

*Appellate Advocacy College*  
*2000*



*Lecture*

**Effective Oral Argument**

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**Oral Argument in Criminal Cases  
in the  
California Appellate Courts  
by  
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**The Role of Oral Argument  
in the Criminal Appellate Process**

In a perfect world, oral argument should be the least important component of the appellate process. It is the briefing generated by counsel that has a much greater opportunity to influence the court. Because it is in written form, it has a certain stability and immutability. It defines the issues and the controlling law and freezes it at a point in time. Everyone involved in the process has access to it. Literally, and metaphorically speaking, it is what puts the court, the judicial staff attorneys, and the parties “on the same page.”

Yet it is oral argument that generates the most anxiety, excitement, apprehension and challenge for almost every appellate lawyer. Oral argument has been called “the highest art of the legal profession” that brings together the “mind and heart and spirit” of the advocate.<sup>1</sup> Some appellate attorneys enjoy the excitement and challenge and absolutely love oral argument. For others, the anxiety and apprehension it causes prompts them to avoid oral argument whenever possible. But one thing is clear: in every appellate attorney’s career, there will be cases when oral argument does present an opportunity to influence and persuade a court to adopt the position advocated by counsel. When that opportunity presents itself, appellate counsel must be able to rise to the occasion, so that s/he can use the opportunity to his or her client’s best advantage.

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<sup>1</sup> See Morrison, *Oral Argument of Appeals*, 10 WASH. & LEE REV. 1, 3 (1953).

Oral argument does present an opportunity to assess whether the court understands the facts and the issues, and to develop a sense of the court's leanings on particular issues. It also affords counsel an opportunity to reply to issues or concerns which disturb the court and which may dictate the disposition, but which were not raised in respondent's brief, and therefore were not refuted in appellant's reply brief. When the court identifies an issue it believes to be potentially dispositive of the appeal, but which neither appellant nor respondent has briefed, it should request supplemental briefing.<sup>2</sup> This is not, however, always done. Sometimes the new argument relates to a briefed issue, and the court may believe supplemental briefing is unnecessary. As a result, oral argument may be the only opportunity counsel will have to refute the argument before the opinion is filed.<sup>3</sup>

How does counsel ready him or herself for such an opportunity? The obvious answer is that appellate attorneys should use their oral advocacy skills frequently. However, to a certain extent, frequent practice opportunities will not be presented in a typical indigent criminal appellate practice because oral argument simply is not requested in the majority of cases. This is not because there is no right to oral argument.

The right to oral argument in criminal appeals was established in *People v. Brigham* (1979) 25 Cal.3d 283, 285-288, in which the late Chief Justice Rose Bird acknowledged that the right to oral argument on appeal is recognized in the California Rules of Court, the Penal Code, the California Constitution, and the prior decisions of the California Supreme Court.

Rule 22.1 of the California Rules of Court governs oral argument in the Courts of Appeal and provides that counsel for each party be allowed 30 minutes for oral argument.<sup>4</sup> If there are multiple

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<sup>2</sup> Government Code section 68081 provides:

Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party.

<sup>3</sup> If the opinion the court files relies on an argument or an issue that was not briefed, counsel should file a petition for rehearing. However, the rehearing petition is not a perfect substitute for a pre-opinion oral argument. It is often the case that once the panel has agreed on the disposition and the opinion has been filed, it will be less receptive to appellant's rebuttal than it would have been had the contention been advanced before the opinion was filed.

<sup>4</sup> The Third District normally sets oral argument time at 15 minutes per side. The Fifth District honors requests up to 30 minutes per side, but 15 minutes is what is typically requested. The First, Second, Fourth and Sixth District set oral arguments for as little as five

parties represented by separate counsel or if counsel for an amicus curiae requests argument, the rule provides that the court can apportion or expand the time according to the interests of the respective parties. Upon written request, the court may grant or deny any amicus curiae the opportunity to argue. Counsel for appellant or the moving party has the right to open and close. Where there is more than one appellant, the court will indicate the order of argument. And unless ordered otherwise, no more than one counsel may argue for each party who appeared separately in the court below.

The late Chief Justice Bird held that the implicit right to oral argument on appeal found in the Rules of Court was buttressed by the provisions of Penal Code section 1254:

Upon the argument of the appeal, if the offense is punishable with death, two counsel must be heard on each side, if they require it. In any other case the Court may, in its discretion, restrict the argument to one counsel on each side.

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minutes. However, if the court becomes interested in the case in those five minutes, it can extend the time.

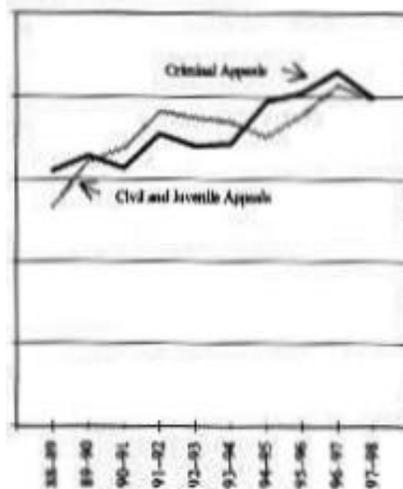
And of course the Constitution of the State of California recognizes a right to oral argument in the Court of Appeal.<sup>5</sup>

The more eloquent defense of the right to oral argument, as well as the acknowledgment of its virtues comes, not surprisingly, in the civil arena. In *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1255, Justice George wrote that the authority cited in *Brigham* applies with equal force to oral argument in civil appeals:

Our decision [in *Brigham*] also noted policy reasons underlying the right to oral argument: as the only opportunity for a direct dialogue between the litigant and the bench, it promotes understanding in ways that cannot be matched by written communication, and for many judges a personal exchange with counsel makes a difference in result. (32 Cal.3d at pp. 872-873; cf. *Mediterranean, supra*, 66 Cal.App.4th 257, 264-265 [noting similar policies supporting a right to oral argument in the trial court].)

Figure 6 - Record of Appeal Filings  
In All Divisions  
Fiscal Years 1988-89 through 1997-98

So while a client has a constitutional right to oral argument, Figure 6 illustrates the crushing caseload the Courts of Appeal have faced in California over the last decade. While each court sets aside approximately one week per month in which to hear oral argument, if oral argument were requested in even 25% of the cases, the backlog that would accumulate would be crippling to the system. And while this judicial administration problem should not influence appellate counsel in discharging his or her ethical duty to zealously represent the client within the bounds of the law, appellate counsel should not ignore the fact that the creation of such a backlog may increase the amount of time it takes the court to decide



Source:  
Administrative Office of  
the Courts

Court Statistics  
Report 1999

the appeal. As a result, in those cases, oral argument may not further the client's interest.

Another factor which often militates against making a request for oral argument is the compensation consideration. While appellant may have an absolute

<sup>5</sup> California Constitution, art. VI, § 3.

constitutional right to oral argument, counsel for an indigent appellant in a court-appointed case does not have an absolute right to be paid for requesting an oral argument that the court considers to have been unproductive. For these reasons, appellate counsel should give full consideration to whether oral argument will be helpful to the client and to the court. If counsel concludes that it will be helpful, then the compensation issues cannot be considered to be controlling.

### **When To Start Thinking About Oral Argument**

The process of thinking about oral argument should start early in the case. In fact, many attorneys start an oral argument file when they open their master file, just so that as they review the record, they have a place to preserve their thoughts and the references to the record<sup>6</sup> that might later be useful in preparing for oral argument. Keeping oral argument in mind throughout the briefing process enables counsel to preserve ideas as they come to him or her in the different phases of the appeal, which should, as oral argument approaches, be a great way to start oral argument preparation.

This necessarily presumes that oral argument will be contemplated in every case. And the possibility that counsel for appellant, the attorney general, or the court will request oral argument should be considered in every case where substantive briefing is filed. However, that consideration should be tempered with a strong measure of pragmatism. Nonetheless, because oral argument is always a theoretical possibility where a substantive brief has been filed, counsel should always initially proceed as though oral argument is a serious possibility.

Counsel can think of the process of developing an appeal as a continuum—and counsel’s theory of the case at the beginning is almost never the same as it is when the case is concluded. Many counsel find that the highest understanding of the issues occurs during preparation for oral argument, and that in cases where oral argument is not requested, that level of understanding may never be attained. In fact, attorneys who have written a brief on the merits and then argued it in the California Supreme Court find that yet a higher level of understanding of the issues is achieved there. And in preparing a certiorari petition in the United States Supreme Court, counsel may attain even higher levels of enlightenment. It is clear that for many attorneys, it is oral argument that facilitates the highest level of understanding of the issues. It necessarily follows that at least some members of the court who participate in an oral arguments have similar experiences.

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<sup>6</sup> This can be done in hard copy or electronically. For ease of recall, many attorneys find it useful to take their record notes, as well as their oral argument notes, electronically.

## **When Should Oral Argument Be Requested?**

If the court requests oral argument, there is no question but that counsel should view it as a positive sign that the court is interested in the case and wants whatever assistance counsel can provide to it in oral argument. Appellate counsel can hear no finer praise from an appellate court after an argument than: “Thank-you, counsel, for an enlightening argument that is of great assistance to the court.”

In most cases, however, the court will solicit a waiver of oral argument. Most of the projects encourage counsel to consult with the project staff attorney assigned to the case before deciding whether to seek or waive oral argument. Most projects also encourage counsel to send a short letter to the client when oral argument is set, and after oral argument has been held.

But by far, the oral argument question most frequently asked by newer criminal appellate attorneys is when oral argument should be requested. This is a question to which there is no generally agreed upon correct answer.

Below is a checklist of factors that counsel should consider; ultimately, however, the weight given to each of those factors in this calculus is a matter of professional judgment and experience. For that reason, until counsel acquires the professional judgment that results from years of experience and professional growth, counsel should confer with more experienced attorneys whenever possible. Counsel should also realize that the professional judgments of a variety of accomplished attorneys may not yield a consensus. As a result, no one single opinion should be blindly deferred to, but when a consensus of accomplished attorneys is achieved, counsel would do well to listen closely to the reasons underlying the consensus. And in soliciting an opinion from a more experienced attorney, counsel should include information on the following factors:

- Was a reply brief filed?
- Is reversal or modification of sentence reasonably possible?
- Is there case law which was decided after the case was fully briefed which is relevant and material to the disposition of the appeal?
- Does the case present a question of first impression?
- Is there a split of authority between different district courts of appeal, or between different panels within the same district court of appeal?
- Is the case factually or legally complex? It is likely that the court might have

formed a misimpression about the facts or law?

Once counsel has decided to request oral argument, s/he must then decide whether to argue telephonically or in person.<sup>7</sup> Telephonic oral argument has the advantage of saving court-appointed-counsel dollars which the court would otherwise spend to pay for counsel's travel and related expenses. It has the added advantage of saving travel time and costs for counsel who can argue from the comfort of his or her office. Nonetheless, many attorneys feel they are less effective in telephonic oral argument because they cannot see the justices during argument. Others feel it is an unfair advantage for respondent to appear in person while appellant appears telephonically.

The decision to request live oral argument or telephonic oral argument should be given careful thought. While some courts freely allow subsequent waivers of oral argument, not all Courts of Appeal take this position. In some courts, once requested, the argument should generally not be waived unless the court subsequently sends a second letter in which it requests a waiver. In these courts, requesting oral argument causes the court, its staff and opposing counsel to commit their time in preparation for the requested argument. A late waiver thus inevitably causes other people to waste their time. It may also serve as a red flag that, on further consideration, counsel does not believe the case is very strong.

In considering whether to associate counsel for oral argument, counsel should keep in mind that in some, if not all, districts only the appointed attorney will be permitted to orally argue a case unless the substitute has been associated with the specific approval of the court in advance of the date of the argument. Requests for association of counsel must detail the reasons appointed counsel needs the assistance and must include the legal qualifications of the person to be associated.

Appointed counsel must not delegate to others those functions which require the ability and experience for which counsel was appointed. It is extremely important that counsel be aware that in courts that have this requirement, unless a formal association of counsel has been requested and approved by the court, the only attorney authorized to make appearances is the attorney appointed by the court. Even members of the same firm will not be permitted to appear for oral argument if there is no formal authorization obtained in advance.

Finally, if counsel does intend to request oral argument in a case where there are co-appellants, and a co-appellant has already requested argument, counsel should not assume that request serves each co-appellant. The court may take the position that other appellants are not entitled to participate if they did not individually respond to the court's waiver letter. To protect the client's right to participate, each appellant must separately request that the matter be placed on calendar for oral argument.

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<sup>7</sup> It would appear that the Third District, and Divisions I and II of the Fourth District, are the only Courts of Appeal that do not offer telephonic oral arguments.

## **When Should Oral Argument Be Waived?**

The flip-side to the most frequently asked question is when should oral argument be waived. In considering this question, counsel should acknowledge that nothing will annoy the court faster than an attorney who has requested oral argument, only then to appear at oral argument to stand up and announce that if the court has no questions, counsel will submit the matter. It has been done, and the court has been extremely annoyed when counsel for appellant does it. However, where defense counsel has requested oral argument, and the attorney general has not, the deputy handling the case will frequently waive oral argument, or, if she appears, will simply stand up and ask the court if it has any questions. If none are forthcoming, the deputy then submits the case for decision. This does not seem to annoy the court. So the lesson is, if counsel for appellant does not have something new to say, s/he should not request oral argument.

This caveat also seems to highlight the “catch 22” dilemma of oral argument rules. The courts frequently announce that they have read the briefs, are familiar with the facts, and do not want to hear what is already set forth in the briefs. At the same time, counsel is not supposed to raise new arguments in oral argument. How, then, can counsel conduct an oral argument that satisfies these two apparently conflicting goals?

It isn't easy! And it is a particularly delicate dilemma when the facts are complex and the court has asked a question which demonstrates that it does not really have a command of the facts. But the dilemma does highlight the fact that there is really one central function for counsel in an oral argument: to answer questions the court asks, and to parlay the answers to those questions into a persuasive argument. Counsel's oral argument should therefore start by quickly “cutting to the chase” in a way calculated to evoke (not provoke) a response from the court. The opening to the argument should be an invitation to colloquy. There is no kind of oral argument worse than the one in which the entire bench sits mute throughout the entire argument.

Below are a few of the situations in which counsel for appellant might choose to waive oral argument.

- If the same issue is pending in the California Supreme Court, this has been drawn to the court's attention in the briefing, no new cases have been decided by other appellate courts since the case was fully briefed, and after fully reviewing the Supreme Court briefing, counsel has nothing new to add and nothing different to say.

- If the same issue has been recently disposed of by the California Supreme Court or the same Court of Appeal, and counsel has no meritorious grounds on which to distinguish this case, or to argue that the binding precedent was incorrectly decided.
- Where there are difficult questions which respondent failed to pose, but which the appellate court probably will pose, and for which counsel for appellant has no good answer.<sup>8</sup>
- If the remedy requested in the appeal is very minor, such as the staying of a concurrent term, or the striking of a small fine.
- Where oral argument will give the respondent an opportunity to be heard by the court in surrebuttal to the reply brief which knocked the underpinnings out from under respondent's position.

But be advised! The California Supreme Court has suggested that a lawyer's waiver of oral argument, when combined with inadequate briefing, may constitute ineffective assistance of counsel.<sup>9</sup> And if a reply brief has not been filed, and oral argument has not been requested, waiver can be found.

## **The Call to Arms - the Letter from the Court of Appeal**

Because the function of oral argument, as well as its frequency, has changed considerably as a function

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<sup>8</sup> This situation creates an ethical dilemma for counsel for appellant that frequently arises: should counsel for appellant address an argument in the reply brief that respondent has failed to raise, in order to have an opportunity to refute it, or should appellate counsel wait and see whether the court raises the issue at oral argument. On the one hand, appellant does not want to make respondent's case. On the other hand, just because respondent fails to raise the issue, does not mean the court will not consider it on its own.

<sup>9</sup> *People v. Lang* (1974) 11 Cal.3d 134, 138-139.

of an ever-burgeoning caseload, and because correspondingly smaller increases in judicial personnel are allocated to handle the increase, the rate at which oral argument is requested by the court, or even by the parties, continues to decline. At the same time, the amount of time the courts are able to devote to oral argument appears to remain relatively constant. As a result, even after recognizing the homage to oral argument paid by the California Supreme Court, it is unlikely that the Court of Appeal will request oral argument in a significant number of cases in any indigent appellant criminal practice. For that reason, if the court requests oral argument, counsel should be thrilled and view it as a golden opportunity for meaningful dialog with the court.

Counsel should not confuse, however, the routine setting of oral arguments (which is done in some districts and which is followed by a solicitation of waiver in most of those cases) with a true request for oral argument.<sup>10</sup> In the districts that routinely set oral argument in all cases, the setting of the argument is a way of letting counsel know that the case is ready to be decided.<sup>11</sup> In either case, upon receipt of the notice setting oral argument, counsel should calendar the oral argument date. In those districts in which a waiver is solicited, the date the waiver or oral argument demand is due should be calendared. In some districts, if counsel intends to waive, no action is required. Counsel should read the contents of the notice carefully to determine what the court's expectation is in that regard.

Often the court will send an explanation of its rules and oral argument procedures with the notice setting oral argument. Counsel should review them carefully and calendar any additional dates, such as the date by which exhibits are to be received.

Once oral argument has been set, if illness or some other truly unforeseeable circumstance makes

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<sup>10</sup> See the CALIFORNIA COURTS OF APPEAL: INTERNAL OPERATING PRACTICES AND PROCEDURES (2d ed. 1985) for a breakdown of the practices of individual districts and divisions concerning oral argument. For updated material, also see the amendments to the procedures manual, as well as answers to frequently asked questions, set forth in these materials, entitled "Concerning Oral Argument: A Compilation of Answers to Frequently Asked Questions Integrated with Amendments to The Internal Operating Practices and Procedures of the California Courts of Appeal." Because Division Two of the Fourth District has not included any amendments or answers to frequently asked questions, counsel is urged to consult the ADI Panel Attorney Manual, pp. 178-181, for additional information. Of particular note is the fact that Division Two of the Fourth District utilizes the "tentative opinion" format, in which the opinion is sent to counsel the week preceding oral argument, with an accompanying letter which either encourages or discourages oral argument.

<sup>11</sup> For example, in the Fifth District an oral argument setting notice is sent to counsel accompanied by a questionnaire. This setting is merely a "reservation" of oral argument date and time. Approximately one month before oral argument is scheduled, counsel can expect to receive a 10-day waiver letter. (See <http://www.courtinfo.ca.gov/courts/courtsofappeal/5thDistrict/faq/answer19.htm>.)

attendance impossible, counsel should communicate that to opposing counsel and to the clerk of the court as soon as possible. Counsel should promptly file a motion for a continued oral argument date in which a specific showing is made as to the circumstances which prevent counsel from attending. Some courts, like the Third District, prefer that counsel inform them, when the case is fully briefed, of any vacations counsel has planned, so that the court can avoid setting argument at those times. This is because in such courts rescheduling oral argument is strongly disfavored.

## **Preparing for Oral Argument**

If possible, it is a good idea to start thinking about oral argument about 30 days ahead of time. This will give ideas time to percolate. Reviewing the contents of the oral argument file, as well as the briefs, is a good place to start. Counsel will have already researched, in conjunction with the decision to seek oral argument, whether there are any new cases, or whether any cases relied on have been reversed or depublished. If there are new developments, counsel should review them early on to determine whether any supplementary action needs to be taken. If there are new authorities, or the status of authorities relied on has changed, the court should be advised. Counsel should acquaint him or herself with the practices of the court vis-a-vis offering new authorities at oral argument because s/he should supplement the briefing in a manner that complies with the court's practices.<sup>12</sup>

In addition, as soon as the identity of the members of the panel who will hear the case becomes available, counsel should read some biographical information about them, and might conduct "justice-specific" research to determine whether the justices who will hear the case have written any important opinions relevant to the issues. It can be extremely important to know this. However, if this is the case, that information should be used to be prepared in case the justice wants to discuss in detail one of the cases s/he authored. Counsel should not use the information to patronize or "butter-up" the court. It will not be well received.

If augmentation with exhibits was not sought, but the exhibits are relevant to issues raised on appeal, counsel should ensure their production in the appellate court by making a request of the clerk of the superior court, pursuant to California Rules of Court, rule 10(d). The clerk will then see to it that the exhibits are transmitted to the Court of Appeal. In an abundance of caution, confirming that the transmitted exhibits have been received is not a bad idea.

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<sup>12</sup> The Third District, for example, wants citations to new authorities only. The Fifth District, in contrast, wants the citation accompanied by a brief statement of how the case relates to the pending issues.

One recurring request, which often leaves counsel in a quandary, occurs when an amicus curiae requests time to argue, and the appellate court will allow the amicus to argue only if counsel for appellant yields part of his or her time to the amicus. Should appellate counsel yield time to an amicus?

Again, there is no clear cut answer. However, several issues come into play here which should be identified and evaluated by counsel. First, are the amicus' interests in the case congruent with the interests of the client? It is frequently the case that the amicus is interested in a larger policy issue. But the client will generally only be interested in his or her case. Will including the amicus advance the client's individual interest, or will the amicus take on a larger issue, the resolution of which is not necessary for the client to prevail? If the amicus wants to bite off more than the appellant needs to chew to win, appellant may not wish to yield his or her time. Similarly, if the amicus takes any position which does not advance the client's position, appellant should not yield. But if the amicus' position has lined up squarely with that of the client, the attorney representing the amicus is as experienced appellate attorney who enjoys a certain stature with the court and will complement appellant's position and oral argument, without causing appellant to give short shrift to an important argument, yielding to an amicus may not only be advisable, it may improve the client's position. Counsel should simply keep in mind that an amicus curiae has his or her own agenda, and counsel should be constantly vigilant so that the amicus does nothing to compromise the client's interest.

After counsel reimmerses him or herself in the case, counsel should re-evaluate the issues. Among the questions counsel should ask are:

- Which issues have the most potential for a favorable result for the client?
- What are the essential elements or aspects of each argument relating to that issue?
- What are the strengths and weaknesses of each argument relating to that issue?
- How can appellant's position on the issue be best expressed for clarity and impact?

Counsel should concentrate on those issues that have a realistic possibility of success and should streamline and reduce the argument to the minimum elements necessary to prevail. This is especially critical in those districts that may limit the oral argument to five minutes. By doing this, counsel will map the most direct route to success. This analytical framework provides coherence, direction, and logical progression.

While it is important to stress the strong points, it is even more important to be prepared for difficult questions on the weak points. Counsel should identify the weaknesses, and prepare a response for the most difficult questions the court can ask. Counsel should not be caught off-guard, and should always have an answer ready.

Having decided which issues to address, and having outlined the essential elements of each argument, counsel should do a practice run. In translating notes and thoughts to a smooth verbal presentation, the rough spots that need work will emerge. Counsel should time the practice run so s/he can provide the court with a reasonably accurate estimate of the length of the argument.

Where possible, a “moot court” experience yields the best prepared presentation. In most cases in the Court of Appeal, it will not be possible for three project attorneys to conduct a live moot court session. However, in appropriate cases, a single project attorney may be able to participate in a telephonic moot-court-type proceeding in which s/he poses the questions to counsel that are most likely to be asked. If this is to be done, it should be done at least one week before the argument. This is because this is often a jarring experience for counsel, and s/he will need time to recover, refocus, revise the argument, and regain his or her composure. In spite of this, counsel universally agree that the experience prepares them well for the argument.

Another reason this type of exercise is recommended is because by the time s/he is prepared for oral argument, counsel is so familiar with the case, and is so well-acquainted with its more subtle nuances, counsel may lose some of his or her objectivity. Moreover, his or her ability to see the “big picture” issues may be compromised. A moot court experience can acquaint counsel with those portions of the case that are most likely to capture the court’s interest.

The approach to oral argument in the Court of Appeal is necessarily different from the approach counsel would take to an appeal in the California Supreme Court. Appellate cases are more fact-based, and are most-often resolved on the basis of existing case law, while the California Supreme Court entertains questions of first impression found in cases that present those issues. As a result, an appellate court is much more likely to be fact-focused. For this reason, many experienced appellate attorneys find that reviewing the record the day before the argument is very beneficial.

## **Anticipate the Unexpected**

Not every oral argument is met with some unexpected event. But once again, the unexpected does happen, and counsel must be prepared for it. Here then are two anecdotal surprises that have ambushed appellate counsel in recent years.

### Problem Number One

- Suppose counsel arrives at the Court of Appeal to argue the sufficiency of the evidence in a sexually violent predator case. She is already uncomfortable by the frank and graphic discussion she must have with the court, but realizes that having it is absolutely necessary to effectively representing the client on appeal. When she enters the courtroom, she is flabbergasted to see a court room full of children. She is then informed, unbeknownst to her, that a seventh grade class made arrangements to observe oral argument on that day. What

should she do?

#### Possible Solutions to Problem Number One

- a) figure it is the court's problem, and go forward with the argument as planned;
- b) change the emphasis of her argument to another issue to avoid the problem;
- c) retain the sufficiency of the evidence argument, but make the argument without reference to anything sexually explicit;
- d) immediately contact the court room clerk and advise her that the contents of the argument will be unsuitable for the children to hear, and ask that s/he notify the presiding justice of that fact, so that s/he can advise the teacher when the case is called that the children should leave the court room.

#### Comments on Possible Solutions to Problem Number One

While it may be the court's problem, it will most likely also become a problem for counsel if she does not take some responsible action to insulate the children from the sexually explicit argument. Changing the emphasis of the argument for reasons unrelated to the zealous representation of the client is ethically improper. Similarly, if arguing the issue without the sexually explicit details compromises the argument, that would also compromise counsel's ethical duty. And while there is a First Amendment consideration that requires the court to keep the courtroom open, it does not prevent the court from advising the teacher that the material to be covered may not be appropriate for children and suggesting that s/he remove the children from the courtroom when the case is called.

#### Problem Number Two

- Counsel approaches the lectern to make her oral argument, and after the formalities have been observed, the court asks: "Why are you here?" or "Can you tell me why this appeal is not frivolous?"

#### Possible Solutions to Problem Number Two

- a) ask the court to specifically direct counsel's attention to the argument it finds frivolous;
- b) ask, with the court's indulgence, if counsel may continue to address those members of the court who have not yet made up their minds on the merits of the case.
- c) state that as counsel understands Justice Puglia's opinion in *People v. Craig* (1991) 234 Cal.App.3d 1066, an issue is frivolous if it is wholly unsupported in the record, or if the argument is wholly unsupported by any legal authorities. An argument might be wholly unsupportable where there is clear binding precedent which counsel has failed to acknowledge, distinguish or argue was incorrectly decided. Argue that none of those factors are present here because every argument in appellant's opening brief

was supported by detailed citations to the record, and there is no precedent compelling this court to uphold the judgment. Further argue that appellant has distinguished the cases relied on by respondent. Transition into the merits of the case by then stating that the issue counsel requested oral argument to discuss is . . . .

d) fall on one's sword and ask for the court's indulgence, indicating that frivolousness is a term of art and requires a judgment call on which reasonable minds can differ.

### Comments on Possible Solutions to Problem Number Two

Obviously the human reaction is to interpret that question as hostile and to become defensive. However, when counsel reaches the lectern in the court room, human indulgences are not allowed. Counsel must respond respectfully and informatively. Counsel must treat that question as a valid question. Sometimes doing so requires great skill and tact.

The problem with asking the court to direct counsel's attention to the argument it finds frivolous is that the court may construe the question as argumentative and challenging the court's judgment. The court is under no obligation to pinpoint the parts of the brief it found to be frivolous. This question does not suggest a question from a justice who is actually looking for counsel to explain to the court why its impression is incorrect. It is more of a challenge to counsel to show the court where any merit is in the appeal. For this reason, this probably is not the best response.

Asking the court for permission to essentially ignore at least one justice and to address the remaining justices also does not seem to be the most tactful of answers. The best one can probably hope for here is for the speaker to tune out. But consider the position in which that places the other justices. They can either openly disagree with their colleague and come to your defense, which is not impossible but is usually unlikely, or they can simply sit mute through the rest of the argument, which is the more likely response. Keeping in mind that a silent bench is the equivalent of playing cards with someone with a good poker face, if that happens you will have aced yourself out of the opportunity to interact with the court, which is the prime reason you are there. For that reason this is probably not the best rejoinder.

While falling on one's sword may permit counsel to let the court think it is right and to apologize for a lapse in judgment, it is only the right thing to do if the court is correct in its assessment of the issues.

Assuming that the court is not correct in its assessment of the issues, the best answer seems to be to use the question as a way to redirect the court's attention to meritorious arguments. This can diffuse what could feel like a personal attack. This can be done by analyzing the question as a legal one. In doing so, it refocuses the court on the issues of the case. After all, whether the issue is frivolous may be relevant to compensation or disciplinary issues, but the issue for oral argument is whether prejudicial error occurred below. Counsel for appellant should not spend the client's oral argument time defending his or her judgment call, for in doing so, counsel allows the emphasis of the argument

to be why the issues are not frivolous, rather than why they are meritorious. That does make a difference, because if you are drawn into an argument on whether the argues are frivolous, it implicitly concedes that the issues are not meritorious, and focuses the argument on whether the issues are even colorable.

## **Can Anything of Consequence Really Happen at Oral Argument?**

Most of the time, nothing of consequence happens at oral argument. But something of consequence can happen at oral argument, and counsel never knows when that infrequent event will occur. As a result, counsel must be prepared.

### **First, oral argument concessions are binding, and they cut both ways!**

The People's concessions featured prominently in forming the basis for Justice Werdegar's dissent in *People v. Jefferson* (1999) 21 Cal.4th 86, 106-107, in which she found the People's position to violate the separation of powers:

At oral argument, the People expressly conceded that the seven-year period of parole ineligibility set out in section 3046 "is not part of the sentence which the court must necessarily articulate ...." The People went on to argue that "there is nothing preventing the court from articulating it." But the latter argument appears to have been based on the notion that the court, by referring to section 3046, would simply be providing information to the public and to "the victims and the families of the victims" about defendant's prospects for release on parole. Indeed, the People specifically endorsed the conclusion that the court might properly enter a straight life sentence, without articulating a minimum term, leaving the determination of any parole release date to the Board of Prison Terms: "[I]n this particular case, for example, the court could have simply said that the defendants have been found guilty of attempted premeditated murder, the appropriate term for that is life with the possibility of parole, further, the criminal street gang act enhancement was found to be true, and said nothing more on the matter."

If it is true, as the People conceded, that the application of sections 3046 and 186.22, subdivision (b)(4) (see fn. 1, ante) falls within the jurisdiction of the Board of Prison Terms, then a sentencing court has no business doubling and imposing as a sentence the periods of parole ineligibility set out in those statutes. To do so is to purport, without authority, to bar the board from granting parole for 14 years (section 3046, doubled), or 30 years (section 186.22, subdivision (b)(4), doubled), when those sections by their terms expressly confer upon the board the power to grant parole after

7 or 15 years. This violates the constitutional separation of powers. (Cal. Const., art. III, § 3.) The power to grant parole, and to determine whether and when it shall be granted, belongs to the Board of Prison Terms and to the Governor, to the exclusion of the judiciary. (Cal. Const., art. V, § 8, subd. (b); §§ 3040, 3041.2.)

But concessions can also haunt the defense. Justice Baxter, writing for the majority in *People v. Birkett* (1999) 21 Cal.4th 226, 247, fn. 20, relied on concessions in both the briefs and oral argument to defeat the appellant's claim:

Both defendant's briefs and his counsel's oral argument appear to have conceded that the 1994 scheme required full reparation by an offender to the true victim, if any, regardless of private insurance.

Justice George also applied it in *People v. Whitson* (1998) 17 Cal.4th 229, 237, fn. 3, to defeat a *Miranda* violation claim:

At oral argument before this court, counsel for defendant conceded that defendant had waived his *Miranda* rights in connection with the alleged shoplifting incident.

Finally, Justice Brown used the oral argument concession to defeat a habeas claim in *People v. Hester* (2000) 22 Cal.4th 290, 297:

Defendant makes no attempt, though, to explain what prejudice, specifically, he fears from the failure to stay the assault conviction. (Indeed, at oral argument defendant's counsel conceded there is no prejudice under current law.) Accordingly, he fails to shoulder the burden a habeas corpus petitioner alleging ineffective assistance of counsel must carry—showing a reasonable probability that but for counsel's error the result would have been different. (See *In re Fields* (1990) 51 Cal.3d 1063, 1078 [275 Cal.Rptr. 384, 800 P.2d 862].) No prejudice having been shown, we need not determine whether counsel's performance was deficient. (See *Strickland v. Washington* (1984) 466 U.S. 668, 697 [104 S.Ct. 2052, 2069, 80 L.Ed.2d 674]; *In re Jackson* (1992) 3 Cal.4th 578, 604 [11 Cal.Rptr.2d 531, 835 P.2d 371].)

Sometimes concessions have to be made to preserve counsel's credibility with the court. Nothing will cause the court to discount your argument more than attempting to maintain a position that should be conceded. However, before counsel makes a concession, s/he should have thoroughly considered its consequences long before oral argument. The kind of concession made on-the-spot at oral argument is likely to be one counsel may subsequently regret.

**Second, counsel cannot raise new issues in oral argument.**

Justice Chin reminded defense counsel of that in *In re Manuel G.* (1997) 16 Cal.4th 805, 823-824,

when he pointed out that:

The minor asserted for the first time at oral argument that the legality of his encounter with Deputy Sims must be analyzed under article I, section 13 of the California Constitution. He contends the requirement that the officer be engaged in lawful conduct is an element of the substantive offense under section 69, and that the California Constitution's "Truth-in-Evidence" provision (Cal. Const., art. I, § 28, subd. (d)), requiring that questions involving the exclusion of evidence be resolved under federal law applying the Fourth Amendment (*In re Lance W.* (1985) 37 Cal.3d 873, 896 [210 Cal.Rptr. 631, 694 P.2d 744]), is therefore inapplicable. Thus, according to the minor, even if his encounter with Sims was not a detention under the Fourth Amendment, California law establishes that Sims illegally detained the minor within the meaning of the California Constitution.

While the court went on to dispose of the issue anyway, finding there was no merit to it, counsel might well infer that had the issue been meritorious, the court might have defaulted the minor in the issue because it was first raised in oral argument.

The lesson is to anticipate what counsel should be prepared to concede, and if new arguments are to be raised at this late stage, fairness demands that new issues be raised in supplemental briefing - not in oral argument.

## **Oral Argument Protocols**

Counsel should plan to arrive at the courthouse ahead of schedule. Counsel should consult the calendar to determine if any last minute changes have been made. If there is time, counsel should try to relax by having coffee (decaffeinated).

When the court room is opened, counsel should contact the court room clerk to check in. At this time, counsel should also give the clerk his or her business card. If counsel's case is first up, s/he should take a seat at counsel table. If not, counsel must wait for his or her case to be called before taking a seat at counsel table. Some appellate courts take roll before the cases are called, at which time counsel is expected to stand and indicate his or her presence and readiness to proceed.

When the case is called, counsel should take a seat at counsel table and get settled as quickly as possible. The court will want counsel for appellant to step up to the lectern and be ready to begin as soon as possible. Once counsel is at the lectern, s/he should stand up straight, put his or her pen down, and look directly at the presiding justice. When the presiding justice indicates that s/he is ready or asks counsel to begin, this is it!

It is appropriate in any Court of Appeal in California to begin with the words “May it please the court.” Counsel should then state his or her name, the client’s name and designation [appellant, but may occasionally be respondent]. If counsel intends to reserve time for rebuttal, in some courts that must be done at this time or rebuttal time will not be allowed. For this reason, even if the particular court does not require it, it is a good practice to follow. However, several appellate districts do follow a less formal practice. In these districts, oral argument commences with a “good morning” or “good afternoon” greeting to the bench as the more common practice.

Counsel should tell the court what issues will be discussed and in what order. Counsel should introduce each argument with whatever color or verve can be mustered. S/he can seize on an unusual fact pattern that will distinguish this case from the others on the court’s calendar. Counsel should present a streamlined version of the argument.

At this point, the most helpful information can be viewed in a list of things to do, and things to be avoided. The prime directive here, however, is graphically supported by what may be an “urban myth.” Whether it is true or not is unimportant. It is the lesson it teaches that is worth remembering.

As the story goes, a bright young promising attorney’s petition for writ of certiorari was granted by the United States Supreme Court. He diligently briefed the issues and when oral argument was set, he prepared meticulously. He flew his wife, child and parents to Washington D.C. to observe the oral argument in the case. As he began his argument, a member of the court immediately interrupted him with a question. The brash young attorney responded, “Your Honor, I will get to that point in just a minute.” Legend has it that the Chief Justice replied “No you won’t. Sit down. Your argument is over.”

- **DO NOT** put the court off or treat the court’s questions as an interruption in your presentation. The court is in control here.

Despite the fact that a beautiful monologue argument has been prepared, counsel should embrace questions from the bench as an opportunity to advance the argument, rather than viewing them as interruptions. Counsel should not hesitate to depart from the script in response to questioning from the bench. The questions from the court provide valuable information about what is significant to the judge, the decision maker. Counsel should go directly to the area of the judge’s concern! The most skilled of oral advocates will use the question to reenter the argument at the point where the question raised is addressed.

- **DO NOT** bluff.

It is generally a good idea to prepare for the possibility that the court will ask counsel to discuss a case with which counsel has no familiarity. If the court asks a question about a case that was not included in the briefs, and it is unfamiliar to counsel, and the court is unwilling to acquaint counsel with the

case, admit unfamiliarity with the case. Many attorneys will also ask the court, during oral argument, for leave to file a supplemental brief addressing the unknown case. Others attorneys prefer to read the case immediately after oral argument and then, if they believe supplemental briefing is necessary, they can file a motion for leave to file a supplemental brief. The virtue of the latter practice is that counsel is not obligated to file a supplemental brief on a case that is irrelevant or unimportant. The virtue of the former practice is that even if the case is irrelevant and/or unimportant, counsel has created the opportunity to point that out to the court. The fact that the court has questioned counsel about the case implies that the court thinks the case is relevant or important.

If it is a case cited in the briefs, but counsel does not have immediate command of the facts or the holding, counsel should have his or her materials arranged in such a way that counsel can ask the court's indulgence while s/he quickly finds the source material and refreshes his or her recollection.

- **DO NOT** wander away from the lectern.

The court is recording the oral argument, and even counsel does not require the use of the microphone for amplification, the court requires it for recording purposes.

- **DO NOT** repeat the arguments made in the briefs.

If counsel has nothing new to add, s/he should not have requested oral argument. And if the court requested oral argument, s/he can be certain the court is interested in hearing more than what was set forth in the briefs. Extend the arguments! This means that counsel should address the points raised by respondent by analyzing, refuting and rebutting the point. Counsel should not simply repeat a contention in response.

- **DO NOT** recite the facts.

While counsel should not begin with a fact recitation, counsel should be prepared to tactfully and respectfully take issue with a justice's version of the facts or reasoning, if that version is in error. Many times, in the context of a question, a justice will make a factual assumption or throw out a line of reasoning that is dangerous to the case. To take on a justice in these situations, it is helpful to be armed with a record citation or contrary case authority. Counsel should not be deferential to a misreading of the facts or erroneous legal reasoning that is harmful to the case. Oral argument could be the last chance, short of petition for rehearing, to show the court any factual or legal errors in its approach to the case.

Counsel should listen carefully to the opponent's argument and the questions directed to opposing counsel. Again, a little extrapolation from the judge's questions will generally reveal the tentative thinking of the court. If the court gave opposing counsel a hard time on a particular point, counsel should press the point even further in rebuttal.

- **DO NOT** interrupt a member of the court.

No matter how eager counsel is, and no matter how sure counsel is that s/he knows exactly what the justice is going to ask, a member of the court should never be interrupted. Counsel should listen to the entire question being posed. Counsel should ask him or herself why the question is being posed and what position the court is trying to reach. Counsel should seize the opportunity presented by a sympathetic question. Counsel should address an unsympathetic question as quickly as possible, and transition back into the argument as quickly as possible—without, of course, making the justice feel that the question has been given short shrift.

- **DO NOT** answer the court's question with a question.

The court gets to ask the questions here. Counsel does not.

- **DO NOT** beat a dead horse.

If the court seems to have adopted appellant's position, counsel should not prolong the argument. If the court wants to hear from respondent, counsel should sit down. And if the questioning of respondent was critical, and no points were advanced by the court which support respondent's position, rebuttal is unnecessary. Counsel for appellant should submit the matter without further argument.

## **The Conclusion and the Rebuttal**

Sometimes the court goes beyond the time allotted for the argument, and there may be no opportunity to conclude. However, if the court offers counsel an opportunity to conclude, it generally means it will give counsel 30 seconds. If that is the case, counsel should use the opportunity to ask for the remedy sought on the issue or issues discussed and sit down. A more eloquent conclusion can be used following rebuttal. However, if opposing counsel will not appear, there will be no rebuttal time. In that situation, counsel should follow the same procedure by asking for the remedy sought on the issues or issues discussed and sit down.

If opposing counsel does appear, and actually argues the case or fields questions from the court, counsel should pay close attention and try to determine what the court's concerns are. This is what counsel will want to address in rebuttal before giving the short but eloquent closing s/he prepared. For a fifteen-minute oral argument, most criminal appellate attorneys reserve three minutes for rebuttal. Five minutes seems to be too much to give up when respondent may not offer any

argument. Three minutes allows counsel enough time to address the court's concerns and conclude. If the court wants to ask more questions, it can extend the time.

## **The Post-Mortem**

There is not a criminal appellate attorney in California who is not keyed up when s/he comes out of an oral argument. This is a good time for counsel to treat him or herself to a nice lunch or dinner. And while s/he is doing that, it is a good time to reflect on the experience. What went well? What did not? What could have been done differently? This is the time for self-evaluation. Taking a good long look at this performance will assist counsel in improving his or her oral argument skills. Counsel is encouraged to discuss anything unusual that happened with the project attorneys.

If something eventful did happen at oral argument and counsel feels s/he should address it, this is the time to seek leave of court to file a supplemental brief.

Finally, counsel should congratulate him or herself on a job well-done.

**Concerning Oral Argument:  
A Compilation of Answers to Frequently Asked Questions  
Integrated with Amendments to  
The Internal Operating Practices and Procedures  
of the California Courts of Appeal**

**Edited by Linnéa M. Johnson**

The purpose of this compilation is to supplement the September, 1985 publication entitled CALIFORNIA COURTS OF APPEAL: INTERNAL OPERATING PRACTICES AND PROCEDURES. This supplementary material has been taken from the web pages maintained by the Administrative Office of the Courts in cooperation with the Courts of Appeal. It is organized by Court of Appeal District and Division, where applicable. Where a particular court has addressed oral argument concerns in the "FAQ" section of the web page, the questions and answers are set forth first, followed by any submission the particular Court of Appeal made on its operating procedures. This material was taken from the AOC web pages on April 3, 2000. For counsel's convenience, the web address for each excerpt has been included, and in the electronic form of this article, each address appears as a "hot link" which will take the reader to the web location.

## First District (San Francisco)

FAQs taken from the web page located at:

<http://www.courtinfo.ca.gov/courts/courtsofappeal/1stDistrict/faq/answer8.htm>

### 8) Oral Argument

#### A. Oral Argument in General

Generally, each of the 5 divisions of the First Appellate District holds oral argument two days each month.

A party requesting oral argument must serve the request on all other parties. If the parties wish to submit additional authorities not cited in their briefs they must do so within the time prescribed in their particular division's calendar notice.

At the beginning of oral argument, the presiding justice may inform counsel of any particular issues the panel wants addressed.

Counsel should remember that oral argument presents the opportunity to emphasize or clarify key factual or legal points not fully treated in the briefs, and to discuss the relevance of authorities decided since briefing was completed.

Counsel may not stipulate to the continuance of the date scheduled for oral argument.

If a request for oral argument is not filed, oral argument will be deemed waived and the court will proceed with the processing and filing of the opinion.

#### B. Oral Argument in Each Division.

**Division One** - Upon the completion of briefing, a notice is sent to the parties asking if they request oral argument. A request for oral argument must be filed within 10 days of the notice. When the court is ready for oral argument, another notice is sent indicating the date and time of oral argument as well as the panel of justices assigned to the case. Oral argument sessions begin at 9:00 a.m. and 2:00 p.m.

**Division Two** - Upon the completion of briefing, a notice is sent to the parties

asking if they request oral argument and indicating the panel of justices assigned to the case. A request for oral argument must be filed within 10 days of the notice. When the court is ready for oral argument, another notice is sent indicating the date and time of oral argument. Oral argument sessions generally begin at 9:30 am. and 1:30p.m.

**Division Three** - Upon the completion of briefing, a notice is sent to the parties asking if they request oral argument and indicating the panel of justices assigned to the case. A request for oral argument must be filed within 10 days of the notice. When the court is ready for oral argument, another notice is sent indicating the date and time of oral argument. Oral argument sessions generally begin at 9:00 am. and 1:30p.m.

**Division Four** - Upon the completion of briefing, a notice is sent to the parties asking if they request oral argument and indicating the panel of justices assigned to the case. A request for oral argument must be filed within 10 days of the notice. When the court is ready for oral argument, another notice is sent indicating the date and time of oral argument as well the amount of time the court has allotted for that particular case. Oral argument sessions generally begin at 9:30 a.m. and 2:00 p.m.

**Division Five** - Upon completion of briefing, a notice is sent to the parties indicating the date and time scheduled for oral argument and asking whether any party requests oral argument. A request for oral argument must be filed within 10 days of the notice.

Oral argument sessions generally begin at 9:30 a.m.

#### C. Argument by Teleconference System.

To reduce costs to the parties and provide greater convenience to counsel, the First Appellate District Court of Appeal has installed a telephone conference system that enables attorneys to present oral arguments by telephone as an alternative to personal appearance in court.

In all cases, civil and criminal, in which a party has a right to present oral argument, counsel may elect to present oral argument by telephone conference. Counsel's request to present oral argument by telephone conference shall be made in writing and served on all parties. The request shall contain the following information:

1. the number and title of the case

2. the name of counsel who will present oral argument
3. the name of the party counsel is representing
4. the telephone number to be used for the conference call

No fee is charged to court-appointed counsel in any criminal, juvenile or civil case or to the Attorney General or counsel representing the state, a county, a municipality or other government agency. In all other cases a \$20.00 fee shall be paid by counsel requesting a telephonic appearance at oral argument. A check in that amount, payable to the Court of Appeal shall accompany counsel's request for oral argument.

Telephone conference calls made to counsel outside the geographic boundaries of the First Appellate District will be made collect.

The court may record oral arguments by telephone conference and a request for oral argument by telephone will be deemed consent to such recording.

Taken from Internal Operating Practices and Procedures on web page located at:  
**<http://www.courtinfo.ca.gov/courts/courtsofappeal/1stDistrict/iopp.htm>**  
Section 20. Monthly Calendars and Hearings

- (a) In General. Each division of the court schedules hearings on cases one or two days each month. The deputy clerks prepare monthly calendars, which consist of the cases to be heard. The deputy clerks notifies the parties of the date, time, and place of the hearing; some divisions will also notify counsel of the maximum time to be allotted oral argument, using rule 22 as a guideline.
- (b) Except when the presiding justice either:
  - (i) Finds good cause for shorter notice, or
  - (ii) Determines that a rule of court or a statute dictates shorter notice, the clerk will transmit notice of oral argument at least 20 days before the date set for argument.
- (c) Unless the court directs the parties to appear for oral argument, the calendar notice usually states that oral argument will be deemed waived unless one of the parties requests oral argument within the time (10 to 15 days) designated in the notice. A party requesting oral argument must serve the request on all other parties. The calendar notice also reminds the parties that they must comply with Rule 10(d) concerning transmission of exhibits from the superior court to the Court of Appeal. If the parties wish to submit additional

authorities, not cited in their briefs, they must do so within a prescribed time before oral argument.

If the parties waive oral argument the court will proceed with the processing and filing of the opinion.

(d) Oral Arguments.

The presiding justice determines the order in which cases are to be argued. The time allowed for oral argument may be guided by rule 22; however, the court has discretion to allow additional time or to reduce it.

At the beginning of each case's argument, the presiding justice may inform counsel of any particular issues the panel wants addressed. The court discourages counsel from repeating the argument raised in the briefs. Oral argument presents the opportunity to emphasize or clarify key factual or legal points not fully treated in the briefs and to discuss the relevance of authorities decided after the briefs were filed.

At the conclusion of the arguments, the presiding justice will declare the cause submitted, unless submission is deferred for further briefing.

(e) Media Coverage. Media coverage of courtroom proceedings is governed by Rule 980 of the California Rules of Court and this court's policy statement B.

(Adopted, effective July 1, 1991. As amended, effective November 15, 1999.)

Section 21. Argument by Teleconference System

(a) Teleconference System. The First Appellate District Court of Appeal has installed a telephone conference call system that enables attorneys to present oral arguments by telephone, as an alternative to personal appearance in court. The court has determined that oral argument by telephone conference call will reduce costs to the parties and provide greater convenience to counsel.

All oral arguments by telephone conference call will be heard by the justices on the bench in the courtroom, which will be open to

the public.

(b) Option of Counsel. In all cases, civil and criminal, in which a party has a right to present oral argument, counsel may elect to present oral argument either by personal appearance in the courtroom or by telephone conference call. The decision whether to present oral argument by telephone or in person is within the sole discretion of counsel and the parties, except that the court may direct counsel to appear in person.

In deciding whether to present oral argument by personal appearance or by telephone, counsel should consider the expense of a personal appearance to the parties and to the state and should determine whether the matters at issue can be satisfactorily argued by telephone conference call without incurring that expense.

(c) Notice to Other Counsel. Counsel shall notify all other parties in writing whether he or she waives or requests oral argument. If oral argument is requested, counsel shall indicate whether he or she elects to present oral argument in person or by telephone conference call. The notice shall be given within the time allowed for requesting oral argument.

The court may hear oral arguments where counsel for one party elects to argue by telephone and counsel for the other party elects to appear in person. If one counsel elects to argue by telephone and the other elects to appear in person, the counsel who elected to argue by telephone shall have the right to change his or her request and appear in person. The requested change shall be communicated to the divisional deputy clerk and opposing counsel without delay.

(d) Written Request for Oral Argument. Counsel's request to present oral argument by telephone conference call shall be made in writing and shall contain the following information:

- (1) the number and title of the case;
- (2) the name of counsel who will present oral argument;
- (3) the name of the party counsel is representing and
- (4) the telephone number to be used for the conference call.

The request for argument may be made by completion of a "Request for Oral Argument" form, which will be furnished by the clerk at the time notice is mailed to the parties.

(e) Fee to Cover Costs. The cost of the telephone system and service is billed to the court. No fee shall be charged to court-appointed counsel in any criminal, juvenile, or civil case or to the Attorney General or counsel representing the state, a county, a municipality or other government agency. In all other cases, a fee of \$20 shall be paid by each party whose counsel requests oral argument by telephone conference call. A check in that amount, payable to the Court of Appeal, shall accompany counsel's request for oral argument. A party who fails to pay the fee shall be precluded from participating in oral argument by conference call. Additionally, telephone conference calls made to counsel outside the geographic boundaries of the First Appellate District will be made collect.

(f) Notice of Time of Oral Argument. When a party requests oral argument by telephone conference call, the divisional deputy clerk shall notify counsel of the date, the approximate time of oral argument, and may indicate the maximum amount of time the court will allow therefor (see rule 22). The deputy clerk will arrange the conference call when the court calls the case for argument. If counsel fails to be available when the case is called, the court may deem oral argument waived.

(g) Recording of Oral Argument. The court may record oral arguments presented by telephone conference call. A request for oral argument by telephone will be deemed consent to such recording.

(Adopted, eff. Sept. 2, 1992. As amended, eff. March 7, 1995 and eff. July 1, 1999.)

## **The Second District Court of Appeal (Los Angeles and Ventura)**

Taken from Internal Operating Practices and Procedures on web page located at:  
<http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/iopp.htm>

### **Argument**

Each division generally schedules hearings for two days each month and entertains argument on those matters for which oral argument has not been waived by the parties. Each division differs to some extent on the manner in which calendars are called and the order in which the matters are scheduled for argument. Unless further briefing is allowed, the cases are submitted at close of argument and an opinion is filed within 90 days thereafter. If further briefing is allowed, the date of submission will depend upon the

order of the court.

### **Third District [Sacramento]**

[The Third District Court of Appeal has not published any FAQs or any amendments to its operating practices on the AOC web page.]

### **Fourth District, Division One (San Diego)**

FAQs, taken from web page located at:

**<http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv1/faq/answer6.htm>**

6. When is oral argument and how do I request or waive it?

A. Dates and Times of Oral Argument. Oral argument is held the second full week of every month. Except for those matters specially set, court commences at 9:00 a.m. and 1:30p.m.

B. Requesting or Waiving Oral Argument. The court sends a letter to all parties (except for respondents who have not filed a respondent's brief and amicus curiae) asking whether oral argument is requested. A party wishing to request oral argument should do so in writing to the court, stating the thrust of oral argument and time requested, with service on all parties within 10 days of the date of the letter. The court will assume counsel is waiving oral argument if no response to the oral argument letter is received. Each party's oral argument will be limited to 15 minutes unless a party files and serves, and the court grants, a request for additional time. Any such request must specify the amount of time requested and the issues to which additional argument will be addressed. If the request is granted, both sides will be allotted equal time.

Taken from Internal Operating Practices and Procedures on web page located at:

**<http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv1/iopp.htm>**

## **VII ORAL ARGUMENT**

Oral argument is generally held during the second week of the month. Specific cases will be calendared during other times when resolution of the matter is urgent or for other good cause. Argument is limited to no more than 15 minutes per side, unless the time is extended by advance written request and leave of court.

Those matters that are orally argued are generally submitted at the conclusion of counsel's arguments. If argument has been waived, the case will be submitted at the conclusion of the entire argument calendar. Submission of the case triggers the 90-day rule for the filing of the opinion. (Cal. Const., art. VI, § 19.)

## **Fourth District, Division Two (Riverside)**

[Division Two of the Fourth District has not published any FAQs or any amendment to its operating practices on the AOC web page. This may be due to the fact that Division Two is currently issuing intended decisions and evaluating the use of this approach.]

## **Fourth District, Division Three (Santa Ana)**

FAQ taken from web page located at:

<http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv3/faq/answer6.htm>

### **6. When is oral argument, and how do I request or waive it? Dates and Times of Oral Argument**

Oral argument is normally held the third full week of every month. Except for those matters specially set, court commences at 9:30 a.m. and 1:30 p.m. Attorneys and unrepresented parties should appear no later than 9:00 a.m. and 1:00 p.m. to check in with the clerk.

#### **Requesting or Waiving Oral Argument.**

At the time a case is fully briefed, the court sends a letter to all parties (except for respondents who have not filed a respondent's brief) asking whether oral argument is requested. A party wishing to request oral argument should do so in writing within 10 days of the date of the letter, stating the time requested, with service on all parties. The court will assume counsel is waiving oral argument if no response to the oral argument letter is received. Each party's oral argument will be limited to 30 minutes unless a party files and serves a request for additional time, and the court grants the request. Any such request must specify the amount of time requested

and the reason the additional time is necessary. If the request is granted, both sides will be allotted equal time.

Taken from Internal Operating Practices and Procedures on web page located at:  
<http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv3/iopp.htm>

### SECTION III. PROCEDURES FOR PROCESSING CASES

#### A. Appeals

When an appeal is fully briefed, the parties are given an opportunity to request oral argument. Cases are generally scheduled for oral argument in order of the request. Depending on the court's caseload, a significant period of time may pass before oral argument is available. Statutory priorities are enforced, however. Non-oral argument cases are similarly assigned in order based on the date oral argument is waived. Panels, including a justice tentatively designated to author the opinion, are assigned on a random rotating basis. Periodically the court schedules special oral argument calendars for short cause matters. Short cause matters generally result in per curiam opinions. The court also offers remote video appearances for oral argument on criminal matters, allowing counsel to appear via video from other locations.

A confidential written summary is prepared by the author's chambers and provided to each panel member prior to oral argument. The panel may conference on a case before argument and always conferences after oral argument is completed. Thereafter, a proposed final opinion circulates among the panel members for comments and/or approval. Proposed opinions for cases in which oral argument has been waived generally circulate among panel members without a formal conference. All cases may routinely be discussed among the justices and staff members informally on an as-needed basis.

## Fifth District (Fresno)

FAQ taken from web page located at:

<http://www.courtinfo.ca.gov/courts/courtsofappeal/5thDistrict/faq/answer18.htm>

18. How are cases set on the oral argument calendar and why does the court sometimes invite waiver of oral arguments?

The answer depends upon whether the case is a "regular appeal" or "routine disposition" (per curium or by the court opinions). A *routine disposition* is a case on appeal which raises no novel questions of law, is not of wide public interest, and can be disposed of by application of settled principles of law to the facts. (Internal Operating Practices of the Fifth District Court of Appeal Section III-B.) Draft opinions in routine dispositions are written by an experienced attorney assigned to the court's central staff or by a justice. The final opinion is reviewed and approved by a justice of the court.

A *regular appeal* is assigned directly to a justice's chambers for handling. It is a case not screened for routine disposition treatment.

Waiver procedures in routine dispositions - A three-justice panel reviews the proposed draft opinion. In the majority of routine dispositions, the court believes waiver of oral argument is appropriate. As a result, the court mails to counsel a letter inviting waiver of oral argument. If the court does not receive a request for oral argument from either side within 10 days from the date of this letter, oral argument is deemed waived, and the case stands submitted. If at least one party requests oral argument, the court then notifies all parties of this fact, and sets the time and date for argument. The case normally goes under submission at the conclusion of oral argument.

Waiver procedures in regular cases - The Clerk sends out a notice entitled "Oral Argument Notice and Questionnaire/Request for Waiver" (oral argument

questionnaire). A date and time for oral argument is included. Counsel are asked, among other things, whether or not they want to waive oral argument. This notice is not the final word. For example, if a request to orally argue a case is made, the request is really a request to reserve a date for oral argument. After reviewing the briefs, the authoring justice then decides whether the court wants to hear oral argument. If the justice believes all issues have been covered by the briefs, a letter from the Clerk's office will be sent to counsel inviting waiver of oral argument. Counsel are advised that if the court does not receive a request of oral argument from either side within 10 days from the date of the letter, their case will be removed from the calendar, oral argument will be deemed waived, and the case submitted. If all parties waive, counsel will receive a copy of the submittal order and later the court's opinion. If any party requests oral argument, the case will be heard on the date previously set. When one party requests oral argument but the other waives, the justices will hear oral argument from the requesting party alone. It is possible that all parties may waive oral argument, however, the justices may still want the parties to argue the case. When this happens, counsel will be notified either by mail or by telephone. The case will be heard on the date previously set in the oral argument questionnaire.

FAQ taken from the web page located at:

**<http://www.courtinfo.ca.gov/courts/courtsofappeal/5thDistrict/faq/answer19.htm>**

19. How long should we wait for the "request to waive" letter after our opponent has indicated he/she would not waive oral arguments?

It is not uncommon for parties to initially request oral argument in response to the oral argument questionnaire. Remember, a party's initial request for oral argument is not final. It is merely a reservation of an oral argument date and time. You can normally expect to receive a 10-day waiver letter approximately one month in advance of the calendared oral argument date. If you have not heard from the court within one month of the scheduled oral argument date, you can call the Clerk's office and ask about the status of oral argument.

FAQ taken from the web page located at:

**<http://www.courtinfo.ca.gov/courts/courtsofappeal/5thDistrict/faq/answer20.htm>**

20. What should be considered when deciding whether to waive oral arguments?

Keep in mind when you receive the Clerk's letter inviting waiver that you are receiving this letter at the request of the authoring justice. If the Clerk invites you to waive oral argument, it means that your briefs are thorough and you have explored and answered all the justices' questions about the issues raised. If the justices have questions before oral argument, it is not uncommon for counsel to receive specific questions from the Clerk soliciting additional briefing on specified issues. As a result, you can be assured the justices will not decide your case based on issues that are not briefed without first receiving your input.

Local Rules taken from the web page located at:

**<http://www.courtinfo.ca.gov/courts/courtsofappeal/5thDistrict/localrules.htm>**

#### Rule 1. Circuit-riding Sessions

The court will conduct its hearings in its courtroom at 2525 Capitol Street, Fresno, California, except in the following instances:

(1) For the convenience of the litigants and attorneys, court sessions may also be held in those county seats within the district outside of Fresno from which sufficient appeals have been perfected to constitute one full day's calendar. The court will not deviate from its normal calendar scheduling practices in order to accumulate sufficient cases for a full day of hearing in any county seat.

(2) For the convenience of the court and court personnel, court sessions in any county seat other than Fresno will be held only when suitable courtroom facilities, judicial offices, and law library are provided. Suitable courtroom facilities require security adequate to ensure the safety of the public and the court.

This rule is adopted as required by rule 21.5, California Rules of Court.

Rule 1 adopted effective July 1, 1981.

Rule I as amended effective November 15, 1993.

#### Rule 6. The Teleconference Oral Argument Option

The court has a teleconference system that enables attorneys to stay in their office until such time as contacted by the court for oral argument before the court.

##### Teleconference Procedures.

1. Counsel who have requested oral argument will have returned to the court a questionnaire designating the attorney arguing the case and the time requested. If counsel has not specifically designated on the questionnaire a request for personal appearance, the attorney shall be deemed to have consented to teleconference oral argument.
2. The questionnaire of calendar date requests a current California telephone number for counsel which the court utilizes unless otherwise notified by counsel. The courtroom clerk will telephone each counsel's office in the sequence the cases are called on the calendar. Counsel are expected to be at the telephone number previously given to the court during the time oral argument has been scheduled and until such time as it has been completed.  
  
Failure to be available to receive the telephone call will be treated in the same manner as a failure to personally appear for scheduled oral argument. Counsel is responsible for notifying the court if the designated telephone number is changed.
3. At the conclusion of the teleconference oral argument, the matter is submitted or the court will issue further directives as necessary.
4. Retained counsel participating in a teleconference call shall receive a nominal billing from the court following oral argument to cover the cost of the teleconference call and the administrative time involved.
5. Any deviation by appointed or retained counsel from these procedures shall not be permitted except by express prior approval of the court.

### **Sixth District (San Jose)**

FAQ taken from web page located at:

<http://www.courtinfo.Ca.gov/courts/courtsofappeal/6thDistrict/faq/answer10.htm>

10. Procedures for Oral Argument

A. Oral Argument in General

Generally, the Sixth Appellate District holds oral argument four days each month.

A party requesting oral argument must serve the request on all other parties. If the parties wish to submit additional authorities not cited in their briefs, they must do so no later than three days prior to scheduled oral arguments.

At the beginning of oral argument, the presiding justice may inform counsel of any particular issues the panel wants addressed.

Counsel should remember that oral argument presents the opportunity to emphasize or clarify key factual or legal points not fully treated in the briefs and to discuss the relevance of authorities decided since briefing was completed.

Counsel may not stipulate to the continuance of the date scheduled for oral argument.

If a request for oral argument is not filed, oral argument will be deemed waived, and the court will proceed with the processing and filing of the opinion.

B. Argument by Teleconference System

To reduce costs to the parties and provide greater convenience to counsel, the Sixth Appellate District has installed a telephone conference system that enables attorneys to present oral arguments by telephone as an alternative to personal appearance in court.

In all cases, civil, criminal, and juvenile, in which a party has a right to present oral argument, counsel may elect to present oral argument by telephone conference.

Counsel's request to present oral argument by telephone conference shall be made in writing and served on all parties. The request shall contain the following information as indicated on the forms supplied by the court:

The name of counsel who will present oral argument.

The designation of the party counsel is representing.  
The telephone number to be used for the conference call.  
Estimated duration of the call.

The Sixth District of the Court of Appeal uses Conference Call Service for the handling of teleconferencing. You can contact Conference Call Service at 800-272-5663.

The court may record oral arguments by telephone conference and a request for oral argument by telephone will be deemed consent to such recording.

Taken from Internal Operating Practices and Procedures on web page located at:  
**<http://www.courtinfoca.gov/courts/courtsofappeal/6thDistrict/iopp.htm>**

### 3. Oral Argument

When a case is ready for possible argument, the clerk will write and ask the parties whether they desire to exercise their right to appear personally for oral argument or to argue by teleconference. [The Sixth District Court of Appeal Teleconferencing Oral Argument Procedures Manual is available from the clerk's office upon request.] If oral argument is requested, the case is placed on an oral argument calendar.

After the case is scheduled for oral argument, any party or counsel for a party may contact the clerk's office and obtain the names of the justices assigned to the case.

The order in which cases are to be argued is determined by the presiding justice. Because of the considerable investment of court time and resources necessary to prepare a case for oral argument, continuances are disfavored and will be granted only on a showing of good cause. Oral argument will not be continued by stipulation of counsel absent a showing of good cause. If no appearance is made, the case may be ordered submitted.

The order and the time allotted for counsel to make their presentations are specified in rule 22 of the California Rules of Court.

In most instances, the presiding justice will inform counsel at the beginning of each session that the court has reviewed the briefs

and is familiar with the facts and issues. The court requests that counsel not merely reiterate the argument contained in his or her brief. Oral argument is generally most helpful and effective when reasonably brief and when counsel focuses on the decisive issues, succinctly clarifies the facts as they relate to a given issue, or clarifies the holding or reasoning of potentially applicable or controlling authority.

The court disfavors the submission of untimely citations of authority as it deprives the court and opposing counsel of sufficient opportunity to prepare for oral argument. The court retains discretion to strike or disregard such citations.

When oral argument has concluded in a given case, the justice presiding will declare the cause submitted, unless submission has been deferred for additional briefing.

#### 4. Post-Oral Argument Conference

A post-oral argument conference is held in which the justices again discuss the case and finally determine the decision to be reached.

# ORAL ARGUMENT

**A Lecture Delivered to the Stanford Law School Moot Court Program \***

on

March 22, 1979

by

Michael G. Millman

How many students here have ever argued a case? Okay. I will spend the next forty-five minutes trying to give you my perspective on oral argument. I'll answer questions at the end, but if you want to ask some along the way, that's cool too.

The subject of oral argument is very dear to me. I don't argue cases as often as I'd like to, but I love it whenever I do. To lawyers it is one of the highlights of their legal experience. No aspect of lawyering has more fascination to lawyers than oral argument. Now that may seem strange, because in fact oral argument plays a relatively small part in the total process. You know that most lawyering never involves going to court -- it involves counseling, negotiating, drafting, or what-ever. Of those cases that do go to court, few are tried. Of those cases that are tried, few are appealed; and of those that are appealed, few are argued. The conventional wisdom is that oral argument is a declining part of the litigation spectrum, and if that is true, then the question arises: why does it have such fascination for lawyers?

I think the answer is that there is nothing you can do as a lawyer which is more dramatic, which is more electric, which is more terrifying -- than arguing a case before an appellate court. Nothing you do leaves you so exposed before your colleagues as oral argument. When you write a brief, you can hide behind the paper. You write it, but who knows if anyone ever reads it. If someone does read it, who knows if that person is a law clerk or a judge. When they read it, they can't be sure you wrote it, because even though your name is on it, you could have had a law student or a colleague do some or all of the work. But when you stand up and make a fool of yourself in front of a courtroom, everyone knows who's doing it.

It is that terror which fascinates both the people who argue and the people who listen. A metaphor I like is the spectacle of someone at a circus walking on a tightrope, with everyone watching and waiting with hushed expectation to see if he will fall off. That is the excitement you experience when you watch good oral argument. There is an aura of unpredictability. You can't control what's going to happen in argument the way you can control what happens in your brief. You never know if within the next seconds you will suddenly fall on your face.

You should know that we all experience that terror when we first argue, as you are about to experience it. That terror is primarily a product of our preoccupation with our own egos. We are concerned about making fools of ourselves in public. We might like to think that when we get up to argue our primary preoccupation is with the law, or perhaps with the welfare of our client, but the reality is that at the moment of argument, especially when you are beginning, your primary preoccupation is with yourself and with not making a fool of yourself.

When you focus on your own ego, you get deflected from the real purpose of oral argument. Oral argument is not to display yourself before the court, but to persuade the court --the word is "persuade" -- to influence the court, to assist the court in coming to the conclusion you are urging upon it. What you are trying to do is to give the court the benefit of your focused thinking on a problem. That assumes that you have thought about the problem. It means more than just having read the cases. It means having integrated the material and come out with a coherent and intelligent perspective on a problem that will assist the people who have to resolve it.

Now that may seem trivial, but if it is, why do most people argue so badly? Most oral argument is awful -- just awful. First, it is boring. Terribly boring. If you think about argument from the perspective of a judge -- and I will ask you to do that several times this morning -- a judge who is sitting up there listening to case after case on a calendar, you will appreciate how boring it is to hear people just repeat what is already in their briefs. Most argument is rambling, it is incoherent, it is wastefully padded with filler. If you are ever lucky enough to read a transcript of oral argument --usually you get transcripts of trials, not transcripts of oral argument -- you will see that if all the filler is excised from bad oral argument, you end up with perhaps 30 percent content out of the whole argument.

Much of oral argument is non-responsive. When a judge asks a question, you must operate on the assumption that the judge wants to know the answer. Now I know that moot court is somewhat artificial in that respect. The judges here ask you questions to test you, to watch you suffer. But in actual argument, most judges ask questions because they are grappling with a problem and would really like to have the benefit of your thinking. If you listen to the answers given, you hear garbage, you hear fudge, you hear evasion, you hear song and dance, you hear anything but the advocate attempting to respond to the court's inquiry.

There's a wonderful comment by former Chief Justice White of the Supreme Court of the United States, who said that when he watched lawyers before him stumble over their inconsistencies, he felt as if he had been stabbed in the mind. I love the metaphor. It's exactly the way I feel when I judge a moot court competition. I ask someone an honest question and would like to hear what he has to say on the point. When I get evasion and double-talk back, I feel as if I am being stabbed in the mind, as if the person to whom I am talking is not really talking back to me.

A substantial fraction of oral argument is impossible to follow. You might think about that. You prepare yourself for oral argument; you get it all together. You have a speech to deliver. You get up there, and you unload. You think that if you're lucky, they won't ask you any questions, and you'll just get to do it straight through from start to finish (which is wrong; we'll talk about that later). But if you listen to oral argument, you will often find it almost impossible to follow. I may be No. 8 on the calendar, so I sit in court waiting and get to listen to arguments 1 through 7. I think that as a lawyer I know something about the issues raised, yet often I simply cannot follow what the lawyers are saying. Of course, when you sit up there as a judge, you don't want to admit this. The lawyer is proceeding with his presentation, rattling through statutes and the facts of the case. He looks good: no obvious pratfalls or blunders. The judge is thinking, "I don't understand what you're saying, but of course, I'm not going to say that, because that might make me look stupid." So the judge sits there and smiles, while you go on arguing --and nothing has

happened. Think about that when you argue. The point is not to deliver a speech, particularly one which no one can follow. The point is to engage, and hopefully to persuade, the court.

One justice has cited four basic characteristics of good oral argument. They're as good as any I've heard. You might make a note of them. One is selectivity. The second is simplicity, the third is candor, and the fourth is resilience. Selectivity, simplicity, candor, and resilience: we'll talk about each of them.

Good argument is simple, intelligent, clear, easy to follow. It's a roadmap to the court. You can just follow along with counsel and see exactly where he wants to take you. I sat on a moot court competition two weeks ago at Boalt and watched a young man do that brilliantly with statutory interpretation. I don't know how well you do on reading statutes. I'm not too bad on cases, but I'm terrible on statutes. It's just impossible to figure out what the damn things say, and even worse to follow them when they are being reviewed orally. This young man had the ability to take the most complicated statutes and explain them in a way that I could follow perfectly. In good argument you might hear something which sounds like: "Well, counsel, does this statute have any relevance to our case?" "Yes, your Honor, it does. Section 473, as you know, prohibits the blowing of soap bubbles in Berkeley. The demonstration in question took place on the U.C. campus, which is in Berkeley. Therefore, pursuant to the statute the blowing of soap bubbles at the demonstration was unlawful." Hear the clarity. Counsel has set forth the statute and the application of the statute to the facts of his case, and everyone could stay with him. That's very hard to do.

There are two essential components to effective oral argument. The first is experience, the second is preparation. You ask what good does it do for me to tell you that you need experience, when you're about to do your first argument and obviously don't have any. Well, you have to do the best you can wherever you are at the time. Experience takes practice and time. You should not assume that it is easy to do good oral argument. It isn't. You can't acquire the skill overnight. And if you don't use it once you've acquired it, you will get rusty. But if you take argument seriously, and in each one try to do the best you can and afterwards analyze what you did wrong, you will eventually become at least competent.

As you approach each case, the only thing you can do is prepare. Preparation is essential. Pasteur wrote that "chance favors the prepared mind," and what you are doing in preparing for your oral argument is minimizing the risks, minimizing the unpredictability of what may occur in actual argument. By preparation I mean far more than reviewing the major cases the night before you argue.

The single most effective way to prepare is a moot court. That may sound strange to you, because you would be moot courting for a moot court. We encourage attorneys in our office to have a moot court session before argument, particularly in a major case. No matter how good you are, you cannot presume to walk in untested and argue a case to a sophisticated court. I urge you to make it a practice to have a moot court session at least three days before you argue.

There are different types of moot courts. I call them "soft" and "hard". People have personal

preferences. Some people like "soft" moot courts. They are more collegial. You sit around and discuss the case. It works pretty well for experienced attorneys, and it's not too hard on the nerves. I prefer "hard" moot courts, where you have to stand up in front of two or three of your colleagues and answer questions as if you were in an actual courtroom setting. That's when the adrenalin starts flowing and you have the challenge of trying to answer questions under fire. The people who will help you prepare are not those who ask you easy questions. You don't need that. What you need are people who are willing to take the time to read the briefs and some of the cases, and to ask you questions which are harder than any you will be asked by the court: questions which raise your opponent's strongest arguments, those key points on which it is likely the case will turn.

When faced with these difficult questions, you may feel a natural resentment toward the people asking them. Try to get past that. Don't resent the questions. Welcome them, because they prepare you for the ordeal to come. After a good moot courting, you will probably come away feeling, "Good Lord, I don't know anything. I can't do this. I don't understand the law. I don't understand how it fits together. I am not worthy." If it's any solace to you, I had similar feelings when I first started ten years ago, and I still have them.

Now we go back to why I urged you to do your moot court at least three days before your argument. If you do your practice the night before, you will only have succeeded in reducing yourself to quivering jelly, with no opportunity to do anything about it before your argument. That is just destructive. Instead, you want an early moot court at which you, or preferably the judges, make a list of all the things you don't know, all the authority you weren't aware of, all the things you need to research before actual argument. Then use your time to pull it together, so that by argument you have covered all the weaknesses that came out at the practice session. It is surprising how often we realize only very late in the game, perhaps just before or even during oral argument, what our case is really about. I know that sounds strange. But at some point after you have filtered through all the preparation and briefing, it all crystallizes and you realize where the case will actually turn. Unless you're much more prepared than most attorneys, that probably won't happen until shortly before you argue the case. The moot court session is very valuable for doing that. In the process of reading the record and writing the briefs, we tend to lose sight of the fact that most cases will ultimately turn on one or two key, and often rather subtle, points. Often these will have more to do with procedural matters than with substantive law. The case may go off on subtle variations you never contemplated way back at the start, when your focus was primarily on the substantive issue presented. When you understand, finally, where your case really hinges, you will be prepared, and you will have overcome that sense of terror you would otherwise feel.

Now I think I'm supposed to give you some "how-to"'s in this lecture, and I will do that. But I would like to introduce them with this perspective: we usually get a series of how-to's like: "Don't wear a pink tie to court." Which is true. But I would ask you to think about these how-to's from the broader perspective of cognitive principles and a body of knowledge we sometimes call "rhetoric." This perspective is more psychological and has to do with the process of communication, which in turn has to do with transmitting and receiving signals, and with coding and de-coding information. Because, of course, what we are about when we argue is transmitting

information: from us to a court we are trying to influence. I find it helpful to think about that process as involving two components: the first is communication, and the second is persuasion. Persuasion is the goal, but if you have not succeeded in simply communicating your message from transmitter to receiver, you obviously are not going to succeed in persuading the receiver. Many of the things I will discuss are really obstacles to the transmission and reception of signals. It is then helpful to realize that the reason why you don't wear a pink tie to court is not so much because it is a breach of decorum and tacky, as it is that when a judge looks out and sees only the damn pink tie, it is hard for him to think about what you are saying.

If you have a chance, take a look at a little book called "The Art of Persuasion" by Minnick. It talks about communication and provides a useful perspective on the process.

You must be familiar with the record in your case. That is the thing you can know better than anyone else. Judges know the law, more or less, but you know -- or should know -- the facts of your case. The trouble is that you read the record a year and a half ago when you briefed the case. Suddenly one day you get a notice that it's calendared for argument, and you haven't looked at it in months. You must go back and familiarize yourself with the record, either by reviewing an elaborate set of transcript notes, if you have them, or by actually re-reading the record. Otherwise, with a well-prepared court you could find yourself in the embarrassing position that the justices know more about the record than you do -- which is a cardinal sin.

It is imperative that you shepardize the cases cited in your brief before you argue. "Everyone knows that," you say. But not everyone does it. You wrote your brief a year ago. You were on top of the law, and when you filed the brief it was a magnum opus. With a busy law practice you haven't thought about it much since, because you've been representing other clients. Then suddenly you have to argue the case, and you pull out the brief and look through it and say, "Yup, it's just as brilliant as I remember it. I'm ready to go." What you don't know is whether the law has changed since then. There may have been several new cases, or a change in the statute, of which you are unaware. By not shepardizing your cases, you have increased the chances that someone will ask you a question at oral argument for which you have no answer whatsoever.

Cases often involve exhibits. If you want the court to look at an exhibit, you have to get the exhibit to the court. Trivial, but people neglect to do it. The exhibit is in the trial court, the appellate court is over here. There's a procedure for asking that the exhibits be transmitted to the appellate court, but you have to ask, and then you have to check that the exhibit actually made it there.

What do you do to prepare your argument? Obviously you don't memorize your argument. Obviously you won't read your argument. You need to work out your presentation. I focus on two things. First, what am I trying to say? I think about the problem. What do I want, and why? Second, I focus on timing. The first time you practice your argument, it takes two hours to deliver. The most an appellate court will give you is thirty minutes, and in the Court of Appeal in California you are lucky to get ten. If your argument is not pared down to that time scale, you will never get through it. You must rehearse it two or three times just to whittle it down to size. I concentrate on the transitions: the moving from topic A to topic B. How do I avoid those

seemingly endless pauses where I'm fumbling around and don't know how to wrap up what I've finished to move on to something else? Prepare a series of devices to get you through those moments of panic. They're really quite simple: "Therefore, your Honors, we have established our first proposition, and we now move to the next consideration." Something simple like that is just enough to get you over the hump, but you need to work it through ahead of time to make it all fit together.

You need an outline of your argument. Some people think they can wing it without one; I think you're a fool to try. You may lose your place in the middle, particularly if there has been vigorous questioning from the court, and you need something to come back to. By an outline, I mean something simple, with large type, that you can glance at while you're up there, because you don't have time to read anything more elaborate. When people first do oral argument, they bring books, clutters of paper, and cases to the podium. You learn very quickly that you don't have the faintest chance of using any of it. All I bring is an outline; sometimes I have digests of the major cases on cards. I bring the briefs, perhaps a quotation I want to read -- and that's all, because nothing else would be of any use to me.

This too may sound trivial, but I suggest you plan to arrive at your argument early. I live in Berkeley; the court is in San Francisco. The argument is at 9:30, so I figure that if I leave at 8:45, I'll have plenty of time. But I didn't count on a traffic jam, and I end up stuck on the bridge getting madder and madder, and by the time I get to court I'm a wreck. The solution is simple: just plan to arrive an hour early, then go have coffee near the courthouse. You'll feel better.

When you start your argument, it is imperative that you start strong. The first words out of your mouth make a big impression. Judges have long calendars, they're bored, and they think they've heard it all. If your start indicates that your argument will be boring, they turn off. So you need to have your introduction worked out, and I suggest that you memorize it. Know what you're going to say for the first thirty seconds, just to get off the ground and over your initial sense of terror.

You must be selective in what you argue. That was the first principle of good argument. You cannot argue everything. There simply isn't time, and even if there were, you shouldn't do it. Yet lawyers get up and indicate they are about to regurgitate the brief. It's painful to watch. As soon as they say, "In the brief, your Honor, we had four contentions; they are. . .," everyone groans. They know what's coming. The brief is coming, and they've read the brief. You can't do that, or if you do, at least don't tip the court off, because it won't bother to listen. You have to sneak it in.

Avoid anything distracting to your presentation. The reason has to do with the transmitting and receiving of signals: the pink tie, fumbling through papers, awkward mannerisms, anything that deflects the court from listening to what you are saying. That includes being irritating, or condescending, or insulting. Sometimes we don't realize how obnoxious we lawyers are. We can be insufferable. We think, "I was No. 1 in my high school class, and I went to Stanford Law School, and I'm going to tell you what this case is all about." Now the judges also went to Stanford Law School, or if they didn't, so much the worse for you. If you run that number, which we do so well, everyone will hate your guts and want to kill you for it. Tone it down as best you

can, which isn't easy.

You must avoid being contemptuous toward opposing counsel. Very tacky, and done all the time. Sooner or later you might get to know the other person, and even deal with that person over a period of time. It would be nice to have a decent working relationship. You also have to avoid insulting the judge in the court below whose order you're appealing. Although you may think that the ruling was incredibly stupid and that the fool obviously didn't know the law, what you may not know is that the dumb judge in the court below also plays tennis with the judges before whom you are arguing. You will unwittingly succeed in alienating everyone when you attack that judge personally.

I would suggest that in argument you generally adopt the kind of thoughtful tone you would extend to a senior colleague in your law firm, someone to whom you are explaining a project you had worked on extensively, to whom you want to give the benefit of your work, and whose judgment you respect.

You need a working model of the court you're addressing. Sometimes we don't think about that, because when we think about oral argument we tend to think about ourselves, when we ought to be thinking about the judges we are trying to persuade. To whom am I talking? My working model is that most judges are pretty bright and pretty unprepared. Of course, I adjust the model to fit the particular court, or to what I see when I get into argument. Sometimes I'm surprised.

Remember that judges are generalists. Although you may specialize in one area of the law, judges -- unless they're bankruptcy judges -- handle cases in all areas of the law. Most judges have to hear ten or twelve separate matters in a morning. It is hard for them to be on top of every dispute and to keep up with what the lawyers are saying. In some graceful way, you need to bring the judges along. You say things like, "As the court will recall" and then you review the key facts of your case. Or, "As the decision in Case X indicates, . . ." You bring the judges along with you, so they're not sitting there thinking, "I don't know what this person is talking about."

Begin by telling the court what your case is about and what you intend to argue. I usually tell the court what the key issues are. After I say what I intend to argue, I then proceed to argue it, and when I get done I summarize what I have argued. The emphasis and repetition solidifies the argument in a judge's mind. Ask yourself what you remember about an oral argument you heard a day or a week ago. Usually nothing. You need the reinforcement so the judge retains the essence of your position when he or she leaves the bench.

Have a conclusion, so you don't just fade away at the end. You can end by summing up what you've said, and telling the court what you want. That's something many attorneys don't do, perhaps because they have never really figured out what they want. That principle applies not only to oral argument, but to lawyering in general, and probably to the way we lead our lives. We run around like crazy, and we may never know what we really want. When you litigate cases, it's real important to figure out with your client, who may not know either, what he or she is really after. What are you asking the court to do? What is the bottom line? At the end of your argument you ought to tell the court precisely what you are asking it to do.

When you have finished with what you set out to say, what do you do? You asked for twenty-five minutes, and you've only used twenty. What then? I sit down. I stop. If I've said my piece, and answered any questions from the court, I quit. Everyone will be delighted that I left the podium a little early.

Your argument is not supposed to be the delivery of a speech, but rather a conversation with the court. "Conversation" conveys a sense of what the process should be. That means you want to welcome, to encourage questions from the court. One way you do that is by leaving little pauses in your argument to provide an opportunity for the justices to ask you a question should they wish to. Some lawyers machine-gun along, and no judge could ever get a word in if he wanted to.

Unless you're awfully good at it, I would suggest you avoid any rhetorical flourishes or bombast in your speaking style. The people who are best at argument are very casual, very easy. They look like they're just there talking with the court, giving the court the benefit of their thinking, and available for questions.

When the court does ask you a question, you must respond to it. Lawyers say things like "I'm coming to that later, your Honor," -- which is another sin of argument. When the court asks a question, you must answer it then, because the court is interested in it then. If you defer answering, you may never get back to it.

One of the best answers to keep in mind is a very simple one. Only three words. "I don't know." If you want to embellish it a little, you can add a comma and a "Your Honor" so it sounds a little better: "I don't know, your Honor." That answer does not stab anyone in the mind. If I'm sitting up there as a judge, and I don't know the answer to a question, and the attorney says "I don't know the answer either," the reply doesn't cause me any pain. The attorney doesn't know any more than I do. What hurts a whole lot is when the attorney starts dancing around in reply. I'm sitting there listening, trying to follow, because I was really interested in the answer to the question. After a while I catch on that what's coming out is garbage, only it took me three minutes to figure that out, and then I resent the attorney for making me go through that, when he could have just said, "I don't know."

It is important to remember which forum you are in, which court you are speaking to. Are you talking to an intermediate court, which basically is going to follow precedent, or to a high court, which makes policy. You have to distinguish. Lawyers continually slide over that little difference -- which is really a very big difference -- between the word "should" and the word "must." Are you telling the court that they "must" do something because as a lower court they must follow controlling precedent? Or are you saying that the court "should" do it for some policy consideration?

You must also distinguish between the "tone" or "atmosphere" of courts. Your argument to the Court of Appeal in California will be vastly different from your argument to the California Supreme Court. In the Supreme Court you are entitled to thirty minutes for argument. If you ask for thirty, you get thirty. You may bomb for thirty minutes, but no one will make you sit down. In the Court of Appeal, the calendar is longer and the time is unstructured. The court is usually

trying to move you along and off the podium. So you have to tailor your argument there to five or ten minutes, to fit the framework of that court. A more formal, lengthy presentation will seem out of place.

Be precise in the words you use. Any time you are sloppy, or worse yet, exaggerate your position, you just invite the judges to jump all over you: "Do you mean to say, Counsel, that . . .?" If you're subtle, if you understate, you're much less likely to invite that kind of attack.

I want to give you an example of two possible responses to questioning from the court to help you understand why one works a lot better than the other. Imagine that you have just given a brilliant explanation of some legal point, and the court asks you a really dumb question. What do you do? One possible response is, "Perhaps the Court did not understand my explanation. I will repeat it." Sounds bad, doesn't it -- yet you hear it said. A second response might be, "I am sorry my explanation was unclear. Allow me to try again." Now both of those answers can be delivered in a calm respectful tone, and yet, as you perceive, there is all the difference in the world between them.

The conventional wisdom is that the second response is the correct response, and it is. It is believed to be the correct response for reasons of courtroom etiquette: it's insulting to suggest to the court that it didn't understand what you said, and it's better for you to accept the responsibility for the confusion than to insult the court. That's true, but there is another reason why the second response is preferable.

Think about the intended receiver of your explanation. The judge has just asked a dumb question. If your answer, in one way or another, communicates the message, "Boy, was that a dumb question," the judge is likely to feel embarrassed. At that point he realizes that he has committed this terrible gaffe in public. Now if your judge is a saint, it won't bother him one bit. He will not worry that he has asked a dumb question; he's above all that. But most judges aren't above all that. They're just people, and they don't like to make fools of themselves in public -- just like you don't like to make a fool of yourself. If your response is, "I don't think the court understood my explanation," the judge may be so busy protecting his ego that he will not be listening to your answer. He'll be trying to formulate a second question down the line which will make it look like he really did understand, even though he didn't, or he'll be trying to figure out some way to pay you back for what you just did to him. Even worse, you will discourage further questions from the bench, because some judges will not run the ego risk. You increase the possibility of questions if you make it clear that the judges can ask anything they want and you will not embarrass them.

In the process of being polite and respectful to the court, as you should be, you must not allow yourself to be intimidated. The court has a calendar and wants to move the case along. You have to decide if you have something important enough to say that you need to keep going. Use your judgment. If something needs to be said, then just stand up there and stay with it. Take the time that you need, even if the court is crowding you.

Resilience. You will go through points in your argument where you will almost fall off the high

wire -- where you fumble over a hard question and realize your answer is not very satisfactory. Do not let that be the end of your argument. There is a tendency for people to get discouraged, to become deflated; when that happens they mutter something like, "Well, um, that's all I have, your Honors," and sit down. That's wrong. You may have made a mistake, or been unable to respond, but there's more to the case than that. Try to recoup your losses. Always have a punt of some kind ready. When the question comes that you didn't anticipate, and can't come up with a rapid reply, say something like, "Your Honor, I did not brief that point. May I have five days to submit a supplemental letter brief to the court?" Now you can't make your whole argument a series of "May I submit a supplemental brief?"s, but that's available to you once or twice if you need it.

You should always know your fall-back position. What is the least that you will take? What is the most you are prepared to concede, what is it that you cannot concede because if you do you have tunneled your whole case? Be very wary of making explicit concessions at argument that you haven't had time to reflect on. They will come back to haunt you.

The most persuasive quality you can have as an advocate is professional sincerity, a sense of candor and integrity that the court recognizes and respects. We are all much more likely to accept information from a source we believe to be reliable and trustworthy. If the court feels that you are being candid, that you are not cutting corners, that you are describing cases fairly and informing it of adverse authority, it will be much more disposed to accept your arguments.

Above all, be interesting. The worst thing in the world is to sit on the bench and listen to boring argument. In our seminar we've been doing demonstration arguments with students as judges, just so they can see what it's like to be on the other side.

Last point. Many of us experience what I describe as post-argument depression. I don't mean the mortification that comes from having made a fool of yourself in front of your peers. Assume you did fine. You stood up there, you answered the court's questions, it seemed to go pretty smoothly. You walk out of court, and after the adrenalin stops flowing you feel depressed, and you don't know why. Whatever it was that you expected to happen in the courtroom, didn't. Then it's months before you get a decision, and somehow it all seems to fizzle out.

I would suggest that one reason for the depression may be that we haven't thought very much about what we really expect to happen. If you expected that at the end of your argument the bench was going to get up and applaud, you're going to be disappointed -- because that doesn't happen very often. What was supposed to happen was that you were to be intelligent and persuasive. And you were. You were helpful to the court. The case may or may not come out your way, but you fulfilled an important function. If you understand that, you won't feel so let down when you walk out of court.

It is important to distinguish between matters that you can control and matters that are beyond your control. Lawyers tend to get ulcers over things they simply cannot control. In your moot court problems, keep in mind that some fiend designed the problem not you. You didn't make the facts of your case, and you didn't even choose which side you would argue. And in court someone else decides the case. It is pointless to torture yourself because you did not win a case.

that was not, and perhaps could not, be won. You argue as effectively as you can on behalf of your client. When you have done that, and lost, you go on to something else without regrets -- because losing was not your fault. That may seem trivial, but along the way we often forget it. When we do, we erode the satisfaction we should get from our work.

We should not minimize our sense of accomplishment from doing something well. If you can skillfully argue a case to an appellate court, that is a real accomplishment. Really good argument looks so easy it's deceptive. It's so low-key, it seems effortless. Watching it, you might think, "That must be easy to do." It is not. If it were so easy, how come so few people do it well? If you are gifted enough to be one of those people who do it well, don't minimize the satisfaction you derive from doing it. That is one of the rewards of your professional career. It is a real accomplishment to be able to get up in front of intelligent, sophisticated people for half an hour, and not merely keep the ball in the air but have something worthwhile to say about a matter of importance. If you are able to do that, you have good reason to feel very pleased with yourself.

I wish all of you good luck in the ordeal to come.