

The Art of Appellate Advocacy - Preparing for argument

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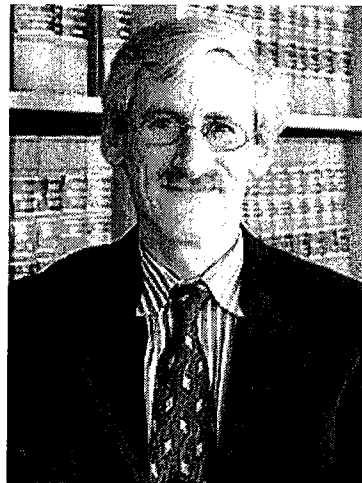
During the course of writing this column over the last year and a half, I have often pondered my own version of the philosophical question, "if a tree falls in the forest and there is no one there to hear it, does it make a sound," by asking myself, "if I write an article and there is no one who says anything about it, has anybody read it?" Although I didn't think of this question due to the feedback I received when I first started the column, I began musing about those sad fallen trees when the novelty wore off and the initial comments waned.

Before I create the wrong impression and possibly talk myself out of my regular monthly space on page 3B, I hasten to add that I'm not talking about deafening silence. Like last spring, for instance, when I wrote an article gently making the subtle suggestion that some judicial opinions might benefit, possibly, from the same type of page limitations that apply to appellate briefs.

OK, I wasn't so gentle or subtle, but the point is that I didn't need to guess whether anyone read that one. Someone even sent me an unsolicited agenda for last month's meeting of the Standing Committee on Rules of Practice and Procedure, which had scheduled for discussion "a policy issue concerning the length of appellate opinions."

As the months have passed, however, I have heard progressively less from others about the contents of these articles, even from former stalwarts such as my mother, who now calls me not to comment but to ask whether it's the second or third Friday of the month when my column is supposed to appear in this newspaper (it's the second Friday, mom, unless it gets bumped for an arguably more readable and definitely more profitable full-page ad).

None of this may seem to have anything to do with today's subject — which returns to John Davis' 10 Commandments of appellate advocacy — but I've realized, after arguing an appeal last month and finding myself in the midst of getting ready for another, that preparing for oral argument can be just as isolating an experience. It may not be as bad as falling alone and hard in the wilderness, but it ranks right up there with spending a lot of time writing something that maybe even your own mother won't read.



Andrew Baida

If you have an argument in the not-so-distant future, consider the following advice as my way of telling you that, no, you are not alone.

Know your record

For starters, know the briefs, know the main cases, and especially, as John Davis points out in his ninth commandment of oral argument, know your record from cover to cover.

The first two suggestions are self-evident but the third merits a little amplification. I interpret Davis' reference to the word "record" to mean the record extract or, if the appeal is before the federal appellate courts, the joint appendix, each of which, if properly assembled, contains those portions of the record that will enable the appellate court to properly dispose of the questions on appeal.

Depending on the nature of your case, the record extract or appendix can range from as little as a few pages to as many as several thousand, or even more. Regardless of the length, know it well.

Oral argument is very unpredictable, which is precisely the reason why you should become very familiar with the record extract. This can be a very tedious exercise in preparing for argument, as can be editing the brief, but as my 13 year-old tells me regularly in his warm and fuzzy way, get over it.

The time spent reading and re-reading the extract is well worth it when you can readily cite a particular page containing a key piece of information, such as a witness' testimony or a critical document, that directly answers a judge's question, contradicts an incorrect statement made by your adversary, or focuses the court on a significant matter that might have otherwise escaped attention during the argument.

Effective oral argument preparation also includes putting together a good argument outline that encompasses all of the major points that you believe should be addressed in the course of the argument. I have seen and used different versions of this technique, but over the years have gravitated to what is my present approach to oral argument. Starting approximately 10 days to two weeks before the argument, I'll read my brief, once, and will then begin to prepare and repeatedly revise a verbatim text of the argument, which, in anticipation of the questions that I expect to receive, consists of bullet responses tied together by a central theme which offers the court a new spin that casts in a different light the written arguments in the brief. You should begin preparing the text this far in advance of the argument because this is an ongoing process that slowly evolves as you think of different questions that the court might ask and more effective responses that you will want to give.

Listen to yourself

Just so I'm clear, I am not suggesting that you stand at the podium and read your argument to the court. As John Davis advises in his seventh commandment, you should read sparingly and only from necessity. You need to practice the argument enough times so that it is almost completely memorized.

By practice I mean out loud, either in the car on your commute to and from work (wear a telephone headpiece so it will look like you are really important and not a lunatic talking to yourself) or elsewhere, but it needs to be audible so you can hear

what your argument sounds like. The written word is often different than the spoken word, and so it will be necessary to adjust your oral presentation continuously as the argument date approaches.

I am also not suggesting that you must stick to your prepared text no matter what questions the court asks. If you have prepared properly, you likely will have anticipated the question, albeit not necessarily at the particular point in your argument where you are interrupted. You will be ready with a core response, however, so just be flexible and prepared to switch directions accordingly, which may mean moving up a portion of your argument by a page or two, or completely re-shifting the focus from Point A to Point C.

You may also get one of those questions out of left field for which you have not prepared any response at all, but you will not say, "with all due respect, that's irrelevant, your Honor." You will instead give the clear impression that this is an excellent question and do your best to answer it before moving on with your argument.

It is also advisable that you do a moot court with at least one mock judge who has read the briefs and can ask intelligent questions. If you can't justify to your client the time expenditure for such an exercise, at least do a dry run before a colleague, your spouse, a friend, anyone, just so you can get a general reaction to your argument.

And if they just look at you with silence so that you wonder whether you've said anything at all, feel free to call me. Because I know what that feels like.

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