SOME RULES, COMMENTS AND OBSERVATIONS ON THE ART OF APPELLATE ORAL ADVOCACY

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> Archibald Cox: Every lawyer has three arguments – "the argument he plans, the one he makes, and the one he wishes he had made." Cox, *The Court and the Constitution* 276 (Houghton Mifflin 1987).

I begin with a few essential rules – rules which *never* can be violated without risking defeat, humiliation, and even unpleasant interactions with your malpractice carrier[1] – and then move to some more general comments and observations.

Please understand that this short paper is by no means a comprehensive treatment of the topic of appellate oral argument. It does not even address many important points. There are, however, many excellent authorities on the subject. Some of them are quoted and cited below. *See also, e.g., Appellate Practice: Virginia and Federal Courts* (Virginia CLE) (3d Ed. 2001), Chapter 6.

Rule 1: PREPARE! It is quite difficult to *over*-prepare an oral argument (although it is not nearly so difficult to prepare poorly).

Prepare over an extended period of time – several weeks if at all possible. Read and re-read the opinion(s) below, the briefs, every significant authority, and the entire Appendix (*not* merely the passages cited in the briefs). When you walk into the courtroom, you should know the authorities and the evidence like the proverbial back of your hand.

> All significant case authorities must be read and reread before argument, while peripheral cases may be reviewed through summaries from assistants. Counsel also should try to "read around" in the area,

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[1] *See generally New York C. R. Co. v. Johnson*, 279 U.S. 310, 319 (1929):

> [A]rgument here was so inadequately prepared and exhibited such lack of familiarity with the record as not to be of assistance to the Court, and in the argument of counsel on both sides, who had participated in the trial below, there was a want of that candor which is essential to the proper and adequate presentation of a cause in this Court. The occasion seems appropriate to remind counsel that the attempted presentation of cases without adequate preparation and with want of fairness and candor discredits the bar and obstructs the administration of justice.

> including any relevant law review articles and policy-oriented materials such as economics studies. Familiarity with issues of policy will better equip counsel to deal with the questions likely to be heard from the bench.

Shapiro, "Oral Argument in the Supreme Court of the United States," 33 Catholic U. L. Rev. 529, 533 (1984) (Shapiro). "While familiarity with your own authorities is key, knowledge of your opponent's authorities is equally important. For example, you are more likely to be asked during oral argument to comment upon or distinguish your opponent's authorities than your own." Diehl, "Oral Argument," *in Making an Appeal to the Court of Appeals of Virginia* VIII-2 (Virginia CLE 1996).

Be your own Devil's advocate. Figure out the ***hard*** questions that other side did ***not.***

> Each brief submitted by counsel to the Supreme Court, and each proposition to be covered during oral argument, must be reviewed from the point of view of a skeptical or hostile Justice who is intent upon exposing all latent fallacies and errors. Jot down such questions and think through the best response. The very process of anticipating questions and devising effective replies will strengthen one's understanding of the legal issues, and help to build an intellectual framework that lends substantial assistance in dealing with even unanticipated questions from the bench. An assistant with an objective viewpoint also should be recruited for the purpose of identifying questions.
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> In trying to anticipate questions from the bench, it should be kept in mind that many questions will pertain to the familiar, common-sense themes discussed previously. What is the case about? (What are the record facts and procedural history?) What do you want? (What holding do you want in this case? What rule do you want the Court to adopt to justify that holding? Is there any other rule that would satisfy you?) How would your rule work? (What are the practical consequences of the rule? How would it change current practices? Can it be administered?) Can the Court do that? (Is there a legally respectable argument for the rule? Does it have support in relevant authorities? Is it consistent with what the Court has said before?) Why should we do that? (What values and interests would be advanced by adoption of the proposed rule? Would opposing values and interests be fairly accommodated? Why is the rule sought by counsel preferable to the alternative?) After anticipating questions in these categories, counsel should develop simple and common-sense replies. They should be convincing on an intuitive level, even to the layman.

Shapiro at 534.

Plan to argue only your one or two key points – usually your strongest points, but necessarily including any point on which you *must* prevail to win – but *prepare* to argue *every* issue in the appeal.

Develop one or *perhaps two* themes around which you will build your argument. (Usually your theme will be apparent from re-reading your brief.) Your theme

> can be a sentence or phrase that sums up your case and that will recur throughout the argument. Like the theme of a successful summation or opening statement at trial, this is the glue that holds the whole argument together. A good theme makes for a smooth transition from point to point and provides a bridge back to your argument after you have responded to a bizarre hypothetical or confusing question.
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> Of course, incanting a theme should never substitute for answering a question from the bench. But a well-thought-out theme lets you redirect the court's attention to your main point after you answer a question that sidetracks you. This is particularly important when your case is complex or your opponent has led the court astray by strewing your path with red herrings.

Molo & Biebel, "Preparing for Oral Argument," *in* J. Koeltl & J. Kiernan, Eds., *The Litigation Manual: Special Problems and Appeals* 291, 294-95 (American Bar Association 1999) (*Litigation Manual*).

Rule 1(a): KNOW the *record*. This often is ***CRITICALLY important*** at oral argument.

> It is a truism that counsel should "know the record from cover to cover." But the point is of crucial importance. Not only is familiarity with the record essential to provide specific information to the Justices, but it is also essential to convey the impression of reliability and leadership that is fundamental to any effective presentation. The attorney who cannot turn, in a moment, to an essential part of the record, or who cannot answer questions about the state of the record, will not command the confidence of the Justices.

Shapiro at 532.

Rule 1(b): PRACTICE! Practice to hear your own prepared remarks, which often sound very different from what you "hear" when you read silently to yourself, and revise your presentation as needed. Practice in front of a mirror or even better, a video camera – or at least with a tape recorder. When you watch the video tape, you'll *see* the annoying mannerisms that would be so apparent to the judges.

"Moot court" practice with others in your office, or colleagues at the bar, or with law student volunteers. All they need to do (at minimum) is to read the briefs, one time, and then listen and ask questions.

Test oral arguments on your spouse, your teenagers, or taxi drivers (people who may give you honest advice, because they see no incentive to flatter you); if they understand your points, then the court likely will also.

> The attorney preparing for argument should discuss the issues in the case with anyone who will listen. Intelligent laymen may raise questions that are highly pertinent, as may attorneys who specialize in other fields of law. Specialists in the field, of course, can provide sophisticated insights into potential difficulties. If the case arises in a field of interest to nonlawyer specialists – such as economists, sociologists, or businessmen – the issues should be discussed with such persons as well. Brainstorming sessions with such persons frequently result in the identification of questions and issues that later arise during the course of oral argument.

Shapiro at 534.

Rule 2: WELCOME the judges' questions. They provide your *best* opportunity to persuade. They are windows into the minds of the judges who will decide the case. You may think a question is irrelevant, or even stupid; and you *may* be *right.* But you're not writing the opinion, or voting on the decision. The question *may be* irrelevant, or even stupid; but if a judge *asks* it, it's *usually* ***important***. (Not always, but usually.)

Questions demonstrate that the judges are interested in the case, provide the moments when their attention is most fully fixed on what you have to say, and tell you what they think are the key issues in the case. In the words of a highly respected federal appellate judge, John C. Godbold:

> In an assemblage where the purpose is to inform and persuade, it should be like manna from heaven for the potential persuadee to say to the persuader: "Here is what troubles me about the subject on which you are trying to convince me." This is an opening into the mind of the listener. It is the most valuable piece of information the persuader can get. Most advocates understand this principle and welcome questions from the bench. They know how to capitalize on them. Other counsel unwisely resent questions as intrusions into a carefully prepared and organized presentation. But the court has its own responsibility to reach the correct decision, and only the judge knows what still troubles him or her.

Godbold, "Twenty Pages and Twenty Minutes," *in Litigation Manual* 107, 116.

A corollary to this rule is that you should go to the argument mentally prepared for the possibility that your entire argument time may be taken up with answering questions – which after all is a better use of your time than spending it rattling off your prepared presentation. (Of course you also should be mentally prepared for the possibility that you may get few questions or none at all, but that typically is less stressful and requires less mental preparation.)

"To answer a question intelligently, you must first *listen* to the question." R. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 334 (Clark Boardman Callaghan 1992) (Aldisert, *Winning on Appeal*).

> The same principles govern questions and answers during oral argument as govern questions and answers in ordinary conversation. If you are going to be able to intelligently answer a question, you must first *listen* to the question. But it is surprising how often appellate advocates, just like many people in private conversation, seem to hear only part of the question, and respond to the part of it they heard even though the answer they give may not be an adequate response to the entire question. And for heaven's sake, forget about the rather trite response "I'm glad you asked that question," or "That question goes to the very heart of the case." We have all heard this response to our questions, and we are all a little bit skeptical about it. Whether the question is hostile or friendly, first understand the question, and then give the best answer you can for the purpose of advancing your cause. Answering questions from the Bench is a vital part of oral advocacy.

Rehnquist, "Oral Advocacy," 27 S. Tex. L. Rev. 289, 301-02 (1986) (footnote omitted).

> In listening to the question, be certain that you *understand* it before attempting an answer. This is especially true in federal appellate courts, where the judges deal with specialized subject matter and have a tendency to speak in shorthand expressions. Less-experienced lawyers may not be familiar with the jargon used. For example, the court may inquire, "Counsel, do the authorities you rely on come up in the context of a *Teague* matter?" What the court is really asking goes to the distinction between a direct appeal in a criminal case and an appeal on collateral review. If you don't understand the question, say so. You won't lose any "Brownie points."
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> Answer the question directly. Do not evade. If the question calls for a yes or no answer, respond with a yes or a no. Then elaborate. You don't have time to beat around the bush, and you don't want to give the impression that you are stonewalling. Do not postpone the answer by saying, "I have not reached that point in my argument yet." The judge will respond, "Yes, you have."

Aldisert, *Winning on Appeal* 334-35.

If your *entire* time is consumed by questions, the Chief Justice or presiding Judge *may* allow you a little more time. Ask politely: "In view of the Court's questions, I have not gotten to my central point. May I have a few minutes extra?" (Just be sure that *if* the indulgence is granted, you do not abuse it. Go straight to the central point, argue it concisely, thank the Court again for extending your time, and sit down.)

Rule 2(a): BE FLEXIBLE – go where the judges *want* you to go. It's okay to pause and think before answering. But *answer* the *question*.

Do not build a highly sequential logical structure that can be disrupted by questions. You should be able to move effortlessly from any part of your prepared presentation to any other, depending on where the judges want you to go.

NEVER say, "I'll get to that."

Rule 3: MAKE IT COME TO LIFE. Your oral argument should not even *resemble* your brief. You are arguing the same *issues*, of course; but you must make a *different presentation*, because oral argument is a different medium from a written brief. If argument comes out of brief (even an *excellent* brief), it will be stilted, formal – *dull*. The judges will ask questions just because they're *bored*. They've *read* the *briefs*. They're ready to *listen* and *talk*.

> [T]he brief in an appellate court has about the same relation to oral argument as the pleadings in a case do to arguments before the trial judge or even a jury. The oral arguments you make must necessarily be structured by what is covered by your brief, but under no circumstances should you simply recite, summarize, or selectively read from your brief and consider it a satisfactory oral argument.
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> You naturally try to make your brief readable, even interesting if possible; but you are hampered in this regard by the commonsense dictate that your brief must cover every point you wish to preserve within a limited number of pages. A brief may often be top-heavy with citations to cases or quotations from them, quotations from portions of statutes, and the like. There is no help for this. But when it comes to oral argument, the more flesh and blood you can insert into it, as opposed to a dry recitation of principles of law or decided cases, the more interesting and effective that argument can be.

Rehnquist, "Oral Advocacy," 27 S. Tex. L. Rev. 289, 299 (1986) (footnotes omitted).

An obvious corollary of Rule 3 is that you must *never read* your argument. This seems entirely self-evident; but the best experts in the field always emphasize it, so I do likewise.

> To read your argument is to antagonize the court. Never, never do it. Don't even think about it. Have an outline or notes, but your notes must be a safety net, not a crutch. Look at your notes when you are giving a short quote from the record or a case. Referring to your notes at this time adds the appearance of reliability to your quoting. If you have prepared sufficiently, or have rehearsed adequately, you should know exactly what to say.

Aldisert, *Winning on Appeal* 327. *See also, e.g.*, Davis, "The Argument of an Appeal," 26 A.B.A. J. 895, 898 (1940):

> The eye is the window of the mind, and the speaker does not live who can long hold the attention of any audience without looking it in the face. There is something about a sheet of paper interposed between speaker and listener that walls off the mind of the latter as if it were boiler-plate. It obstructs the passage of thought as the lead plate bars the X-rays….
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> Of course where the case turns upon the language of a statute or the terms of a written instrument it is necessary that it should be read, always, if possible, with a copy in the hands of the court so that the eye of the court may supplement its ear. But the reading of lengthy extracts from the briefs or from reported cases or long excerpts from the testimony can only be described as a sheer waste of time. With this every appellate court of my acquaintance agrees. A sentence here or a sentence there, perhaps, if sufficiently pertinent and pithy, but not I beg of you print by the paragraph or page.

I respectfully suggest an amendment to Mr. Davis's formulation: if the case turns on the language of a statute or the terms of a written instrument, it may well be necessary to read ***selected excerpts*** from the document, paraphrasing where possible. If the full context is necessary to understand the point, consider providing it on a large display board with the critical language underlined or italicized; but be sure, if you do, that it is large enough to be read by all of the judges, even the nearsighted gentleman at the opposite end of the bench. (Experts differ on the use of visual aids in appellate courts. I have used such displays with much success, ***where they were appropriate and helpful to the Court***, but I would ***never*** use more than one (or ***perhaps***, in a rare case, two) demonstrative exhibits in a single argument.

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So much for the Rules; now to some more or less random comments and observations:

The ***best*** oral arguments are not ***argument*** at all. They are a process of reasoning together.

Most appeals are won and lost on the briefs – not because briefs are intrinsically more important than oral argument, but because (a) the judges read the briefs before they hear arguments and (b) most appeals *can* only be decided one way (if the Court is willing to adhere to established rules of law fixed by precedents and statutes, anyway). The outcome of most *close* cases, on the other hand, tends to be heavily influenced by the oral arguments.

More appeals are lost than won at oral argument – because counsel are not thoroughly prepared, bungle questions, anger or offend the judges, and otherwise squander the advantages that they have compiled on the briefs. Some lawyers do a poor job writing briefs but manage to recover at argument, but this is more rare.

The judges have read the briefs, and they are at least generally familiar (and they *may* be *intensely* familiar) with the facts of the case. They hear arguments in numerous cases in each session of court, however, so there may be a benefit in providing a very brief description of the facts and the procedural posture of the case to remind them which case you are presenting: "May it please the Court; I am Jesse James and I represent the appellant XYZ Corporation. This is the case in which the District Court granted summary judgment dismissing a claim for insurance proceeds, following a train robbery, on the ground that my client delayed unreasonably in giving notice of the claim."

Having thus re-oriented the Court to the nature of the case, next give it a "roadmap" of your intended presentation – identify the issues that you intend to argue. Tell the Court that unless it has questions on the other issues, you will submit them on the briefs. (There is no harm, and there may be a benefit, in adding that you are not doing so because you think they are weaker points but because you think they are adequately presented in the briefs, or because the nature of the issues does not allow oral exposition in the available time, or ….)

Provide a roadmap, but don't overdo it.

> A brief description of the points to be elaborated in the course of the argument is helpful at the outset, but this should not be carried too far. One lawyer who ambitiously described the many subjects he hoped to canvass during his argument met with the following humorous query from the chief justice: "Will you be entertaining questions?"

Shapiro, "Questions, Answers and Prepared Remarks," *in Litigation Manual* 326, 329.

If you are arguing for the appellee, you must *respond* to the appellant's key arguments (which you probably can identify by re-reading her brief), but you should *not* allow the appellant to dictate your agenda. Prepare your own argument, built around your own theme(s), and include rebuttals in it. Leave room in your outline to note any additional arguments, or any questions from the bench, that you want to address in your presentation. *See* Aldisert, *Winning on Appeal* 306, *quoting* Chief Justice Andrew D. Christie of the Delaware Supreme Court: "The attorney for the appellee should pay special attention to the

initial argument by counsel for the appellant and to the Court's questions during that argument, because sometimes [?] it is more important for the appellee's attorney to address what seems to be troubling the Court than it is to get into his or her prepared presentation."

When necessary, just move on. If it is clear from the judges' questions that they do not accept an argument, and they are not asking questions to elicit information, give up that point and move on. (Just be careful not to react to one or two judges, in a situation where a silent majority of the Court may be more sympathetic to your case.) Use a transition: "We have stated our argument, and I believe the Court understands our position. Permit me now to address the second point." Don't waste so much time battling the Court on an issue that you ***will not*** win that you neglect to move on to an issue that you ***may*** win.

Quit while you're ahead. If you have presented all of your intended argument – or if the Court is making your arguments for you by its questions – and there is still time on the clock, ***sit down***. Invite any additional questions first, then go to your seat. Judges appreciate this far more than you may know.

> A certain atmosphere or mood characterizes an argument in every case…. There comes a time when the man or woman at the lectern reaches the maximum possible advantage of the oral presentation. That is the moment to quit talking and sit down. Do not think that talking for a few more minutes can't hurt. It ***will*** hurt. It can dispel the positive, confident atmosphere created by your presentation.
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> There is a level of theater in appellate courtroom rhetoric, with recognized highs and lows. To abandon a high point that has been successfully reached and then proceed to fill the air with meaningless padding and verbal filler is to transform your sizzle into drizzle. The moment of forensic drama becomes lost. But even more dangerous, the anticlimactic speech used to fill the air between the close of your real argument and the expiration of your allotted time may call attention to a weaker point in your position. One of the judges may pick up on this, start probing and wind up destroying the court's prior willingness to accept your argument. I have seen this happen many, many times. Judges carry impressions – weak or strong, good or bad – from the close of oral argument to the decision conference that immediately follows the day's calendar.
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> A word to the wise: When you've made your point, sit down.

Aldisert, *Winning on Appeal* 329-30.

The tone of oral argument should be conversational. (***But cf.*** Shapiro at 539: "The style of the presentation should fall approximately half way between a formal speech and a personal conversation. It must be clear, forceful, and emphatic, without any element of stilted oratory or artificial rhetoric.")

Oral argument is a process of reasoning together with the Court. It should *not* be lifted from the brief, for at least two major reasons: the judges have already read the briefs; and formal writing style does not resemble conversational style.

Opinions differ on the issue of reserving time for rebuttal, but probably a significant majority of experts recommend it. I agree with Judge Aldisert (among others):

> My advice to appellants' lawyers: *Always* reserve some time for rebuttal, even if later it appears that you will not need it. The very act of reserving rebuttal time is an insurance policy to protect you against possible extravagant or unsubstantiated statements from the appellee. Protect yourself with the opportunity of having the last word to expose an exorbitant utterance. This alerts the appellee in advance that you are hanging back to enter the ring again if necessary. Whether you will also depends on what is said by your adversary, but the fact that you have reserved time is in itself a strategic ploy. The appellee knows that you may have the last word.
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> Strategy aside, keep in mind that rebuttal should be used sparingly. It is the opportunity to respond to the appellee's presentation, not to rehash your argument-in-chief. Generally speaking, appellate judges seem to be impatient with rebuttal speeches. To be effective, the argument should be very concise – "snappy" is the word some experienced lawyers use. Select only one or two major emphases, and cite the authority that most effectively rebuts any new dimension added to the case by your opponent and not already covered by you.
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> Unless there has been some misrepresentation that deserves rejoinder, and if you detect that the appellee's argument did not impress the judges, stand up with confidence and state, "Unless the court has questions, we waive rebuttal."

Aldisert, *Winning on Appeal* 345-46.

Oral argument to a writ panel is a different animal – but not *as* different as you might think.

In a writ panel argument, you have *10 minutes* to persuade *one Justice*, out of 3, that your case should be accepted for review. You *have to choose* the one – or *at the most* 2 – strongest arguments and go with them. You just don't have time to do any more.

That is *not* all that different from argument on the merits in the Supreme Court of Virginia, however. You get 15 minutes there. If you get more than a few questions, that's *not much*. So the same advice obtains – pick your one or two *best* arguments, and ride them. If you get *no* questions, you may have time to argue a third point. But if you get *no* questions, you may be better advised to quit while you're ahead. If your two *best* arguments didn't get 'em, it's not likely that the third best will.

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