David A. Domina
2425 S 144th Street
Omaha, NE 68144
(402) 493- 4100
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Effective Oral Argument. Thoughts on Appellate Advocacy

David A. Domina[1]

DOMINALAW Group pc llo

Omaha, NE

Birmingham, MI

Introduction

To be effective before a tribunal in oral argument, an appellate advocate needs little abstract advice. Instead, sharp focus on the particulars of the case before the Appellate Court will make the appellate argument effective. How a particular case can be argued effectively depends on the case itself more than general rules.

For example, gripping facts may dictate the argument be opened with a pictorial recitation. A fascinating, or first impression, legal issue may require a statement of the issues at the outset. A routine case presenting a perceived error, but neither gripping facts nor a novel issue, may require the advocate's candor with an opening sentence like, "The lower court's error should be corrected. That error was…."

[1] David Domina and his law firm have presented more than 200 cases on appeal during Mr. Domina's years in practice. His law firm's appellate appearances outnumber the totals posted by all the lawyers in nearly all the state's largest law firms.

It is always good advice to use the first sentence or two of an appellate appearance to grip the Appellate Court's focus, delineate the appellate party's strength and outline the requested relief.

Abstract Advice

Abstract advice about appellate argument abounds. Lawyers who have done it relatively rarely, and appellate judges who hear arguments often, but seldom if ever argued themselves, are common fare for choices to make presentations on appellate advocacy at Bar Association seminars. But, one of the nation's most successful appellate advocates, John W. Davis, wrote, "A discourse on the argument of an appeal would come with superior force from a judge who is in his judicial person the target and trier of the argument."[2] In effect what Mr. Davis said was most judges give good advice on how to win a winning case. Commonly, a judge's advice is to focus on the language of a statute, discuss the facts fairly, and describe holdings of controlling cases. This works well if the statutory language is helpful, the facts are supportive, and the precedent is compelling. But, clients do not always have the luxury of wanting the court to reach the right result. At least half of all parties to an appeal want the court to reach their result, which is not always the *right* result.

Focal Presentation

Appellate argument is sharply focused. The clock permits no other approach. An ill-prepared advocate with only ten to fifteen minutes, quickly hangs his or her client on the

[2] Davis, *The Argument of an Appeal*, 26 ADAJ 895 (1940).

gallows of weak preparation. Even the sharpest focus may make for too little time to fully develop all points.

Appellate judges know the time limit will prevent them from learning what a case is about during argument. Instead, the judges must prepare for the argument, as must the advocates. Often, questions posed during argument show this focus.

Preparation for Argument

A skilled, seasoned appellate advocate may not need to rehearse. But many advocates do. Giving due deference to the appellate argument's importance should suggest at least three distinct moot court sessions, with the last session to occur at least two days before argument. The advocate must have a "bench" of colleagues, and must make the argument, with no less intensity than before the Appellate Court itself. If the advocate cannot present effectively before peers, a different lawyer should be engaged to appear before the Appellate Court.

The first moot court session may involve the advocate's presentation of an argument with few interruptions. The second will involve intensive questioning. The third should be a dress rehearsal, with only good and careful questions.

Moot court judges should take the time to be familiar with the case and read the briefs. They must make an investment in the process too.

Particular attention should be given to answering quickly, basic questions:

1. You have several arguments in your brief, counsel. Which is your *best* argument for reversal? Why is it best?
2. You have assigned four errors. It is true, is it not, that assignments 2 and 3 can be lumped together, and assignments 1 and 4 go together, making only two for us to decide?
3. Where in the record is this critical fact upon which your appeal turns proven?

Decide which issues to argue on appeal on a discriminating basis. Do not argue every point in your brief. A brief allows space to consider complex issues. But, the fact that much space is devoted to an issue in the brief may disqualify it from selection for a good oral argument, except to mention it in passing.

The appellate argument should give the advocate a chance to show the Appellate Court the advocate's client's sincerity about the client's position, professionalism at pursuing the position, and respect for the judiciary.

Know the Court

It is never a good idea to "scope out" the place of argument moments before the argument is made. Find out where the argument will be held, and see it well in advance of the argument. Walk to the podium. Get a sense for the room. Know how to get to the courtroom in the morning, and stay close by. Don't plan your travel so you waltz in at the last moment.

Be certain your entire record is present in the room before the argument begins. If some of it is absent, ask the Clerk to bring it in. You may not refer to it by specific reference, but having the entire case present in case a question comes up is always intelligent, and never costly.

What to Take to the Podium

The case should be outlined in the advocate's head. This often requires several outlines of the case on paper. The advocate should never walk to the podium with a yellow note pad with handwritten scratched notes clearly representing a first draft of argument notes.

A polished, seasoned, well-prepared advocate will walk to the podium with no notes, and perhaps glance, during the few moments immediately preceding the argument, at a bullet-point checklist kept in the advocate's breast pocket, or elsewhere on his or her person, simply describing the three, four, or five points to be made on appeal with a word or two.

If notes are taken, be certain they fit the lectern. Three-ring binders generally do not. Neither do depositions, plus note pads, plus exhibits.

Notes are a crutch. Looking at the notes breaks contact and direct communication with the bench. Avoid using them where possible.

Open your argument with a sentence that tees-up the case. Arrive at your major point immediately. Do not make a lengthy introduction. Do not introduce your client in person.

Length

The advocate's goal should be to use less than all allotted time. An advocate cut off by the red light conveys the impression that the advocate did not complete his/her task. One who ends early—before the red lights goes on, inherently appears to be better prepared, and more sharply focused on how the argument should unfold. Put yourself in the better prepared category.

Rebuttal

Save time for rebuttal as appellant, unless the Appellate Court consumes your time during opening argument. Even forty-five seconds will help keep the appellee's counsel "honest". Be sure you have the clock set to turn the light "yellow" when you want it to change as appellant.

Framework of Preparation

Preparation for appellate argument is not like preparation for a history exam. The advocate need not master the record with that kind of precision.

Memorizing key exhibit references is helpful, as is knowing the general location of key witness testimony in the record.

But, judges who ask questions should be attended to for the substance of their questions, not as quiz masters inquiring of a student.

When judges speak, they should not be interrupted. The advocate should stop speaking, listen, think, and respond effectively to the judge's question. Interruption is not appropriate. Talking over a judge to complete an answer is not compelling advocacy either.

Citing to the record is persuasive. It should be done wherever possible, and whenever possible.

Conclusion

Ask the Appellate Court for the remedy your client seeks at the conclusion of argument. Don't leave the court guessing about what you want. Be direct.