

Appellate Oral Argument: Creating the Presentation, Weighing the Precedential Impact, Preparing for Rebuttal

THURSDAY, MAY 20, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Appellate Oral Argument: Mastering Techniques of Persuasion

Presentation and Post-Argument Matters

A live 90-minute CLE webinar with interactive Q&A by Strafford Publications, Inc.

**Presented by Robin Meadow, Randy Roach, and Benjamin Shatz
Fellows of American Academy of Appellate Lawyers**

**Randy Roach
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I. Purpose of Oral Argument

The primary purpose is to help the Court do its job

- The Court's job is to decide cases
- The Court must choose between two competing rules of law being proposed as the right holding given the facts

I. Purpose of Oral Argument

The primary purpose is not to say what you want to say

- What you want to say may be irrelevant to how the Court decides the case
- Only the Court know how / on what basis it may decide the case

I. Purpose of Oral Argument

What does the Court want in order to do its job?

- Answers to its questions
 - ◆ Questions are opportunities to address and persuade on the issues key to the Court's deliberations
 - ◆ Questions are not obstacles to be overcome on the way to making the point the advocate considers important

I. Purpose of Oral Argument

What does the Court want in order to do its job?

- Answers to its questions
 - ◆ Questions help you determine (to the best of your limited ability) what is substantively important to the Court
 - ◆ Questions are the window into the Court's deliberations

I. Purpose of Oral Argument

How can you help the Court do its job?

- By giving the Court the basis for them to persuade themselves
- By properly framing the issues
- By clashing with opponents on the “whys” of the law
- By clashing with opponents on the “whats” of the law in the brief

I. Purpose of Oral Argument

How else can you help the Court do its job?

- By going beyond the briefs
 - Be the master of the record and the law
- By maximizing your credibility
 - Avoid mistakes that diminish credibility
- By provoking questions and issues

I. Purpose of Oral Argument

What should you avoid doing?

- Don't give a prepared speech / oration
- Don't regurgitate what the Court already heard from the brief
- Don't just say what's best for you
- Don't just say what's worst for your opponent
- Don't avoid discussing your weaknesses
- Don't avoid discussing your opponent's strengths

I. Purpose of Oral Argument

Who should present argument?

- Trial counsel? First chair of the appellate team? Second or more junior chair?
- Who best knows what the Court wants?
- Who can best answer the Court's concerns?
- Who has the most credibility with the Court?
- What is the nature of the case?
- Ultimately, it's a client call

I. Purpose of Oral Argument

Should you ever waive argument?

- Will it help the Court do its job?
- As the appellee, do you want to invite further discussion?
- Is it cost-effective?

Appellate Oral Argument: Mastering Techniques of Persuasion

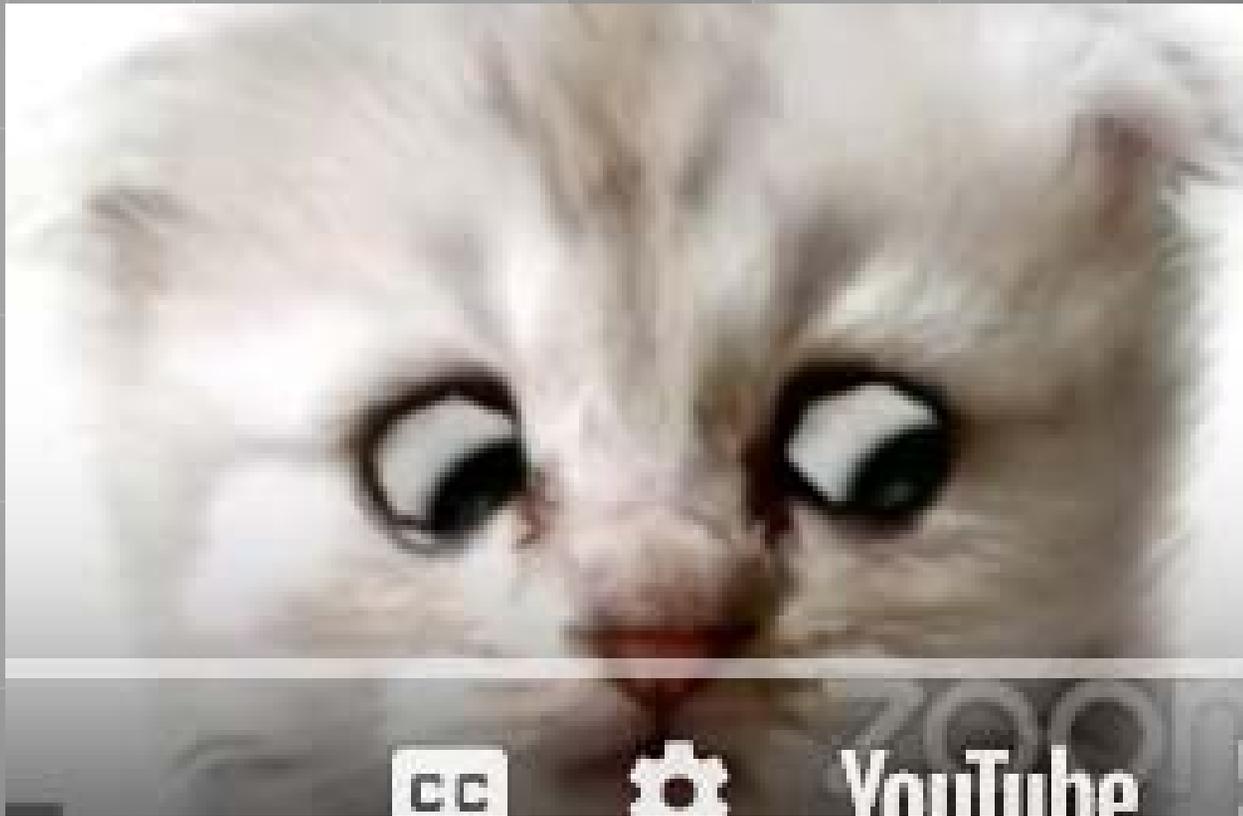
Preparing for the Argument

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OVERARCHING CONSIDERATIONS



OVERARCHING CONSIDERATIONS

- Background
- Sound
- Test
- Practice

OVERARCHING CONSIDERATIONS

- What questions will the court ask?
- What two or three points must I try to get across if I have the opportunity?
- What is the theme of my argument?

PREPARATION TASKS

Timeline

- Immediately upon calendaring: Begin updating authorities
- About two weeks before argument: Start personal preparation
- About a week before argument: Hold moot court/brainstorming session
- The day before argument: Stop preparing and give your brain a day's rest

PREPARATION TASKS

Update key legal authorities

- Have someone Shepardize key authorities
 - Are the cases still good?
 - Do they lead to any new authority?
- Consider whether to notify the court of any post-briefing cases
 - Obligation to advise of directly applicable cases
 - Otherwise, the only question is whether you may need to cite the case in argument

PREPARATION TASKS

Re-think the case as you go

- You're likely to have new insights into how the court should view the case.
- This isn't the same as changing your core theory of the case, which you generally can't do at oral argument
- But what if you conclude you've left something out of your briefs that should be there?

PREPARATION TASKS

Start reviewing the case and developing your argument notebook

Why have an argument notebook?

PREPARATION TASKS

Re-read the briefs argument by argument

- Study both sides' key cases
- Use some technique to help you access commit key aspects of the cases
- RM approach: Write up and put in your notebook a précis with a couple of key facts that will quickly bring the case to memory—"merchandising rights for Roger Rabbit"—and the key holdings

PREPARATION TASKS

Review key portions of the record

- Review and highlight key portions of the record
- Decide what portions, if any, you may want to have in court
- Don't even think about taking the entire record, unless it's very short

PREPARATION TASKS

Review key portions of the record

RM approach:

- Create digital copies of items as you go
- Assemble them in record-citation order
- Print them and take them in your notebook
- Why not use an iPad or laptop?

PREPARATION TASKS

Prepare for questions

- The fear factor
 - Nervousness is unavoidable; embrace it
 - It will disappear when you stand up to argue
 - The best antidote is to know that you've planned well
- Never forget that questions are your friends

PREPARATION TASKS

Prepare for questions

- Will there be a need to explain any complex legal points?
- What are the toughest questions the court might ask?
- What kind of questions might come from a judge who doesn't fully, or correctly, understand the facts or law?

PREPARATION TASKS

Prepare for questions

RM approach: Write down anticipated questions and formulate answers with record and case citations as needed

PREPARATION TASKS

Prepare your must-say points

- Consider these in light of any new theme you've come up with
- Carefully prepare your opening
 - A very few words that capture your side of the case
 - Expect that with a "hot panel," you may not get to say much
- But plan for a cold panel, too

PREPARATION TASKS

Moot Court/Brainstorming session

- How formal should it be?
- Who should be involved?
- What roles should the participants play?
- How much time should you spend?

PREPARATION TASKS

Moot Court/Brainstorming session

RM approach

- Structure: Role-playing mixed with brainstorming; no formal presentation
- Participants: Client, trial counsel, the appellate team, and a wild-card player
- Participants' role: Questions and criticism—should not answer questions
- Time: Until people run out of questions

PREPARATION TASKS

Rehearse

- In the shower, while commuting, wherever you are
- Ask yourself questions and *speak* the answers to help internalize them
- Work through any problems and go through the drill again; write ideas down
- Goal: *Not* to memorize, but to have ready answers for any questions

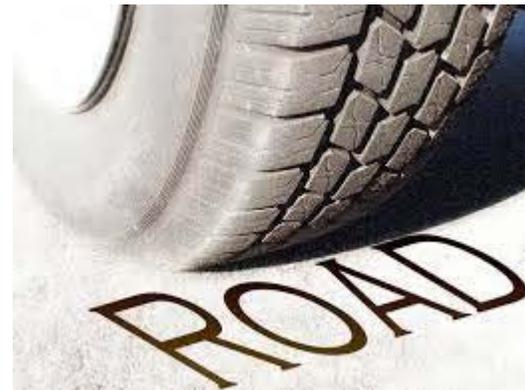
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**Appellate Oral Argument:
Mastering Techniques of Persuasion**

***Presentation and
Post-Argument Matters***

Benjamin G. Shatz
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- I. Purposes of Oral Argument
- II. Preparation
- III. **Presentation**
- IV. **Post-Argument Matters**



III. Presentation of Oral Argument

- Have fun!
- Don't phone it in!
<Covid-update: Unless you have to.>



- Look sharp:
appearance and demeanor count

- Speak slowly and clearly
<Covid-update: Create pauses>

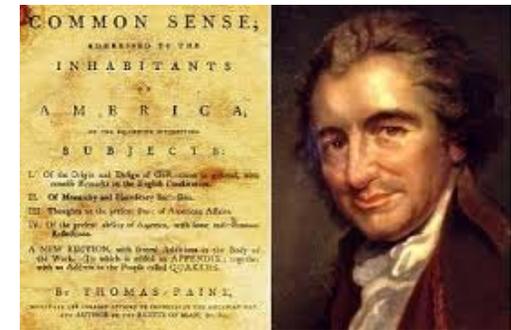


- Make eye contact; do not read
<Covid-update: Watch for signals>



III. Presentation – Goals & Tips

- “Fearlessness & Confidence”
- Project comfort and credibility
 - Be conversational, not argumentative
 - Be respectful, courteous, and calm
 - Be direct; avoid humor and visual aids
 - Be clear, concise, and focused
 - Emphasize logic and common sense
 - Cite to cases, law, and the record sparingly
 - No jury arguments
 - Do not interrupt the court
 - Do not ask the court questions
 - Do not stray from the record
 - Monitor your time
 - Know when it’s time to sit down



III. Presentation – Questions are the key

- Types of questions
 - Factual questions
 - Case law questions
 - “what’s your/their best case?”
 - Policy questions
 - Standard of review questions
 - Hypotheticals
 - Don’t fight hypos; know what you can concede
 - If the court asks, it’s important



III. Presentation — Answering Questions

- Listen carefully to the question

- Don't miss the softballs
- Think about how to answer



- Answer the question

- Do not comment on the question
- *Answer the question!*
- Begin with “yes” or “no”



- Don't have an answer?

- Don't bluff; say so
- Seek leave to submit a letter



III. Presentation – Cold panels / Appellant’s tips

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- Dealing with a cold panel

- Have you already won?
- Try to elicit questions
- Play hypothesia
- Answer other side’s questions



- As appellant

- Hit key points quickly
- Start with your best point
- Know how to open and close



- As respondent/appellee
 - Pay close attention
 - Respond to what you heard
 - Adjust your comments to fit the conversation
 - Correct important misstatements
 - Have you already won?
 - Know how to close



■ Rebuttal

- Don't waive it in advance; clearly request it
- Waive rebuttal if you don't need it
- Take notes during argument
 - Rebut; don't raise new issues
- Be concise; rebut only what is necessary
 - Rifle shots; short; punchy; pointed
 - Correct important misstatements
- Close strongly



II. Presentation — When things go wrong

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- Keep cool
- Don't get distracted
- Don't waste time
 - Have back-up phone #s handy



IV. Post-Argument Matters

- Compliment opposing counsel?
- Confer with client
- Consider settlement?
- Supplemental briefing?
- Calendaring next steps
- E-notification and docket monitoring
- Get & transcribe recording? (Westlaw audio/transcript)
- Learn from the experience to improve



- *The Winning Oral Argument*, Bryan Garner
- *Supreme Court and Appellate Advocacy*, David Frederick
- *Winning on Appeal* (3d ed.), Dysart, Southwick, Aldisert (Part 4)
- *Guide for Counsel in cases to be argued before the Supreme Court of the United States* <supremecourt.gov/casehand/guideforcounsel.pdf>
- *Remote Video Argument: Suggestions for Arguing Counsel*, AAAL <AppellateAcademy.org/publications>

Thanks!

Feel free to contact us