

# **The Art of Oral Argument According to Some of the Best**

by William M. Robinson, SDAP Staff Attorney, May 2007  
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## **Introduction**

Imagine the process of your work on a criminal appeal transformed metaphorically into a meal. Record review and issue spotting would be like menu selection; legal research would be the assembly of necessary ingredients; putting together the opening brief is the preparation of the meal. A reply brief, then, would be like a small second course, in the Italian mode. This leaves oral argument, as it were, as the dessert at the end of the meal – not that important in terms of the overall meal, but it's the last thing the Court sees and consumes before it either shows its appreciation for the hearty meal we presented by reversing or, as is more typically the case, just chomps our arguments to bits.

Many advocates think the meal works just fine without dessert, or that taking time to prepare an elaborate dessert is a waste of time and effort because those consuming the meal we prepared are going to write that horrible review whether we give them oral argument dessert or not. But every appellate justice I have heard speaking on the subject has said that oral argument can change the result, and assign some small percentage – between one and five percent – to instances in which this occurs. Since we only win in about five percent of cases, a change of five percent, or even of one percent, turns out to be quite significant statistically in terms of whether we win or lose one or more issues in a case.

So, in this sense, oral argument is worth the bother. But how to do it well? That's the question to which this article, and the seminar presentation which will go with it, intends to address.

I decided to approach the subject not by writing my own treatise on oral argument, but by seeking out the wisdom of those who effectively practice criminal appellate

advocacy and the art of oral argument that goes with it. I did a similar thing some years back on Issue Spotting, and was pleased with the result. So, I decided to do it again for the Art of Oral Argument, eliciting responses from some of the best oral advocates on the panel as to why, when, and how they orally argue cases. I got responses from a number of excellent appellate advocates: Kathy Chavez, Kyle Gee, Larry Gibbs, Mark Greenberg, Maribeth Halloran, Lori Klein, Frank McCabe, Michael Millman, Brad O'Connell, Danalynn Pritz, Dallas Sacher, and George Schraer.

What follows is a summary of some of their responses, along with my own thoughts. Sometimes I will quote them, other times summarize, and still others ruthlessly paraphrase.<sup>1</sup>

The subject is organized into four categories, based on the outline/questionnaire which I sent out:

- (1) the importance of oral argument to appellate work;
- (2) how to choose which cases to argue;
- (3) how to prepare for oral argument, and
- (4) the actual process of argument itself.

Lastly, in honor of our current COVID predicament, I will add include a slight revision of the discussion in Part II-B below, on oral argument by telephone, a practice which has recently switched from being an unwise choice to a necessary evil – at least in the short run.

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<sup>1</sup> In the back of these materials, I include for your review a copy of the Questions/Outline I sent out with my original e-mail, and the most prosaic response which I received, from Mark Greenberg, which is well worth reading in its own right. Also included, with permission of the author and publisher, is a Michael Millman contribution to the subject, a 1979 lecture on oral argument to the Stanford Moot Court Program which was reprinted in the State P.D.'s 1982 *Criminal Appellate Practice Manual*. This lecture will be especially useful for persons with little or no experience giving oral argument.

**I-A. How Important Is Oral Argument in Terms of the Ability to Persuasively Present a Case on Behalf of the Client? Does it Help You to Win?**

We've all heard it, or even said it, before. Oral argument is a waste of time in the Court of Appeal. Appellate courts in this state are "front-loaded," which means when they hear oral argument, they've already conferenced on the case and circulated either a draft opinion or a bench memo which almost always decides the case. What good can it do to orally argue a case in these circumstances? Well, it can really matter.

Lori Klein put it best: "Usually, oral argument has no effect at all, but when it's important, it's very important." As Dallas Sacher explains, it's a rare case where oral argument makes any difference; yet appellate justices have told him that oral argument has changed minds and resulted in a different outcome than what was in the bench memo or draft opinion. Kathy Chavez was a bit more skeptical, opining that cases are won or lost in the briefs; but even she can recall one case where it helped her to win.

It's unusual, Maribeth Halloran notes, for oral argument to make a difference, but it has happened where a justice asked the tough question and she had a good answer, or a misunderstanding of the facts or issues was corrected, or an appellate justice, "wittingly or not, provided a good key for laying out the right approach." Lori Klein notes that oral argument can lead to a win where the court is undecided or leaning in her favor, but that it hasn't proved successful at all when it appears they are against you from the get-go.

Kyle Gee comments that we only win appeals "on the margin" in a small percentage of cases, and that even a small increase in winning percentage from orally arguing a case is therefore highly significant statistically. He adds that he likes to believe that "always showing up for oral argument creates a tad more pressure on the court to think about what they say in the opinion."

**I-B Does Oral Argument Help You to Focus Issues for the Court? What Is the Goal of Orally Arguing a Case, and How Much Does it Vary from Case to Case? Are There Collateral Benefits (Besides Winning) From Orally Arguing Cases?**

Several respondents to the survey commented that oral argument can be important where there is a novel issue, or a unique pattern of facts that gives rise to an issue, and where you can expect that the Court of Appeal panel has some misunderstanding or reluctance concerning the case that can be effected by your knowledge of the law and facts and your persuasiveness. Everyone agreed that it can be helpful to provide focus to the key issue or issues in a case, and that it can educate the Court of Appeal about the issue, even if this doesn't necessarily lead to a change in result. Mark Greenberg notes that this can presumably help when this issue, or a related issue, comes up the next time.

Mark Greenberg identifies another collateral value that flows from orally arguing cases: "If you appear often enough and make creditable arguments, you enhance your credibility as an advocate, which will benefit your cases in the long run." I would add a codicil to this point: the more you argue, the better you get at it. While oral argument may not make the difference for you now, it will help you become a better oral advocate by educating you about the court, teaching you what works and what doesn't, all the while enhancing your credibility and experience as an advocate. In the long run, this works to the benefit of our clients as well as ourselves.

A principal goal of oral argument is to engage with the Court. Kyle Gee, paraphrasing George Schraer, put it clearly: "The goal is not for us to talk but for us to get the Court to talk." Michael Millman put it even more directly. The "gestalt" of oral argument, Millman told me, is to try to have an authentic conversation with the justices who will be deciding the case, with the assumption that they know a lot about the law but not much about your case or the particular legal issues that matter in the case. In this sense, the two key goals are to figure out what the court knows already, and what you

need to explain to them. Millman suggests that you approach oral argument in a manner similar to how you would approach a conversation with a non-lawyer about a legal issue. Use the conversation and everything you know about the persons you're talking to as a way of gauging the appropriate level of response to their questions, focusing the conversation on what the court needs to know in a way that will persuade them to go your way.

If persuasion is the mantra of appellate advocacy generally, this carries over profoundly into oral argument. In arguing for his belief that oral argument helps in almost every case, Mark Greenberg explains the centrality of persuasion.

Like all true believers, I start with a doctrine: the long-established sacrament in this Church of Appellate Practice is oral argument. Some wise prophet, at some time in the distant past, thought that parties in an appeal should be offered an opportunity to appear in person and try to persuade the judges of their position. Persuasion must have been deemed a possibility, and, as with many things in the appellate process, I think it's wise to act as if it were true.

Mark notes that if a good lawyer can be the margin of difference in a close case, and we all tend to believe this, a good oral argument can be the margin of difference by animating your case, giving it a dimension of actual experience that transcends the intricacies of the substantive law and the ins and outs of your highly technical argument.

Engaging the court, and especially handling the toughest questions, is the key to good persuasiveness. Maribeth Halloran sardonically suggests that where the panel is courteous and pleasant, the justices are likely to affirm; but "a grumpy panel means the justices are experiencing the kind of doubt that may result in relief for my client." The goal, Danalynn Pritz adds, is to make sure the court understands your argument, even if they don't ultimately agree with it. Dallas Sacher notes that his twofold goal is to emphasize the merits of his case and the manifest injustice suffered by the client, while utilizing the opportunity to "cure any errors of fact or law which may be in the mind of

the justices.” Kyle Gee puts it bluntly: “The goal is to determine what the court does not understand about the case, what the court does not understand about the law, and how the court plans to screw the client.”

But how to accomplish this goal? This leads to the third major topic, how to prepare for oral argument. However, there is an intervening subject which much be covered, i.e., deciding which cases to argue.

## **II-A How Do You Decide Which Cases to Argue? What Consideration Do You Give to Length of Punishment Versus Complexity or Novelty of Issues? What Is Your Process for Deciding Whether to Argue the Case? Do You Reread All the Briefs, Discuss Your Decision with Someone Else?**

There is general agreement that not all cases should be argued, and that some cases should absolutely be argued. But beyond that, there is a lot of variation in both the proclivity to argue cases and the decision-making process.

On one point, there is solid agreement. When you get the notice from the Court of Appeal indicating that it’s time to request argument (or not), the first thing to do is to reread the briefs. My own practice at this point is to read the briefs in a funny way: one issue at a time, starting with the AOB, RB, and then the ARB. This allows me to think carefully about each issue in the case from the Court’s perspective, which helps the process of deciding which, if any, of the issues are ones for which oral argument would be beneficial.

Kyle Gee looks to the strength of the issues raised, with punishment not an important consideration, since “a loser is a loser.” Also important to Kyle is the quality of the AG’s brief: when his own brief is strong and straightforward, and the AG’s brief not well crafted, Kyle believes that things could only get worse at oral argument.<sup>2</sup>

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<sup>2</sup> I note that I learned this lesson in a positive way in my first-ever murder reversal, where I had waived argument in the face of a weak AG brief and a great reply brief by

Lori Klein, Danalynn Pritz, and Dallas Sacher look to the novelty and complexity of the issues in the case as key to deciding whether to argue. Danalynn adds that argument makes sense where there is a “factual twist in the case that separates it from precedent.” Lori looks to whether there is something “new” to say about the case at the time she is considering argument.

While a long sentence is not in and of itself determinative, several responders note that this can be a deciding factor in a tough decision whether to argue. “Unless the appeal is truly hopeless,” Dallas Sacher comments, “a long sentence should always be argued.”

Several commentators indicated that they seek input in deciding whether to argue the case, talking to their project buddy or a colleague as to whether argument makes sense, and which issues to consider arguing. In my view, this is extremely helpful; my own conversations on this subject with Dallas Sacher have led me to argue cases I might not have, sometimes with surprising results in terms of a favorable oral argument experience and/or opinion.

None of the group mentioned anything about appeals in guilty plea cases. As a staff attorney, I do a fair amount of these. I also argue a considerable number of them when there are novel legal issues and/or the stakes are especially high for the client. I have found that the narrow focus of issues in guilty plea cases, especially where the questions presented are challenging, can lead to a very engaged and fruitful argument experience.

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me. Mind you, I was pleasantly surprised by the reversal, and kicking myself with “what ifs” for not arguing the case.

## II-B In-Person vs. Phone Arguments? Do You Ever Argue by Phone? How Do You Decide Which Cases to Argue this Way? *And What if You Have No Choice But to Argue by Phone?*

In my original article, the answer to this was clear: there was near-universal consensus that you should *never* argue by telephone if you can avoid it. Mark Greenberg describes telephone oral argument, which he has done three or four times in 25 years, as “like making out with gloves on,” and as discouraging conversation and engagement, which are the requisites of oral argument. Danalynn Pritz notes that there are many visual cues which one gets from the justices during an argument – e.g., a judge rolling his/her eyes – which you have to be there to see, and notes that with phone argument “you miss innuendo and subtlety that could make the difference as to whether you will ever get the judge on your side.”

In the original article, I noted a recent argument in one of my cases which ended up resulting in a reversal, where I, arguing in person, saw a lot of eyes being rolled while the AG, who argued by phone, was doing a particularly poor job responding to tough questions.

Thus, the general wisdom is, never argue by phone, unless you really have no choice, or the issue is so weak, or the court panel so bad, that it won't make a difference. In which case, maybe you shouldn't be arguing the case anyway.

However, COVID has, for the time being, altered this calculus. In the Sixth District, for example, telephone argument is the only option. Other courts may be using some form of *video* argument, which is a decided improvement. Either way, it calls for some changes in your approach and mindset. What can you do to make telephone argument work for you?

Not much really. Try to get *verbal* cues instead of those visual ones. Obviously, do your best to engage the panel in discussion, and try even harder to respond to any questions or comments you receive. Let the justices interrupt you when they want to; you



won't see those visual cues which typically precede such a welcomed interruption – the raising of a finger, or eyes peering over at you, or head shaking. So take advantage of any questions or interruptions that occur to figure out what is on the mind of the panel member who wants to engage you, and do your best to respond.

Of course, if you have the experience that I did just a few weeks back – where the panel said absolutely nothing during my 12 minutes of argument – there is nothing you can do but finish your spiel and hang up the phone. It actually felt better for me to be able to foam at the mouth *immediately* after the argument was finished, rather than having to wait until I left the courtroom.

In short, make the best of a bad situation – kind of what we are all doing in the World-of-COVID.

### **III-A Preparation for Oral Argument: How Do You Begin to Prepare?**

Once you've filed the request for oral argument, it is typical, especially in jury tried cases, for there to be a time lag, sometimes considerable, before you receive a notice indicating that the case has been calendared for oral argument. When that notice arrives, and the argument becomes a mark on your calendar, it is time to begin to prepare for argument.

What's the best way to go about preparing for argument? How soon before argument do you start working on your preparation? As Mark Greenberg sagely notes, preparation for oral argument is a “highly individual affair,” and everyone who responded had very different approaches, mostly tried and true, which they use.

Everyone agrees on the starting points, however. First, you reread the briefs, and either during or after your rereading, make an outline of potential issues and tough questions which you anticipate about the issues. Kyle Gee does this well in advance, and then comes back to it a few days later to write a detailed outline. Danalynn Pritz and I tend to do the whole process in one crunch, starting within three or four days of argument,

so the whole process is fresh in your mind.

One goal of all the differently described preparation rituals is the same: to have a strong, solid understanding of the arguments you wrote many months before in the briefs, and to have as complete a grasp as possible of the record on which your arguments are based. Mark Greenberg explains that the most important expertise needed for effectively arguing your case is for you to be the “biggest expert in the room on the record in your case,” noting that your storehouse of knowledge about the record is essential for the moment during the argument in which “the judges finally reveal their ignorance.”

Another point of agreement, and perhaps one of the most essential facets of good oral argument preparation, is coming up with a series of tough questions which you think the court will, or could, or should, ask about your case. The point can’t be stressed too much. Kathy Chavez comments that she always “makes notes of questions I think the court may ask even though the AG didn’t come up with them.” I wholeheartedly agree. I know that many times have I lost a close case on an either subtle or obvious point which the AG completely missed, but which the court raised during oral argument, or in their opinion if there was no argument. It’s our job to think these through when we’re preparing argument, and be ready to respond to tough questions when they come up.

I have also found that the process of thinking about hard questions that might arise helps me to put myself into the mental space of thinking about the case from the court’s point of view, rather than my own, which is conducive to the rapport and interaction that can produce a successful oral argument experience.

**I-B Choosing the Issues to Argue: How Do You Pick the Issues to Focus On? How Often Do You Focus on More than One, or More than Two Issues? How Much Do You Prepare Other Issues Which Aren’t Your Focus?**

Once the decision is made to argue a case, we typically have a pretty good idea which issue or issues we will focus on. But often, especially in long-record jury tried

cases, there are a number of strong issues, and even a couple or more which are interesting enough to lead to good oral argument. How then, to decide which issues to focus on? The overwhelming consensus of the group is to choose one, or, at most, two issues to focus on, but to be prepared to address others.

The focus issues will often, as Kathy Chavez notes, be obvious and apparent. Lori Klein suggests looking for the issues you think “the court is most likely to wrestle with – meaning the case law is uncertain or the facts of my case are more favorable.”

A number of my correspondents warned against trying to argue too many issues, suggesting that it’s much better to focus on a single issue, or, at most two issues, given the short period of time and the desire to engage the panel. At the same time, there was strong sentiment in favor of making some decent measure of preparation as to your not-chosen issues – e.g., rereading the briefing, and writing up some kind of outline. Kyle Gee makes notes on every issue, remembering that he was once directed by the court to address an issue which he deemed to be a loser; neither he nor the AG were prepared on this issue, and it led to a reversal.<sup>3</sup>

Dallas Sacher reminds us that the extent of preparation should be tied to the complexity of the case. “It is a mistake to overprepare. I want to be fresh and unscripted.”

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<sup>3</sup>I had a similar experience with the issue that led to my one and only win in the California Supreme Court, *People v. Mendoza* (1998) 18 Cal.4th 1114. I had showed up prepared to argue several issues which I thought were cutting edge and exciting. After ten minutes of silence from the panel, Justice Manoukian started asking me questions on an end-of-the brief issue about improper intoxication instructions on aiding and abetting. I had at least reread the briefing, and did my best to answer her, getting some unexpected help from Justice Mihara. When I sat down, my co-counsel, Eric Multhaup, passed me a note: “Nicely done. But there are foul winds blowing.” The unfavorable opinion on this issue by Justice Manoukian was published, with a dissent by Justice Mihara. I eventually won the point in the Supreme Court, where this time I was very well prepared to argue the issue.

### **III-C Is There a Gestalt of Oral Argument? Do You Have a Particular Approach to What You Want to Present at an Oral Argument So That it Is Not a Rehash of Briefing?**

The answers I received to my question about there being a “gestalt of oral argument” were impressive. Here are some of them.

Mark Greenberg: “I actually do think there is one, or at least I have one. I like to clear at least a half day before the argument to “absorb” the case. That’s the metaphor I use to describe what my preparation feels like. Usually, walking and thinking about the case is the primary activity of that half day, and only toward the end of the day, or even in the car on the drive to court, do I start pinning down how I will actually begin.”

George Schraer suggests that you need to “ask yourself the tough questions the court would ask you, and prepare not to argue your best points, but to argue back on the worst points.”

Kyle Gee: “I try to identify something contentious about my ‘number one issue,’ by which I mean something likely to cause the justices to enter the fray.” As Lori Klein puts it, “prepare an argument that is more likely to provoke questions.”

When preparing for argument, Lori Klein tries to read the briefs over with a “fresh eye,” which is easy since a lot of time has usually passed since she wrote the reply brief. “As I read the briefs, I think to myself, ‘If I were writing up or presenting this argument today, would I use this approach or would I use a different approach, a new way of explaining the case?’ That different approach is what I bring to oral argument.” Kathy Chavez makes a similar point: “I usually take the courts at their word, i.e., they have ‘read and reviewed the briefing,’ and always try to come up with something new to say in argument; if I don’t have a new case, at least I try a new way of looking at the issue.”

Dallas Sacher takes an opposite tack: he starts by assuming that the justices “know nothing about the case.” While he doesn’t recite the facts, he begins each argument with a brief preview of the issues to be discussed, so the justices will at least know where to look

on their bench memo or draft opinion for the issues he's discussing.

George Schraer emphasizes that we each have our own voice, and to do argument effectively, we must each find what works for us. George likes to keep in mind that the issues we are presenting are usually quite divorced from the normal experience of the appellate justice who will decide the case, and approaches argument in a manner that can bring the injustice which your client suffered, whatever its form, to a level at which the court can understand it.

In a similar vein, Brad O'Connell looks for issues which lend themselves to the back-and-forth of oral argument, rather than an elegant written presentation. Oral argument, in Brad's view, gives you an opportunity to push the bounds of discourse, and utilize the universe of common experiences of the justices, most of whom are former trial judges and/or prosecutors, and you as an advocate. Rather than portraying what happened in your case as some kind of grave injustice inherent in the system, as speaking truth to power, it is better to couch your argument to the sense of fairness of the justices. Brad suggests that most appellate justices who are proceeding from good faith believe that the criminal justice system, since the course corrections of the 60s and 70s, is basically fair, and that reliable convictions will result if the rules are followed. What works best in arguing for reversible error is to emphasize that this is a case where there was a screwup in the rules being carried out, that a judge or a prosecutor, as a fallible being, made a mistake that undermined the fairness of the trial and the reliability of the outcome. In this sense, you should pitch your argument to "small-c" conservative justices who see their job as getting it right, not making changes in the law; try to spark their sense of outrage about what happened in your case without requiring them to embrace broad indictments against the justice system.

**III-D Writing it Up: Do You Start Drafting Your Notes Before or After Deciding Which Issues to Focus On? What Is the Physical End-Product of Your Preparation, i.e., an Outline, Notes, a Speech, Etc.? How do You Prepare This?**

As you might expect, everybody does it differently. Mark Greenberg goes up there with no notes at all. George Schraer, Lori Klein and I each write up a speech, as if we were going to walk up and read it, and hopefully never read it at all. Everyone else is somewhere in between, preparing one or another variety of detailed notes or an outline.

Just about everyone scripts the “tough questions” anticipated from the court, and various answers to these questions. George Schraer notes that he will always pause before answering one of his scripted questions, to make it appear as if he’s thinking hard about the answer.

Dallas Sacher handwrites an outline which he makes after rereading the briefs and key parts of the record, and updating authority. His goal is to have a five minute spiel which touches on the key points; if there are no questions after five minutes, further argument “is useless in any event.”

Lori Klein starts by outlining all the issues when she’s rereading the briefs and deciding whether to argue. As preparation advances, and she narrows down to the issues she’ll be focusing on, Lori adds to the outline, which she transforms into a speech, moving the remaining ideas and notes into a “possible-answers-to-difficult-questions file.”

For my own part, I write a speech. It’s usually far too long, about as long as my time estimate. I usually start reading it, and hope and plan to be interrupted with questions. If I am not interrupted, I generally skim through my argument without doing much more than glancing at my speech. For me, the point of writing out the speech is to embed the argument in my head so I can pretty much say it without reading it. I write the speech out pretty “stream of consciousness”; often I find myself paraphrasing parts of the

AOB or ARB to cover key points. My speech will be peppered with “asides” that constitute the tough questions or sub-issues which I anticipate or fear I will have to address. I use lots of **BOLD TYPE** in my outlines, and print the thing out in 15 point type, so it’s really easy to read and I can easily locate the key parts when I need them.

Kathy Chavez used to write a speech and memorize it, but found this led to a scripted and unlively argument. Now she does an outline, with points and phrases to carry her through the progression of the argument. Maribeth Halloran has an elaborate outline format that she uses:

I argue from three or four pages at most — ideally one page for each major argument with the others more concisely summed. Each page is a double column. In the left-hand column are the argument’s bare bones plus the points to be argued about the issue as a whole. This contains no sentences. Supporting material is on the right side, hopefully across from the area of the relevant idea. It’s there to use if I want, or to have the statutory language at hand to make a point, or give a relevant record cite to something important. I learned this technique from a person who made a lot of speeches. It permits a more conversational tone and gives some room for flexibility. The stuff on the right-hand side can come in really handy in answering questions.

Kyle Gee uses an equally elaborate outlining regime. He starts with a lengthy outline, based on the structure of the brief; he then prioritizes the issues in order of importance, then does a “final outline,” which is followed by an even more shorthand set of keywords with important case names and characters from the case on it. He brings to the lectern only the key words, final outline, and copies of anything crucial from the case.

Kyle also reminds us of the importance of working out the tough questions in advance. “Identifying problems and hard questions is the number one priority in preparation. With complex and tough cases, I will write out the hard questions, with written answers for each. However, I don’t actually use the written answers at argument.”

Larry Gibbs succinctly described his preparations for argument:

My practice is to have a scripted opening, and a scripted closing, and to make a list of the 10 or 20 toughest questions I think the panel will ask. I then write out the answers to each of those questions. In answering them, I make myself go back to the record (not just the briefs) and relearn the case. This is important since there is often a year or more that passes between the time the ARB is filed and when the case comes up for argument.

Mark Greenberg used to make very extensive notes for oral argument, but changed his approach after having an epiphany experience in which he had forgotten to calendar an argument, and went running to the court of appeal after receiving a call from the clerk. While waiting for his case to be called at the end of the calendar, he read the briefs and thought about what he was going to say. When he got up to talk, he “proceeded smoothly, comfortably, and coherently in what was a relatively lively oral argument.” Since then, he hasn’t used notes except in rare instances where some specific complicated language which he needs to quote is involved. But he does prepare extensively in the sense of thinking of a way to organize presentation of the issues from a different perspective than the briefs, and with a loose formulation of how he will start out the argument and respond to key questions. He works on saying this out loud, rather than writing it down, as a way of practicing. Unlike briefing, Mark recommends that you start with the worst points first, not the strong ones, and try to demolish the other side’s procedural default or harmless error argument. Putting the weaknesses out front, Mark suggests, gives you a “better chance of getting a response and engaging the judges,” which, Mark reminds us, is “the name of the game.”

As is obvious from the above, everyone has their own style, and the variations within successful and effective practitioners of oral argument are wide. Hopefully, this range of different approaches can help you, the reader, to settle on a style of preparation that works for you.



### **III-E What Do You to Prepare in Addition to Writing up an Outline or Speech? Do You Practice in the Mirror, or Do a Moot Court of the Argument?**

Once your outline or speech is finished, what else can be done to prepare for argument? One way of preparing is to argue the case before a “moot court” of colleagues or others familiar enough with the law and your case to play the role of judges. Michael Millman calls this “the single most effective way to prepare” for oral argument. Millman describes “soft” and “hard” moot courts. The “soft” version is just a matter of sitting with one or more colleagues and discussing the case.<sup>4</sup> That is what we often do at SDAP. It works well because we let our discussion of the case and the intended argument strategy morph into give-and-take questioning and argument, then talk about what kinds of responses are best to the sorts of questions that may come up. You can also do this kind of practice argument with a colleague on the phone. Several appellate practitioners in my survey say they do it this way. Others say they will practice their argument/speech in front of a mirror. Still others stopped doing this years ago, believing that it detracts from spontaneity.

The most useful form of preparation, according to Millman, is a “hard” moot court, where you stand up before three or more colleagues and basically put on a dress rehearsal of your argument. Millman notes that this works best because your colleagues may often ask harder questions than the actual court, and this toughening through battle process will improve your argument. Millman suggests that you do such a moot court at least three days before your argument, because it will give you time to “regroup” from tough questioning that can have a deflating effect. After a couple of days, Millman suggests, you will have figured out how to grapple with the problems that surfaced during the moot

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<sup>4</sup>Millman, “Lecture to Stanford Moot Court Program,” State P.D. Criminal Appellate Practice Manual (1982), pp 414-415.

court, and you will be truly ready for the real argument.<sup>5</sup>

While you may not be able to, or want to, “moot court” most of your Court of Appeal arguments, it’s an especially helpful process when you have a case in a higher court, e.g., the state Supreme Court, the Ninth Circuit or, Roberts Willing, the U.S. Supreme Court. Also, if you are just starting out in appellate work, some form of moot court, soft or hard, is an essential tool to prepare you for the rigors of an appellate argument.

Another useful practice for new appellate attorneys is simply to attend arguments in the Court of Appeal and/or Supreme Court, and watch how it’s done. You will see the good, bad, and ugly, and will learn a lot about how the process works.

I note that Dallas Sacher and Kyle Gee, two of the most experienced and effective advocates I know, say that they *never* do any kind of moot court. Mark Greenberg, on the other hand, agrees with Millman that moot court is the best form of preparation, but is usually not practicable. He recommends a couple of fallbacks:

The second best [way to prepare for argument] is to interest someone in your case who is knowledgeable and let him play devil’s advocate. The third best method is to be your own moot court as best you can. As you may guess, I’m usually stuck with the third best method. The fourth best method is to go on a wing and a prayer and hope your experience makes up for deficiencies in your preparation. This has been known to happen.

Maribeth Halloran concedes that she doesn’t “rehearse” her arguments as often as she would like, but that when she’s having trouble running through it in her mind, she will “hike out on the local ridgetop and run through it as I walk.”

Finally, Larry Gibbs comments on the importance of practicing an argument with non-experts:

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<sup>5</sup>*Ibid.*

When I'm satisfied that I've covered every tough question that I think the panel will answer, I go over the opening, a few questions and the close. Then I talk to a few non-lawyers (it helps to have children in the house with whom you can try this out with), and get the non-lawyer, "common sense," take on the case. That helps to orient back to earth after too much abstract legal theorizing.

### **III-F Preparing to Argue Multiple-Defendant Cases**

Lori Klein suggests another very useful pre-argument task in certain cases. "If it is a multi-defendant case, I check in with co-counsel to determine who is raising which arguments, the order in which we should argue, and to avoid (if possible) undermining each other as we zealously represent our own clients."

### **III-G Will You Prepare a Supplemental Authority Request in Connection with Your Oral Argument Request?**

Every responding attorney indicated that they carefully look for supplemental authorities while preparing for oral argument, and send a notice to the court about such authority prior to argument. Typically, one simply writes a letter to the clerk, notifying the court and opposing counsel of the authority you intend to cite, and leave the discussion of the relevance of the new case to the oral argument. If the new authority is particularly significant, and changes some aspect of your argument in a significant way, you may consider asking leave to file a supplemental letter brief that discusses the new authority more extensively.

Frank McCabe describes a set procedure which he uses in all cases regarding supplemental authority:

After the briefing is completed and I run across a case that might be relevant to one of the issues in the appeal, I will note it in my file. About 7-10 days before argument, I will read any cases that I have noted. I will also Sheppardize the really key cases in my briefs to see if there is a new,

relevant case that I might have missed. If I think one or more is relevant and I want to mention them at argument, I will write a letter to the court. I don't want to discuss a new case that I have not advised the court about (unless the opinion comes down the day before). I have been chewed out about that before. (Of course, if the case is really significant, such as *Cunningham*, I will probably want to write the court as soon as it is announced and suggest supplemental briefing.)

### **III-H Do You Seek to Find out Who Is on Your Panel Before Preparing? How Can this Affect Your Approach to Preparation and Argument?**

There is a somewhat little known Internal Operating Procedure for the Sixth District which permits a party to learn, at or after the time the case is calendared for argument, the identities of the justices who will be on the panel. (Sixth Appellate District IOP II-A-3.) I *always* find out who is on the panel. It matters to me because I have argued before the justices of this Court so many times that I have a strong sense of what works and doesn't work with various members of the court. And, candidly, I know that my chances of winning through persuasion are much better if particular members of the Court are on the panel, and slim or none with others. For example, when I learned that former Presiding Justice Rushing was on the panel, I was much more likely to throw in some kind of literary reference into the argument. Most of the respondents say that they try to find out who is on the panel.

On the other hand, my colleague Dallas Sacher never wants to know who is on his panel. For Dallas, it makes no difference: you should always do your best. If you know you have a bad panel, you will simply do a poorer job preparing.

### **IV-A. Argument Itself: What do you bring with you to oral argument?**

The big day arrives, with butterflies and anticipation. Michael Millman reminds us to plan to arrive early, so that you can avoid being late or in a state of rage from the traffic. You've got on your best courtroom outfit. But what to bring with you?

Obviously, everyone brings the outline/speech/notes they have prepared. Some bring a separate set of notes with the names of key cases and references to important parts of the record. Still others bring the briefs and parts of the record with them, with pages of important parts marked.

What you don't want to do is show up with the whole record and a stackful of notes and papers. *Nothing* looks worse than a person trying to argue a case while sifting through a stack of papers, or stopping during argument to hunt for a certain document or set of notes. Be selective in what you bring with you. I tend to only bring up my speech/notes which I have prepared, the briefs and occasionally a key record excerpt, and take only my notes with me to the podium.

Telephone argument, of course, is a horse of a different color. There's no fighting traffic and parking or train schedules to worry about – just making sure that you are electronically connected in time. Again, as with in-person argument, you should “arrive early” by logging in at the earliest possible time allowed in the court's telephone argument instructions. And there is no need to fuss about what you are wearing; I argued my last case in shorts and a t-shirt, my COVID summer business suit. The materials you bring with you shouldn't change much though – see above. I suppose you could do it all off of your computer, but that is not my practice. I still like the printed pages of my outlined speech/notes in front of me, with the briefs and any key parts of the record available if I need them.

#### **IV-B Time Estimates: How to Make Them? How Much Time Will You Reserve for Rebuttal?**

There is a regrettable tendency to *under*-estimate the time you want for oral argument. I got into this habit when I was appearing before appellate panels who would routinely hear the shortest time-estimate cases first. I would then find myself racing through the argument, and being unsatisfied when I was cut off because my time was up.

Kyle Gee and Dallas Sacher told me they overestimate the time they need to avoid this problem, knowing that you won't be penalized for not using up your time. Lori Klein and Frank McCabe each read over their argument out loud beforehand, in part for practice, and in part to get a sense of how much time to request.

I note one other point on this topic: when the court wants to hear more from you, they will simply ignore the time estimate; when they don't want to hear any more, and cut you off, it generally will make very little difference.

Always reserve some time for rebuttal. Kyle Gee routinely reserves a third of his time. I usually reserve less than this.

Finally, I note that the Sixth District has recently altered their practice at oral argument by allocating 15 minutes per side, rather than the traditional 30 minutes. If you want to argue longer than 15 minutes, you need to seek leave from the court beforehand to do so, explaining why the number and/or complexity of issues warrants additional time. Fifteen minutes is usually sufficient, but I would not hesitate to ask for more if you think it is warranted.

#### **IV-C When You Start Your Presentation for the Appellant, How Much Are You Referring Visually to Your Outline?**

Lori Klein memorizes her opening so that she has good eye contact when she starts out, which she finds leads to good questions being asked right away. She responds to questions without looking at her notes, based on her preparation, and goes back to her written speech when the questioning stops. My own process is extremely similar. I start out half-reading, but usually switch to extemporizing pretty quickly. If the questions come, which is what I am hoping for, I respond to them with only rare glances at my prepared speech/outline. The questioning that has taken place helps me figure out where in my outline to pick up the thread. Often, the court's inquiries will tell you which part of your argument is least and most problematical to them, and it is wise to take such cues

when picking up the threat of your rehearsed spiel.

Many others never look at their notes at all. Kyle Gee says he looks at the court. Mark Greenberg doesn't use an outline. Dallas Sacher glances at his outline only to make sure he's covering all the bases.

The important thing here is to not look like you're just reading a speech, even if you are. Argument should come across as spontaneous and fresh, making it inviting for the court to jump in with questions.

**IV-D Questions from the Court: Best Suggestions for How to Deal with the Ones You Anticipated and the Ones You Didn't? The Hard Questions: When to Make Concessions, When Not To; How to Deal with the Really Lame Question That's on a Truly Marginal Point; and How to Deal with the Question That Shows the Court Doesn't Grasp Your Argument or Is Trying to Avoid It.**

When your argument is going well, the justices will be asking you questions. If you've anticipated the tough question, you are ready with your responses. Be prepared to concede certain points which are not essential to your argument. As Dallas Sacher points out, this shows the court your candor and fairness. An oral argument comes across badly when an advocate absolutely refuses to concede anything, or takes every question as some kind of attack. Be cognizant of the fact that the Court will sometimes ask you questions designed to elicit good stuff about your case, and take advantage of such questions to lay out your best points effectively.

Mark Greenberg suggests that effective oral argument requires you to "talk to the justices as though they are fair, honest, intelligent, and, most of all, in charge." This means, first and foremost, to answer their questions directly. Evading a question is perhaps the cardinal sin of oral argument. Mark explains:

Never tell them you'll get to their question later, as though they've interrupted the flow of your talk; you have to persuade them; and they've

just done you the favor of revealing how you might have a chance of doing it if you can.

If you want to use the question, which may not be particularly relevant or savvy, as a way of getting to a particular point, first answer it, then figure out how to segue into the point you want to make. For example, you may want to concede that a certain negative conclusion would have to follow under the case law if the case had certain factual or procedural features, but then explain how and why your case doesn't fit within the rubric. Or, as Mark Greenberg explains, "if you see a judge leading you with yes-or-no questions to a conclusion you don't want, let him or her do it. State the conclusion, even, then tell him or her why the premise of the syllogism that led to the conclusion is the wrong one."

When you get a tough question which you have not anticipated, and can't answer right away, Lori Klein suggests honesty: give your best answer, and ask the court for leave to prepare supplemental briefing on the point based on further research and inquiry.

When you get the lame question, or the one that tells you the questioner doesn't really "get it" in terms of the factual or legal bases of your case, your goal should be to try to respond to the question as if it were both intelligent and pertinent, and then to spin the answer in a direction which leads you back on track to something that matters. Dallas Sacher suggests that when you are truly lost by a question, it is all right, especially if you have some rapport with the questioner, to ask for a clarification to find out where you have lost them or they have lost you in the discussion. This will work far better than trying to fake it, conceding something which you don't really understand, or ignoring the question.

And remember throughout that the reason we argue is to get the *real* tough questions from the court. Michael Millman reminds us that these are not attacks, but the best thing that can happen to you, for which you need to be prepared and responsive.



#### **IV-E The Death Stare: What Do You Do When They Say Absolutely Nothing (Or Just Ask One or Two Polite or Not-So-Polite Questions)? What Do You Say When They Change the Subject to Another Issue?**

I've been in this appellate argument business for close to forty years now (Gulp!); and there is still one thing that can happen at an oral argument that truly enrages and befuddles me. That's when I get up there to argue a pretty good case with an interesting, even novel issue (or at least I spun it that way), start in on my spiel about my terrific issue, and . . . nothing happens. No eye contact, no questions, but only what I have come to call the "Death Stare": sleepy eyes, heads moving up and down from paper to you, maybe an occasional nod of the head that shows that someone is at least aware that you are making noise, but no sign of engagement. What do you do when this happens?

The obvious answer is to not let it happen. Be provocative. Kyle Gee suggests that you keep making eye contact with the justices, and that you "say something controversial or confrontational enough to get them to talk." Lori Klein calls this the "worst experience," and notes she has suffered through this more in the Sixth District than any other. She makes her speech and sits down.

There are variations on this, not all of which are unfavorable. Sometimes in the course of my stellar argument about Issue I, which will lead to reversal of my client's lengthy prison sentence if successful, I will get a question about Issue V, which involves, let's say, a 654 error regarding a concurrent sentence. From experience, I know what this means. The court is throwing you a bone, telling you that Issue I has no chance at all, and that they are inclined to agree, or at least curious, about the 654 issue. I have learned to turn to this issue, and give it your best attention, and kiss your big issue good bye.

An even more crucial moment can occur during argument when the court switches from your pet issue, which you are prepared to argue to the death, to another issue, which you thought was going nowhere, but which, if successful, will produce the same or similar benefit for the client. At this point, you must jump with all your soul into the

issue on which the court is focusing, even if your preparation for this issue was minimal. Cases can be won or lost based on how well you do this, as explained in Part II-B above.

Frank McCabe notes that one can often tell from the pattern of questioning who is going to write the opinion. When this is evident, Frank tries to direct his argument to the putative author, trying to “establish a one-on-one dialogue.”

**IV-F The AG’s Argument and Rebuttal: What Are You Doing While the AG Argues? Do You Make an Outline/Notes While You’re Sitting There? What Is the Focus of Your Rebuttal? How Can You Take Advantage of Questions the Court Asked the AG and the Nature of the AG’s Responses?**

Let me be the first to admit it: I don’t always use rebuttal time well. Once I sit down after arguing, I am pretty emotionally spent. I listen to what the AG is saying, take handwritten notes about what seems most outrageous, try to keep track of questions from the court which the AG is evading or answering disingenuously, then do my best to address these when I get up again. I don’t think I do a particularly good job, though. Frequently, I can’t read my own handwriting, which makes my rebuttal comments even more disjointed than they would be anyway, and I’m rarely able to wrap it up in the kind of “Zingo” manner that I’d like to.

Three of the best and most experienced respondents to my survey suggest that rebuttal is an absolutely crucial part of oral argument. Michael Millman described it as an “underappreciated art,” which provides you with a chance to “think on your feet” and devise a strategy in an impromptu manner, to cut through all the background and sum up what the real heart of the matter is in your case.

Mark Greenberg sagely suggests that rebuttal is something you can prepare for, to some extent, and exalts its significance:

Rebuttal is precious. In your opening you are probing the court to see what they will or will not respond to. Maybe they responded to nothing. Maybe

they responded in a way you did not hope for and you did not seem to change their mind. On rebuttal, you now have the foil of the Attorney General's silly and ill considered remarks. You have a fixed target. But don't just confine yourself to jabbing at his points. Think of a way (and you can do this in advance during preparation) of ticking off your points and ending with a conclusion that is concise and memorable and seems to flow from everything that has gone before it in the argument.<sup>6</sup>

Kyle Gee approaches the AG's argument and rebuttal in his typically methodical fashion. He listens carefully to the court's questions and the AG's responses, keeping careful notes, then prioritizes his notes before standing up, highlighting what he wants to say first and how he wants to finish. Kyle suggests that you keep an eye (or ear) out for contentions from the AG that were not in the briefs, and for misrepresentations of the law or the record. The court's questions to the AG can be a fertile area for your rebuttal: you should note any "concessions, misrepresentations, logical weaknesses, or outright blunders" in the AG's responses, and spin these to your favor during rebuttal.

In a similar vein, Lori Klein likes to start rebuttal by answering a question from a particular justice for which she has a different, or better answer than the AG. I like to do the same thing, and find that it provides a bridge from the AG's argument to your rebuttal, and allows you to have rapport and enhanced credibility with the court.

Frank McCabe also pays very close attention to the AG's argument, and any questions from the court, and tries to answer the same questions. If the Court asks no questions (a bad sign), Frank will try to do something on rebuttal, like come up with a better answer to a question asked during opening argument, or find better authority for his answer.

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<sup>6</sup>Mark adds a wise caveat, noting that "if the court has been tearing the Attorney General apart and it's clear that things are as good as they will get in your favor, simply stand up and say, 'Submitted,' and get the hell out of there before they change their minds."

## V **When You Are the Respondent: Any Difference in Your Approach to Argument?**

Yet again, and for the last time, I will let the estimable Mark Greenberg say all that needs saying on this topic:

Finally, you ask if there's anything different about being a respondent. I have been a respondent on more than one occasion. The very first time, it was an appeal by the District Attorney in Los Angeles from a grant of habeas corpus in the Superior Court. It wasn't even close. All the standards of review were in my favor, from sufficiency of evidence to a trial judge who announced clearly on the record the correct burdens of proof and legal standards for the substantive issues. The District Attorney, who had little or no idea about the standards of review, acted like a novice treating them as if they were minor annoyances that could not possibly get in the way of justice, understood as reinstating an LWOP conviction. I flew down to Los Angeles for the oral argument requested by the appellant. It felt like a holiday. I would be the one with my feet, figuratively, on the desk, as the appellant strained and sweated in the face of hostile court. I was the one who would then get up there and consider cavalierly the option of submitting the case on the briefs, or make some brief comment on appellant's multiple inanities. The case was called; I sat in the unaccustomed chair while the deputy D.A. stood at the podium. But before my paper cup was filled with the water I was going to enjoy drinking, the judge announced, "We'd like to hear first from respondent."

I won't retail the bloody details of what followed. Suffice it to say that everything came out right ten years later in the 9<sup>th</sup> Circuit. But the moral of the story was clear. My foolishness was to forget that as a criminal defense attorney, I wear the mark of Cain; no man will offer me shelter; I am shunned by all. The less melodramatic conclusion is that if you represent a criminal defendant, *you* are the appellant no matter what the procedural posture. Treat the case and school your expectations as though you still have the burden of proving that you are right. More often than not, this will be true in the Court of Appeal, and it will be most true in that situation where most of us do find ourselves to be respondent: on the grant

of review to an AG petition in the Supreme Court. Especially there keep in mind that the Court granted review *in order* to place the burden on you to show that the Court of Appeal was right in the first place.

#### VI-A **When Oral Argument Seems to Have Made a Difference.**

Amusingly, I never wrote this part of the article, because I ran out of time. But everybody had a story about when they *think* oral argument made a difference. Here's my favorite one.

I took over a case from a panel attorney who was taking a government job that required her to withdraw from all her cases. It included a strong argument about the failure to instruct on self-defense/defense of others in an attempted murder case and assault with a firearm case. The facts of the case were, to say the least, unusual. My client, Mr. B, was a gang member going to visit his girlfriend. Unbeknownst to him, at about the time he arrived for the visit, two of his gang member colleagues had accosted an unfortunate young man who looked like (but wasn't) a Sureño half a block up the street, and were in the process of knocking him down and trying to rob him. Mr. B's story, corroborated by all the other witnesses, including the victim and his companion, was that he showed up as this was going on, and came running to "help out" when he heard one of his gang colleagues shout "He's got a gun! He's got a gun!" When Mr. B arrived, he saw the poor young man reaching behind him, as if to pull out a weapon – actually, it was his wallet he was trying to retrieve. Mr. B then pulled out his gun, pistol whipped the poor guy, and ultimately fired a single shot, seriously injuring him.

The argument for self-defense/defense of others depended on the perceptions of Mr. B. Even though neither he nor his buddies were in actual peril from the victim reaching behind him for his wallet, we argued that Mr. B would have reasonably believed, based on his buddies' cries about a gun, and seeing him reach for something, that he was about to pull out a gun, and a reasonable belief of imminent peril, even if not based on an actual threat, is enough.

When I started in to argue the case, Justice Rushing jumped right at me, arguing the case from the perspective of the poor victim – lying on the ground, curled up in the fetal position after having been beaten up – and then asking how in the world I could claim that this was self-defense/defense of another? I was ready for the question laying out my argument as to how it's the reasonable perspective of the defendant that mattered in this case and that, as odd as the facts were here, they supported the notion that Mr. B would have reasonably perceived that his buddies were in peril and could be shot. I did my best. It was a lively argument all around, with questions from the other two justices.

When the opinion came out, you might be surprised to learn that Justice Rushing authored the majority opinion reversing for the failure to instruct on self-defense/defense of others, joined by Justice McAdams, with Justice Mihara dissenting. And the hard questions Justice Rushing had thrust at me at the beginning of the argument appeared to be right out of Justice Mihara's dissent.

So, I have always believed that when oral argument took place, Justices Rushing and Mihara had already written their draft opinions, but that Justice McAdams – the deciding vote – was maybe still on the fence. Justice Rushing came at me with those tough questions because he knew I could answer them correctly, and hopefully persuade Justice McAdams to join him and vote to reverse. Do I have any evidence to support this surmise? Not really. But it does help to think that, at least that one time, oral argument may have made the difference and, in the end, saved my client from a life sentence.

### **Conclusion**

Experience is the best teacher. I am hopeful that this rather lengthy summary of some of the wisdom and experience of several outstanding appellate advocates will help you to become better oral advocates on behalf of our clients. I cannot thank the contributors enough for their willingness to help and for sharing with me, and you, the practical knowledge gained from their years of experience.