

TEN LESSONS ABOUT APPELLATE ORAL ARGUMENT

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I'm the token "ivory tower" on the panel, which reminds me of the story about the man whose great accomplishment was surviving the Johnstown Flood of 1878. He goes up to heaven, where he's asked to be on a continuing education panel about the great floods of the past. Honored, he agrees, after which Saint Peter says, "Before you speak, let me tell you that Noah is also going to be on the panel."

Our Noah, Mark Kravitz, has written a wonderful paper about oral argument. It is printed at the first part of Volume Two of the materials for this conference, and I incorporate it into my remarks by reference. As an academic, what I can best contribute is a discussion of the differences between theory and practice. Let me contrast what you're told — i.e., the conventional wisdom — and what my actual experience in arguing before the Second Circuit has been like. I will try to summarize these differences in ten lessons that run chronologically through the oral argument preparation process.

First: *a general approach to the argument*. When I was in law school I was told, as conventional wisdom, that it's your last chance to educate the judges about the case. What I have found, in fact, is that the oral argument is really the last chance to educate *yourself* about the case. As the case unfolds, it becomes more and more complex, and you see more intricacies and pitfalls. Never does your argument seem more complicated and weak than the night before you file your brief, when you see with stunning clarity every flaw in your position. Then you take a break and you come back to prepare for the oral argument. At this point, what is most important is to try to step away. This poses a particular disadvantage for someone who has tried a case, then argues the appeal. Sometimes you'll see an appellate argument where the lawyer at trial tries strenuously to argue that some particular fact or bit of cross-examination that he or she unearthed in the trial

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court is of critical importance. You have to take the opportunity to step away from the case, to try to distill it and simplify it in your own mind. What in the case as it has now evolved, makes it compelling for your side? What invariably happens is that some more simple version of your argument will emerge. It is this distillation, this simplification of the issues, that you want to present to the court in the oral argument.

This leads me to my second lesson: *preparation*. What you're told: master everything; read everything; read every case; make sure you're completely prepared. Of course this is true. But in fact I would urge that you focus less on blanket coverage than on *targeted preparation*. When I tell students to study for an exam that's going to be held in a couple of days, I know they are in trouble when the night before the exam, they're still in the library reading every last case in the case book. This is not the optimum use of their time at this crucial moment. In fact, instead of running around chasing down peripheral issues, they should be focusing on organizing the material, and then preparing to deliver it in a targeted way at the argument.

What this means in oral argument is two things: first, structuring the presentation in your mind — the three or four points that have got to get across. And second, even if it sounds trivial, organizing the materials that you will bring to the podium, so that they'll be right at your fingertips. What I try to have is a notebook, with a one-page outline of what I'm going to say on one side, and on the other side a list of key things that I might be asked about at the argument: for example, a list of citations, key cites to the record, quotes from key cases, and other materials. Behind those two sheets I have a fuller outline, which lays out the same points in much more detail. As with an exam, the time to do original research is not when you're standing at the podium. You want to have the joint appendix tabbed, and all the briefs marked, so that at any moment you can turn to the right page and during the moment when the judge's mind is open, get right to the particular citation or quote that may persuade him or her.

The night before I argued my first case at the Supreme Court, the phone rang at my hotel. The voice said "Harold, this is Larry Tribe [the constitutional law professor and Su-

preme Court advocate at Harvard Law School]. I just wanted to tell you that the podium at the Supreme Court is exactly thirteen inches by twenty inches. This means that you can't put a notebook there, because if you turn the page, it will hit the microphone. The best way to deal with it is to prepare your outline on two sheets of paper, cut to the exact size, and lay them flat." Now, first of all, this showed me that Larry Tribe is quite a perfectionist. But second, it showed me that at oral argument, it's imperative that you not leave anything to chance. You must think in advance about all of these mechanical things, so that you don't get into mistakes or fumble around in those precious moments that you're actually standing up at the podium.

This leads me to my third point: *moot courts*. What you are told: do what feels comfortable for you, and if you don't like moot courts, then don't do them. The reality — you *must* do them, even if you don't like them. Most people who avoid moots do so because they don't want to look like fools in front of their clients or their partners. But you would never drive a car across country and not take it for a trial run around the block. You want to know where the brake is, the lights are, etc. In the same way, moot courts are tremendously important for getting the mechanics just right, for having everything laid out properly, and for seeing how things are going to go under real-life conditions. For that reason, I try to do at least two moot courts and to get them videotaped; then I watch the videotape afterwards. What are you looking for? Three things. First, do you have distracting ways of answering, or distracting hand motions that you want to eliminate? Second, what questions are asked most frequently and what responses are working and not working? Third, what exchanges are you having with the judges that end up at the right place but take far too long to get there? What you are trying to do is shrink down a five-minute give-and-take into a very crisp, ten-second answer that you can deliver, knock the question out of the park, then get on to the rest of your argument. I find that moot courts are invaluable for developing these "silver bullet" answers.

Whom should you get to judge your moot courts? I try to get people from three groups. First, somebody who knows the

case incredibly well, because he or she can figure out what you are leaving out and where you are being evasive. Second, good lawyers who know nothing about the case at all, because they guarantee that you are getting the big picture right. Third, try to put together something close to reality, a mixed panel of some people who know the Court and some who know about various subparts of the law of the case. But nobody will know everything, like the blind men and the elephant. You want a group that will try collectively to piece together your argument. What you will find is that what works for one moot court panel won't work for another. For example, I once did a moot court before a bunch of law professors. We spent a lot of time on collateral estoppel and I was very pleased about how I handled those difficult questions. Afterwards I did the same argument before a group of the civil rights lawyers, who knew no details, except about the larger equities of the case. They said, "If you waste seven minutes on collateral estoppel, you'll never get to the merits, and you have blown your real opportunity for getting the equities across." I found that perspective very useful.

Fourth lesson: *structuring the argument*. What you're told: try to organize the argument and then, separately, anticipate questions that you will get from the bench. What I've found, in fact, is that a good organization by its nature anticipates the questions. My main advice here is develop a "mantra" to plant in the judges' minds. By mantra, I mean two or three points which crystallize your position and set up a template against which the judges' questions can be answered. In the Haitian refugee case, which I argued at the Second Circuit, for example, one of the questions was: when do Haitians being held outside the U.S. on Guantanamo Naval Base, Cuba, have a due process right to a lawyer?¹ After some review, I crystallized my answer into three factors: Are they in custody? Are they on territory subject to U.S. control and jurisdiction? And has there been a *prima facie* ruling that they have refugee status? If all three conditions attach, I said, they have a due process right to a lawyer. So that became my mantra: in custody, in jurisdiction, and *prima facie* refugee status. When the

¹Haitian Centers Counsel v. McNary, 969 F.2d. 1326 (2d Cir. 1992).

judges came back with hypothetical questions, instead of just giving any answer, I would say, "Your Honor, here are the three factors we deem key, and one, two or all three of them are absent from your hypothetical."² This approach has the strength of allowing you to crystallize both your position and its limits and then to let you control the argument with your analysis, rather than letting the judges' questions control your argument.

Fifth point: *the opening*. The theory: prepare your opening verbatim. The reality: being the appellee is a lot different from being the appellant. When I'm the appellant, I try to begin with a very plain-spoken, straightforward introduction in which I introduce myself and then lay out my three- or four-point mantra: "I'm Harold Koh, I represent the Haitians. The judge below ruled A, B and C. All points are correct and therefore that ruling should be affirmed." But when I'm appellee, or going second, I try to focus on whatever issue in the appellant's argument attracted the interest of the judges and which the other side handled unsuccessfully. Go right for that point of controversy and interest, then segue into your argument. As Mark's paper suggests, your argument should be made of interchangeable parts, so that you can juggle it, leading with whichever point has happened to attract the attention of the court.

Lesson six: *tone*. What they tell you: be respectful. What does this actually mean? Not pandering, not overly formal. The best description I've heard is: use the tone that you would use when you're initiating conversation with an elderly relative from whom you seek a large bequest. It is very important to make your presentation informal and conversational — like a seminar, not a lecture. Those of you who have been at the Second Circuit know it's configured like a living room. It has a very informal feel, and the judges are very close to you at the podium. You can maintain eye and ear contact. Make the most of that, even if there are cameras right in

²For example, in the Haitian case, one judge asked, "Do you mean to say that if a Russian walked into the U.S. embassy in Moscow and demanded a lawyer, he could get one?" The answer: "No, Your Honor, he's not in custody, he's not on territory subject to exclusive U.S. jurisdiction, nor does he have *prima facie* refugee status. Given that none of our conditions attach, your ruling in our favor would not have anywhere near such a broad reach."

your face, with people watching you on in-court television. It's important to maintain that informal "seminar style," so that the judges will feel comfortable with you and want to listen to what you're saying.

Lesson seven: *the flow of the argument*. You're told: bring the judges into your argument. What I've found: in practical terms, this means three things. First, structure the decision-making process for them. Say, "The issues are in A, B, and C order. You don't need to reach issue C to rule in our favor." This is often where the judges ask questions of the lawyers: "If we find for you on Issue A but not on Issue B, do you still win?" Judges like to pull away different straws of your argument, one at a time, to see the foundations on which your case truly rests. You should act here like their law clerk, advising them on the narrowest possible opinion that can be written in your favor. Second, keep pulling them back to your brief. Your brief lays it out much better than you will orally, so to the extent you can say, "Your Honor, that point is fully explored on page 5 and 6 of my brief which I now summarize. . ." This helps the law clerks as well, when they go back and draft the opinion, to look closely at the pages of your brief that you think lay it out the best. Third, if you can, get the judges to look *with you* at a text — often the key text of the statute, regulation or case. Try to show how your opponent has somehow misconstrued the text or taken it out of context. For example, I have argued a number of cases under the Alien Tort Statute, in which the key statutory words are "torts only in violation of the Law of Nations." In argument, I have said, "If you turn [with me] to read the statute, you will see that opposing counsel has emphasized the word 'only', while we believe the emphasis should be placed on the phrase 'torts in violation of the Law of Nations.'" In other words, when the judges are willing to read along with you, you have a fighting chance of leading them in the direction in which you want them to go.

Two other points about flow of argument. First, *concessions*. Of course, if pressed, you must make concessions. But if pressed, the critical thing is to say, "Even if I concede that, we still win." That's where laying out the argument in A, B and C form helps you. You can say, "We win if either A, B *or*

C is true, so that if you find against us on A, we still win on either B or C.” Finally, managing time. Be very sensitive to when the argument is almost over — when you have about a minute and a half left — because that’s when you have to get in the last one or two points that you have not yet addressed. Unless you have previously decided what three arguments you must make, you won’t know what points you should make when you are pressed, and only have a few moments left on the clock.

Be very conscious about cues, particularly nonverbal cues. If you’re too interested in projecting, you sometimes fail to notice that the judges are moving restlessly in their seats. For example, one friend of mine argued before the Second Circuit as appellee. One of the judges said softly, “Counsel, I don’t really think you need to take so much time on your argument.” Since the lawyer had been listening closely and heard that his predecessor had already self-destructed, he said, “Then, Your Honor, we submit on our brief, correcting only a typo on page 22.” The judges ruled in his favor only five minutes later.

Eighth lesson: *rebuttal time*. This issue often becomes much ado about nothing. Preparing for one fifteen-minute argument, my counsel and I spent a huge amount of time debating: “should I open in twelve minutes and rebut with three, or do eleven and four, ten and five, or what?” We finally agreed on twelve minutes for opening and three for rebuttal. When I finally got up and argued for real, I sat down and asked “How much was that?” My co-counsel said, “Fifty-three minutes.” I then had three minutes allotted for rebuttal, but they let me argue for twenty-two minutes. The fact is that the Second Circuit is a bench that won’t watch the clock — so long as you are maintaining eye contact, and so long as they care about the case. I would therefore try to keep your rebuttal to a bare minimum. Think of yourself as puncturing a balloon: you presented a case, your opponents present a counter case — by which they’re pumping up a balloon — which your rebuttal should puncture with one or two targeted points. If they didn’t succeed in inflating their balloon, then don’t waste your time puncturing it.

Ninth lesson: *the closing*. I try to do two sentences: *viz*, repeat your mantra, then ask for the relief: e.g., “Because the Haitians were in custody, because they’re in U.S. jurisdiction, and because they are *prima facie* refugees, we request that you affirm with modifications.” Try to prepare your closing thoughts precisely, so that your words sound polished, but not canned.

The tenth and final lesson: *after the argument*. What you’re told: “The case is submitted.” In fact, it’s not over until it’s over, particularly in a high-profile case. Your appearance on TV, the quote that you give after the argument, the newspaper interview you give, all may do a lot more towards influencing minds, including the minds of the judges, than the formal argument that you have just made. I was told by one lawyer; “After your argument, don’t dally in the courtroom accepting congratulations. Walk right out on the front steps and start speaking to the press.” And it was true. You can actually sometimes summarize the case more succinctly and more persuasively outside the courtroom and in terms the lay public can understand, than you can inside the courtroom.

So to recap my ten lessons of oral argument: (1) educate yourself; (2) target your preparation; (3) do moot courts; (4) find and plant a mantra; (5) make sure your opening lays out the mantra; (6) use a respectful, informal tone; (7) manage the flow of argument; (8) use the rebuttal to puncture your opponent’s balloon; (9) close with your mantra and requested relief; and (10) remember that it’s not over until it’s over. Let me close with two thoughts: First, don’t talk down to these judges. Although it has occasionally been challenged by other circuits, the Second Circuit has traditionally been — pound-for-pound — the smartest appellate bench in the country. And that includes the Supreme Court. They get the point very quickly, and you don’t gain anything by talking down to them. Second, don’t forget to do a moot court before your mother. I find this very important for focusing on the “justice” issue. The case, in the end, must have a common-sense point, a justice-based appeal. My mother, who is a sociologist, once said to me: “These judges have never met you. Why don’t you tell *me* what you’re going to argue, because if I’m not persuaded, then why should they be?” (Un-

fortunately, after I laid out my position, she still wasn't persuaded!) What this means is that at some point you should talk through your argument with an intelligent non-lawyer, and lay out the common-sense "justice reasons" why you really should win. (Of course, if your mother is Chief Justice Ellen Peters, you will need to find someone else who fits that description!) Your mother will usually say, "I think you could put it more persuasively this way." Use her common-sense suggestions as the undergirding for your technical arguments, which will help you carry the day.

If you follow these tips, with luck, you should have success with your argument. Even if you hit a flood, your argument, like Noah's Ark, should do more than just stay afloat; it may actually get you to the Promised Land.