TIPS FOR "APPEALING" ORAL ARGUMENTS

Judge Alok Ahuja
Missouri Court of Appeals, Western District

- if briefing is your case "in black and white," oral argument is the opportunity to *add color* – a chance to emphasize key themes and strong points, explain away weaknesses

- submitted on briefs notification – strategic considerations

  - generally, as an appellant seeking the extraordinary result of a reversal, I have trouble imagining a case where the party would *waive* argument; by the same token, as a respondent signaling that "there's nothing to see here," I have trouble imagining that a respondent would *request* oral argument if the appellant agrees to waive it.

  - For an appellant, waiving oral argument *can* signal weakness – is it *really* not worth your time to come argue?

- Before argument:

  - "Case the joint" – familiarize yourself with location of court, parking; the layout of the courtroom (counsel table, podium); timing devices; also, try to view oral argument, with your panel, *before* your argument date.

  - Pay attention to whether any of the judges on your division wrote, or participated in, any of the key cases relevant to your appeal.

  - Understand the extent of the court's pre-argument preparation: calendaring of cases to individual divisions; assignment of writing responsibility among the judges; law clerks' review of record, preparation of pre-argument drafts; circulation of pre-argument drafts

    - Need to be mindful that the Court is well prepared *before* you've even begun

  - develop a limited number of "themes" or ideas that can be expressed in a short sentence or less. Memorize these points. You'll know you've done a good job when you can be confident *each* of those ideas was communicated in your argument, no matter what the Court's questions were, and how much you had to "stray" from any prepared remarks.

- be prepared, particularly on relevant points from the record ("cramming cases" before argument is less necessary, except for cases whose meaning is genuinely in issue and outcome-determinative)

  - especially for the appellant: need to be prepared on preservation issues (*e.g.*, when and how particular objections were made; whether particular arguments were renewed in post-judgment motions), *even if* the respondent does not argue *non*-preservation

    - this is *especially* important for issues arising during trial – *i.e.*, admission/exclusion of evidence, or claims of instructional error

- although this should have been considered already in selecting issues to raise in briefing, be mindful of the standard of review in selecting issues to highlight at argument, and *how* to argue the issues

  - far preferable as an appellant to have an issue subject to *de novo* review, rather than one reviewed for clear error, or for an abuse of discretion

  - as respondent, harp on favorable (i.e., deferential) standards of review during argument; and emphasize any stated reasons, or factual findings, which underlie the trial court's actions

- don't resist, but instead welcome and address forthrightly, questions from the Court. When you get a question, *stop talking* – don't interrupt, or treat questions as a nuisance (either in words or through body language)

  - when a question is asked from the bench, <u>*answer it*</u> – then, and there – don't put the judge off, or avoid the question

  - frequently the best approach is to start with a "yes" or "no," and <u>*then*</u> say "I have [2 or 3] reasons why" – this way, you've stated your position, but also hopefully will buy enough peace to actually get to say what you want.

  - also, don't read too much into questions – a judge may be leaning your way, but want to "test" their own position by asking you critical questions

  - judges may also be using questions to try to persuade their colleagues on the bench

- demonstratives/blow-ups *can* be used effectively, although only in infrequent circumstances

- be yourself – don’t try to “assume a personality” that is different from your own – be reasonable, calm, serious – but friendly – they don’t call it a “winning personality” for nothing!

- avoid overly emotive presentations – in an appellate court, they’re awkward; they also can telegraph weakness in your *legal* position – a great closing argument is *<u>not</u>* the same as a great appellate argument – instead, be conversational, even matter-of-fact in tone

- preserve your credibility

    - be prepared to make a “strategic concession” – namely, conceding what is undeniable, but not essential to your case

        - at argument, this not only is a credibility-preserver or credibility-enhancer, but can also be a time-saver also – in too many oral arguments, counsel get distracted arguing points which (a) they *<u>can’t</u>* win, and (b) they *<u>don’t need</u>* to win

    - Preserving credibility is important not only for purposes of an individual case, but also for an attorney’s future appearances in the same court – judges remember, and they talk to each other!

- don’t let your opponent frame your worst point – take the sting out by making a “preemptive concession”

- avoid long openings – the members of the Court have read the briefs, and you frequently won’t make it through the opening anyway

    - We do <u>not</u> need a long, detailed recitation of the facts – and the time won’t permit it anyway

    - a good approach is to begin by *concisely* framing the definitive issue in one or two sentences which sound fair (but are advantageously phrased); then give the court a road map that gets from established legal principles to your “solution” of the problem the case presents.

- don’t read – besides being boring, it also prevents an advocate from making eye contact with the judges, and picking up on any non-verbal cues coming from the bench as to arguments which are succeeding or failing

- while you can’t rely on appeals to “Truth, Justice and the American Way” *alone*, be prepared to explain why the result you’re advocating, beyond being required by the law, also *makes sense*

- often, oral argument is an opportunity to explain *why* a case proceeded as it did, *why* an issue was presented in the way that it was; this practical background may help make your client’s conduct look more reasonable

- perils of dividing argument with other parties
    - in our Court, *most* judges will have the marshal set the clock separately for each advocate arguing on the same side – so, you'll still get *your* 5 minutes, even if your co-counsel goes over on *his* 5 minutes
    - *but* not all judges on our Court proceed in that way; and it's certainly not the practice in the Missouri Supreme Court!
- proper uses of rebuttal – focus on a limited number of points responsive to what transpired in respondent's argument (either erroneous statements/concessions from counsel, or questions or comments from the bench that merit response or repeating)