briefing and Arguing Federal Appeals* §122, at 328 (2d ed. 1967). During one of my first arguments to the Michigan Supreme Court, I was urging the court to retain a common law "two-inch rule" that disallowed liability for failure to maintain a sidewalk if the gap in it was two inches or less. I argued that municipalities were not obligated to keep sidewalks "as smooth as glass" to avoid liability. A sidewalk need not be the same as a polished dance floor. The idea was to convey the real issue about the two-inch rule without reiterating over and over that phrase from old case law, and to use a phrase that was consistent with my theme and theory of the case.

When working with my partner to prepare an argument to the Michigan Supreme Court regarding the attorney-judgment rule, we tried to find a way to persuade the court that a jury was ill-suited to second-guessing matters of attorney judgment. I suggested analogizing to art and discussing the story of Ruskin's criticism of Whistler's painting, *Nocturne in Black and White*, a painting now housed in the Detroit Institute of Arts. Ruskin said that the painting was "like flinging a pot of pain in the public's face." Whistler sued him, winning a technical victory but no damages. Today, that painting is universally acclaimed as a masterpiece and is one of the most important paintings in the Detroit Institute of Arts' collection. The point was that the attorney's judgment in trial, similar to an art critic's judgment of a

painting, is so varied that whether the judgment was correct ought not to be the subject of a jury trial. *See Simko v. Blake*, 448 Mich. 648, 532 NW2d 842 (Mich. 1995) (no liability for acts and omissions by an attorney that are mere errors of judgment when the attorney acts in good faith and in the honest belief that his acts and omissions are in the best interests of his client).

Finding colorful and lively ways to present your points will enhance the judges' attention to your argument. You must use your best judgment to draw the line between what will come across as overly colloquial or informal or distracting, and what will drive home your points. And of course, you want to be sure that your points are appellate legal points–and not a blatant jury argument, which will undercut your credibility and annoy the court.

Develop a Theme or Theory of Your Case

Once I finish this review, I try to develop a theme or theory of the appeal.

The image of the two billboards (see following page) reveal conflicting themes that might be used for an argument about fast food and whether a retailer can be sued for childhood obesity, or whether a "healthy food ordinance" can be upheld against a constitutional challenge. *See generally* Alexis M. Etow, *No Toy for You! The Healthy* Food Incentives Ordinance Paternalism or *Consumer Protection*, 61 Am. U. L. Rev. 1503 (2012); Courtney Price, *The Real Toy* Story: The San Francisco Board of Supervisors *Healthy Food Incentives Ordinance,* 8 J. Food L. & Policy 347 (2012). Sometimes the theme can be as simple as that the trial was prejudicially tainted by attorney misconduct and junk science, which confused the jury and heightened their emotions against the defendant unfairly.

The theory of the case can also be useful in fielding hypothetical questions. As former Justice Scalia and Bryan A. Garner explained in their lively and useful book, Making Your Case: The Art of Persuading *Judges*, "[j]udges are concerned not only with the outcome of your case but also with the outcome of many future cases that will be governed by the rule you are urging the court to adopt." Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 155 (Thomson/West 2008). If you know your theory, you should be able to field these questions. And knowing your theory will help you announce limiting principles or explain why a harsh result in rare cases is nevertheless appropriate.

Anticipate Questions and Figure Out the Best Answers

The most difficult part of the argument is fielding questions. Preparation can help you turn the questions into opportunities to make your strongest points. Critical to this is anticipating as many potential questions as possible and then thinking through the best way to tie the answers to a coherent legal theory and develop your theme. Questions may focus on background facts that are unclear to the court, the rule being urged and its limiting principles, precedent that the parties have relied on, and a host of other aspects of the appeal. David Frederick has developed a comprehensive discussion of potential questions that is exceedingly useful in his book, *Supreme Court and Appellate Advocacy*

(Thomson/West 2003). Frederick groups questions into four categories: (1) background questions; (2) questions about the scope of the rule being advocated; (3) questions about the implications of the rule being advocated; and (4) questions reflecting judicial idiosyncrasies. David C. Frederick, *Supreme Court and Appellate Advocacy* 75–118 (Thomson/West 2002). He elaborates on each of these categories, listing dozens of potential questions that might trip you up if you have not thought out your responses. I urge you to get a copy of his book. I have used it for years to try to anticipate likely questions. Eventually, you won't need to pull his book out and go through the list; it will become second nature to think about them as you review the record.

As you consider questions, think longest about those that you most hope to avoid. These can often be found by looking for the strongest points in your opponent's brief. And these are the most important to force yourself to answer, even if your answer is a concession that the rule is harsh in a particular situation, or the precedent is unclear, or a defense such as expiration of the statute of limitations or sovereign immunity means that the plaintiff will lack a remedy despite injury.

Anticipating the questions gives you time to figure out the best answers, which will be concise, consistent with the theory of your appeal, and worded in a manner that hearkens back to the theme. As you prepare the answers, make note of key record facts and where they can be found in the record. Also, make note of key authorities that support the points that you will make in response to the question. These will be important for preparing your final outline. As you do this, you will also be gaining greater and greater mastery of the record.

Write a Strong Opening and Closing

As part of the preparation, the advocate needs to think about and prepare for the opening. This is often a missed opportunity at argument; attorneys get up and stumble around, giving of-the-cuff statements about the facts or the case's importance to their client or its procedural history. A far better approach is to write and hone an opening statement that provides the court with a succinct statement of the issue, framed in terms that develop the overarching theme. The opening should be short; one or two minutes are all that you normally have to catch the court's attention and tell your story. If you are the appellant, you can carefully write your opening, including your opening use of "may it please the court," your reservation of rebuttal time, and the basis issue. Here is an example:

> May it please the court, Mary Massaron, on behalf of the appellant, ABC Corporation. I would like to reserve five minutes for rebuttal. ABC Corporation requests this court to reverse the judgment because the jury's verdict was tainted by the trial court's allowance of unreliable testimony from the plaintiff's toxic exposure expert and by the trial court's failure to sustain objections to the plaintiff's counsel's repeated references to ABC Corporation's corporate status, wealth, and past litigation, all demonstrating a studied purpose to divert the jury from the real issues in the case and the actual evidence relating to the brief release of a small amount of chemicals into the air during a single day in 2015.

This introduction tells the court who the defendant appellant is, the issues on appeal, the relief sought, and why the defendant appellant is entitled to win. It also foreshadows the theme.

Writing the introduction for the appellee is somewhat more difficult because the response strategy may change based on what the appellant argues and what the court asks about. Generally, there is no need to reiterate the issue unless the appellant has misstated it. Instead, the statement will typically focus on a quick summary of why the trial court got it right. An example might be this:

> May it please the court, Mary Massaron, on behalf of the appellee, ABC Corporation. ABC Corporation requests an affirmance of the trial court's ruling granting judgment as a matter of law and overturning the jury's verdict for two reasons. First, the trial court correctly concluded that the plaintiff's expert's testimony in support of this product liability design defect claim should have been excluded because he failed to offer a reasonable alternative design that would have prevented the accident. Second, the trial court correctly concluded that without that testimony, the plaintiff failed to establish a necessary element of a design defect claim under Michigan law.

Of course, the advocate arguing second should be ready to improvise. Sometimes a better opening is to remind the court of questions that various judges or justices asked of opposing counsel and then to provide answers.

In any case, it is important to deliver a strong opening that lets the court know that you know your case, that you know the linchpin issue, and that your discussion will enlighten the court on that key point. Attention and credibility can be quickly lost if you fail to do so.

Prepare an Argument Outline with Key Points

Once you have honed what you want to say, prepare an argument outline with key points, including record and case citations, and prepare a corresponding podium binder with your outline, key documents or portions of the record, and any cases or statutory language or contract that you think you may want to refer to during the argument. I use a three-ring binder with numbered tabs. The kind that I use has an index page with the numbers of the tabs so that I can readily find items without fumbling during argument.

I have altered my style of outline over the years. At one time, I used key words in large type in bullet list, to remind myself of key points, and then organized them in a logical flow within the numbered tabs. Behind the first tab, I would include my introduction. Behind the second, I included the key points on the first issue that I planned to address. Behind the third, I would place the key points on the next issue. Later, I included tabs with a refutation of my opponent's key points and tabs with summaries of key cases or statutes.

Today, I still use the binder approach, but I have added a two-page summary of all my key points. I put these two pages in the binder so that they can be opened facing each other and I can see every key point, record citation, or case or statutory authority that I am likely to need to discuss during oral argument. To fit the points on two facing pages, I distill down the points into key words, using my own system of abbreviations. Here is an example of what one point might look like:

When was occurrence under policy?

- Occurrence = discharge by 'er – 2/2/14 [p's cp P 15; pl's dep p 45-48] Smith [230 F3d 123]
- Notice NOT = to occurrence – lang of policy pp 14-15 Jones [210 F3d 453]

You get the idea from these two lines. I have enough of an abbreviation to remind me of the point, along with the key factual and legal support. Sometimes, if I can't fit the key points on two pages, I include the introduction on a single page separately and then use the next two pages facing each other for the points. The goal is to make it all visible without needing to flip pages to find something. Of course, by the time that I have done this work, I ordinarily know the material so well that I rarely must do more than glance at anything in my podium binder. But it is there if I need it.

The only parts of my outline that are written in close to a complete sentence are the opening and the closing sentences. It is universally agreed that the advocate should never simply read an argument. And one way to be sure that you avoid that—even if you are nervous—is to use an outline and not a narrative with full sentences. Then you can practice saying the words or making the points out loud, but you will not be tempted simply to look down and read.

Work to Develop Your Abilities as a Public Speaker

Oral argument depends on the advocate's ability to speak in a clear, commanding, and likeable way. Learning how to do this can take a lifetime. But part of your preparation may be practicing speaking in a conversational tone, with energy, and loudly enough to be heard. Practice speaking distinctly, using pauses and vocal range for emphasis and clarity. I practice standing, taking a deep breath to collect my thoughts and to have the air to speak with energy.

You can do this in front of a friend or family member. Tape record your presentation, and then listen for distractions and eliminate them. When you say the points in your outline out loud, you will often notice wording that is awkward when spoken, even if it reads well. Taking this step allows you to fix the wording so that it is easy to say out loud.

Go to Court Confident in Your Preparation

Once you have completed this preparation, you can leave for court with the confidence that comes from having carefully and thoughtfully prepared for the intense experience of oral argument. And win, lose, or draw, you will finish the argument with the sense that you have done your best to present your client's position, forcefully and persuasively. Of course, if you are like me, you may spend hours second-guessing one or two answers to the questions that you receive and honing the answers that you provided even though it's too late. I don't enjoy second-guessing my answers, and I often find that the intensity of my concern bears no relation to the outcome on appeal. But I have learned that it is part of my process, and this post-argument thinking has allowed me to hone my presentations over many years.