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The California Supreme Court hears oral argument in Los Angeles (December 2023).

Preparing to be prepared

AVOIDING ROOKIE MISTAKES AT ORAL ARGUMENT

Dale Carnegie is rumored to have said: "There are three speeches for every one you actually give: The one you practiced, the one you gave, and the one you wish you'd given." Swap "speeches" for "argument" and the principle applies to presenting oral argument to an appellate court. Successful preparation helps align these three arguments, so that the argument you give is (mostly) the one you intended. Of course, the fluid nature of a successful oral argument makes total alignment an impossibility. That's okay because the goal is not to perform; it is to persuade.

There are countless treatises on how to advocate persuasively. This article takes a different approach – offering some quick, practical advice to spare you the public humiliation (whether real or more likely, imagined) from making some avoidable rookie mistakes when fielding questions from the appellate court. The formality of an appellate tribunal, whether it consists of three, seven, or nine judges/justices, can be intimidating to even the most seasoned attorneys. The best way I have found to combat apprehension is preparation. Fortunately, there are common questions or themes that routinely arise during appellate arguments that you can (and should) come prepared to address.

Standard of review and presumption of correctness

What standard of review applies to your argument? The standard of review is of the utmost importance to both parties to an appeal, so it has likely been briefed before oral argument. Nevertheless, because of its foundational impact on the appeal, you should know, without hesitation, which standard of review applies to each of your arguments. The standard of review defines the lens through which the appellate court assesses the case, defining the amount of deference the court will apply to the lower court's orders or jury's findings, and influencing whether the court will uphold, reverse, or remand the challenged rulings/orders/judgment.

It is common for appeals to involve multiple standards of review, depending on the number and nature of the issues raised. For instance, an appeal that challenges a grant of summary judgment, which also challenges the trial court's denial of a motion for a continuance for additional time to conduct (or reopen) discovery, will implicate at least two different standards of review. The appellate court will review the trial court's denial of the continuance under the deferential abuse-of-discretion standard of review. Conversely, whether the trial court properly applied the summary judgment standard in granting summary judgment would be reviewed under the de novo standard of review, affording no deference to the trial court's legal findings.

During argument, the court may, but will not typically ask outright, "Counsel,

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which standard of review applies here?" That would be a nice softball question. More likely, the issue will arise in one of two situations: (1) when the parties disagree as to the applicable standard of review to a particular legal issue and raise the issue substantively during the hearing, or (2) where the attorney does not directly discuss the applicable standard, but the attorney's presentation of the point necessarily is shaped by the standard.

This second situation may be subtle. For instance, the standard of review (especially when combined with appellate presumptions), acts like an invisible dog fence, defining the boundaries in which the attorney (the dog in this analogy) may traverse and only zapping when the invisible boundary has been crossed. Counsel arguing facts and reasonable inferences should be wary of the zap because the standard of review will dictate whether the appellate court will consider them in the light most favorable to the party claiming error or, in narrow circumstances (such as evaluating the prejudicial impact of instructional error) to the respondent. If the attorney argues facts construed in his client's favor where there are conflicting reasonable inferences supporting the verdict, expect either opposing counsel or the court to notice.

Similarly, it is critical to have clarity as to the presumptions of correctness that also govern how each side approaches the factual record. Consider, for instance, an appeal following a bench trial. Typically, under the doctrine of implied findings, which will apply when there is no statement of decision in the case, the reviewing court will infer that the trial court impliedly made every factual finding necessary to support its decision. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42.) This doctrine will make it unwise for the appellant to argue contrary inferences.

But in certain circumstances where the reverse is true, it would be unwise for the appellant not to do so. For example, the doctrine of implied findings would *not* apply to the circumstance in which a party requests a statement of decision, the proposed statement of decision fails to resolve a contradicted or ambiguous issue, the party brings the omission or ambiguity to the trial court's attention, and the trial court does not address that issue. (Evid. Code, §§ 632, 634.)

Key legal authority

Although it would be nice to be able to remember every legal authority that supports your appellate position, that is likely not practical or even useful. However, where the outcome of the appeal depends on the court's application and/or interpretation of a handful of key cases or statutes, counsel should ensure familiarity with such key authority.

In this context, familiarity with the authority is not merely familiarity with a case's holding or statutory language. If the appeal requires the court to consider applying existing case law to a new factual context, appellate counsel should be prepared to explain how doing so is supported by the existing body of case law. This may require highlighting certain facts from the appealed case and either analogizing or distinguishing them from the existing cases, depending on the goal.

Similarly, where counsel asks the court to apply statutory language in a new way, counsel should understand not merely how the language has previously been construed and applied, but also, the purpose or policies behind the statute.

Where the court's ruling in your appeal has the potential to shape or create new law, expect the court to look beyond the particulars of your appeal. The court will expect counsel to be able to explore and discuss with it how the specific appeal fits or conflicts with existing precedent, and how far a new legal principle may extend beyond the factual situation currently before the court.

I recently observed a cringeworthy example of what may happen when counsel has prepared but has not adequately prepared to explore the contours of a case in this way. (Side note: One of my favorite parts of arguing is the opportunity to observe the arguments that are called before mine. Because the parties and the court are intricately familiar with the law and facts of the case before argument, sometimes the discussion makes little sense to an outsider. But some lessons transcend the case particulars.) The appellate justice asked counsel about a specific case, and counsel responded with something along the lines of, "I'm not sure, your Honor. But I can find the answer for you if you would like."

I remember verbatim the court's harsh response: "That's unacceptable." I waited for the justice to crack a smile or laugh. His expression remained stoney. Later, I received some context the helped remind me of the lesson I'm sharing in this article: The case was key to the appeal, and although the attorney had read and understood the case in its factual context, the justice expected the attorney to be ready to expound upon that context to discuss the case's potential application to a variety of distinguishing circumstances. Familiarity is not synonymous with mastery. Become the master of your key authority.

Where in the record?

There's an old maxim that nobody should have superior knowledge of the record than the attorney. Nowhere is that clearer than during oral argument, when the court asks a question about the record and the attorney responds, "Your Honor, I'm not sure. I was not the attorney that tried the case." If eyerolls were audible, the courtroom would be deafening.

As the advocate, the attorney should be the master of the appellate record (e.g., transcripts, appendices/clerk's transcript, exhibits). Nobody expects an advocate to memorize every fact and every page of testimony, but the attorney should be able to point the court to key portions of the record that support the client's position. Do not be caught empty-handed when the court asks a direct question: "Where in the record is support for that point?"

As important as it is to be able to quickly identify the supporting portions

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of the record, do not neglect the adverse portions. It is equally important to have at your fingertips the rebuttal evidence to respond to the inevitable challenges to your client's position. If there is a key document or transcript excerpt that would be helpful to have at your fingertips, bring it to the argument. But do not expect to have time to sort through volumes of transcripts to locate it. Time moves very swiftly during argument; if you bring items with you, make sure they are easily accessible.

Waiver/forfeiture/invited error

The curse of the appellate lawyer is coming up with a fantastic argument that was not made in the trial court below, or worse, was waived by the trial attorney. There are few circumstances in which the appellate court will consider an issue for the first time on appeal, and even fewer in which the court will decide an issue that would otherwise have been deemed waived or forfeited by the trial attorney. But sometimes there are reasons an appellate attorney may raise an argument, despite the strong possibility that the appellate court will not reach the merits. Counsel for both the appellant and respondent should each be very clear about whether the arguments at issue have been adequately preserved in the lower court, and should also be prepared to explain why, assuming they were not, the court should nevertheless consider them (or not).

Credibility and candor with the court are of utmost importance, especially during argument. If you (or co-counsel) failed to raise an argument in the lower court, acknowledge that fact but explain why, legally, it is immaterial. Tread especially carefully when pursuing appellate arguments that may be barred by invited error (i.e., the party or its attorney created the error that they later challenge in the reviewing court). There are some exceptions to the doctrine, and if they apply to your case, you should be prepared to discuss them, and especially be prepared to discuss *how* they do so.

Know your desired remedy

This may seem like obvious advice, but remarkably, I've observed several arguments in which the appellate court has asked counsel some variant of the following question: "What is it you would like us to do?" Reversal is typically the obvious answer. Sometimes a remand with instructions is the desired remedy. Sometimes, the remedy seems to come from left field. Oddly, this question sometimes stumps the arguing attorney. Don't be stumped. Know your case and your desired remedy. And know whether the Court has the power or authority to grant your desired remedy.

Prejudice

Another topic that has the surprising potential to stump counsel is prejudice. Often, counsel focuses on the nature of the asserted errors in the lower court, and how those errors occurred, how they were challenged, and what level of deference the reviewing court should apply to the trial court's decisions. Counsel also notes that the asserted error is prejudicial. Although the issue should have been thoroughly briefed, it is nevertheless crucial for the appellant to be able to demonstrate *how* the asserted error was prejudicial. Conversely, it is equally crucial for the respondent/appellee to be able to demonstrate how the asserted error was *not* prejudicial. The key is in the *how* and *why*. How did the asserted error affect the proceedings? How do we know that it did not?

Conceptual pioneering

As an advocate, you know your role – to persuade the court to adopt your client's position. The court has its own role, one that it remains keenly aware of throughout its determination of your case. Before rendering a decision that involves the particulars of a given case, the court must also consider the broader implications of its ruling, particularly regarding public policy, future cases, and/or legislative intent. The court may also consider the potential impact on similar cases or societal issues. To that end, the court may seek your assistance in exploring the perimeter of the ruling you seek. The most common way to do so is through hypothetical questions.

It is helpful, when planning, to consider the ways in which the principles you apply or seek to extend may change depending on different circumstances, and to consider the concerns the court may have with expanding or limiting doctrines in those circumstances. It is probably impossible to explore every hypothetical possibility in advance, and you may not have a prepared answer to a hypothetical question the court poses during argument.

I recently observed a rookie advocate respond to the court's hypothetical, "That is not our case, Your Honor." The justice – predictably – responded, "Yes, I know. That's why it is called a hypothetical." Avoid this rookie mistake.

A better response, and one for which you can prepare, is to understand and be able to tether your response to the hypothetical situation to the applicable principles, policy, theme, or underlying law and logic in your particular case. Where the hypothetical case is tethered to the same principles, or where such tether breaks, are much more relevant considerations for the court's exploration than whether the specific facts are distinguishable.

Hot bench v. cold bench

If you plan to argue a case, I recommend watching oral arguments beforehand. If you can watch arguments before the panel in which you will appear, that is even better. Most of the California Courts of Appeal stream their arguments and you can find the argument calendars on the court's website so you can determine which court will be arguing which day/time. The Ninth Circuit links its arguments on its website as well, and has a YouTube channel so you can watch earlier cases. Each panel has its own personality, and it can be very helpful to familiarize yourself with the individuals who are tasked with deciding your case.

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When you watch arguments, you will gain some helpful insights into how the court conducts its arguments. The more arguments you watch, the more accurate your observations will be. In any given case, a panel might ask questions, but as you watch many arguments, you will have a better idea of whether generally, your panel likes to ask questions throughout the argument, or whether it generally lets the advocates talk without interruption. When a panel asks a lot of questions, that is known as a 'hot" bench. Conversations with a hot bench tend to be challenging, interesting, and require the advocate to prepare to make certain points without being moored to a specific order.

A rookie mistake is to make untested assumptions about the bench's temperature and to prepare *only* for the assumed temperature of the bench. It can be extremely jarring for an advocate to expect to be advocating to a "hot" bench and instead end up arguing to a "cold" bench (i.e., one that does not interrupt the advocates with questions).

Some rookie advocates prepare for oral argument by drafting a speech or presentation – something to deliver in case she does not receive any questions. Avoid doing this. That sort of presentation is generally not engaging or persuasive, and it does not easily lend itself to flexible flow of an argument as the advocate fields questions from the court. And it will not likely warm a "cold" panel. That being said, the underlying idea is a good one: It is helpful to prepare and to practice delivering your message to a "cold" bench, as well as to a "hot" bench.

Another benefit from observing oral arguments before delivering yours is noticing differences in advocate styles, what appears effective (or not), and how advocates address the panel's questions. I observed one court chastise a lawyer because he referred to the appellate panel as "You guys." Too colloquial.

There is an easily avoidable, but common, rookie mistake that arises when the advocate has prepared to address certain points in a certain order and is derailed by the court's question about a topic that the advocate had intended to discuss at a different point of the argument. Do not attempt to defer the question; if the court is asking the question, it is interested in the answer right then. Before responding with some form of I-will-get-to-that-shortly, consider the following memorable passage from Wiener, Federick Bernays, Effective Appellate Advocacy (Rev. ed. 2004), p. 205: "Some judges simply refuse to accept a postponement. It is said that once when a question asked by Mr. Justice McReynolds was answered with the too usual 'I am coming to that,' the Justice snapped back, 'You're there now!'"

A final word of advice

Just like the punchline to the old joke about the pedestrian on 57th Street (in New York) who asks of a musician exiting a cab, "How do you get to Carnegie Hall?" – the best way to persuasively argue a case before an appellate court and to avoid rookie mistakes, is to "practice, practice, practice."

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