By Stephen A. McEwen

Preparing Yourself for Oral Argument

Attorneys appearing before an appellate court need to speak rather than recite

In the world of appellate advocacy, oral argument is the reward for the hard work you put into writing your brief. There is nothing more intellectually challenging and satisfying than engaging in a productive discussion about your case with a panel of appellate judges. Your level of enjoyment, however, is usually directly proportional to the effectiveness of your preparation. Preparing properly, of course, is easier said than done even for experienced practitioners.

The most common complaint that appellate judges make about oral argument is lack of preparation by attorneys. I doubt that many attorneys approach oral argument without having at least attempted to prepare. Therefore this complaint likely stems from a lack of *proper* preparation. Just as some ways of studying for law school exams are better than others, better ways exist to prepare for oral argument.

Proper perspective is necessary at the outset. Effective preparation is impossible if you do not consider oral argument as something more than a regurgitation of the briefs. By the time you reach the podium, the court has already read your briefs. At this stage of the proceedings, the court needs guidance on how to resolve the conflicting legal views presented in the briefs and address public policy issues. The form of this guidance varies from case to case and judge to judge. The court's questions will often focus on the subjects on which the judges want guidance. Therefore, in preparing for argument, you must anticipate these concerns and formulate articulate responses.

You may falter during oral argument if your preparation consists only of rereading the briefs and trial record and assuming that you can repeat some text to answer the court's questions. An attorney who does nothing more than study the briefs and the record can probably explain the issues in the case but is ill prepared to answer difficult and probing questions about it. Reviewing the briefs and trial record is always a good starting point, but thorough preparation requires a much more active approach.

Knowing the trial record inside and out should be a major focus of your preparation. If you do not have time to read through the entire record again, at least read through the portions that are relevant to the appeal. Learning the trial transcript requires memorization, and there are countless ways to accomplish this. I like to outline the testimony of key witnesses so that I develop a clear picture of the order in which evidence was produced at trial. In doing so, I pay careful attention to where items of interest are located in the transcripts so that I can quickly direct the court to relevant passages if asked to do so during oral argument. The importance of mastering the trial record cannot be overstated. You can never anticipate every question a court may have, but a firm grasp of the facts will allow you to respond in most situations. The more command you have with the record, the more confidence the court will have in your argument.

An equally important step in preparation for oral argument is identifying and addressing your position's weaknesses. While you probably did this during the brief writing stage, many weaknesses become more apparent after the case is fully briefed and time has passed for reflection. Assess your case as objectively as possible. If you do not, you can rest assured that the appellate panel will. Ignorance is bliss sometimes, but certainly not when you are standing in front of three appellate judges and your appeal is going down in flames. Being able to identify the weaknesses of your argument and address them will strengthen your argument and credibility. Like all jurists, appellate judges appreciate candor and will lose trust in you if you refuse to acknowledge an obvious weakness.

Do not assume that all the necessary legal research is accounted for in your brief. Before oral argument, research the relevant legal issues again to determine if there have been any new developments. In addition, recheck your authorities to make sure they are still good law. The last thing you want to hear is your opponent arguing for the application of a recent court decision about which you know nothing. Finally, research whether any judge from the panel has written an opinion on a case relevant to your argument. Any such opinion should provide insight on what you need to emphasize during your presentation.

Throughout the analysis of your case, you should brainstorm by yourself or with colleagues for potential questions, areas of concern, and arguments that require emphasis. As you develop these ideas, preserve them in writing. Predicting questions and concerns from the panel is notoriously difficult, but this exercise is valuable because it will force you to think more actively and critically. Do not limit yourself to questions that probe the weaknesses of your case. It is not uncommon for judges to ask you questions that highlight strengths in your case in order to emphasize a point.

When you have your list of questions, concerns, and arguments, start working on responses. Some attorneys find it very helpful to write these responses. The goal is not to create a script for your argument but to edit and revise the key points so that you can discuss them in the most articulate manner possible. The more you write and revise, the more natural and concise you will sound during

Stephen A. McEwen is a deputy attorney general in the Criminal Division of the California Department of Justice and a member of the Barristers Executive Committee.

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Are You Ready?

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- ***Will your carrier*** impose a substantial rate increase at your next renewal due to unstable market conditions?
- ***Will your carrier*** continue to insure "your type" of practice at your next renewal?
- ***Will your carrier*** leave the marketplace because they can't secure sufficient reinsurance for their professional liability program?
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oral argument. If you wait until oral argument to articulate the theme of your appeal, you may get by, but your responses are likely to be rambling, disjointed, and ineffective.

Famed Los Angeles attorney Vincent Bugliosi employs a similar philosophy when preparing for summation in his trials. In his book *Outrage,* he argues that a summation must either be written in full or set down in an outline. In doing so, the goal is to compose the all-important articulation of each point. According to Bugliosi, it is simply not possible to articulate a number of points extemporaneously. He explains that there is a best way to phrase a point, and to find it "takes sweat." Bugliosi's advice applies equally to the preparation of an oral argument, which is about articulating, not reciting. The process of composing, revising, and rehearsing a key legal point or answer to a potential question will increase your comfort level and make your argument far more persuasive.

Once you have your facts, arguments, and answers floating around in your head and on paper, the best way to organize all the material is with an outline. The main purpose of the outline is to help you stay focused during your presentation and ensure that you address the necessary elements of your argument. Your outline should usually be no more than one page per issue and should include the points you need to make in favor of your position, the points you need to rebut, and important record citations. I also find it helpful to leave space on each page of my outline for note-taking during my opponent's argument. This helps me avoid shuffling pieces of paper while standing at the lectern.

Moot Court Rehearsal

After mapping out your argument and completing your outline, arrange a moot court. Provide each member of the court with the briefing from your case and encourage the participants to be skeptical and critical. Moot court should be approached as seriously as the real thing—abide by the applicable time limits, avoid scripts, and do not call for a time out when you get stumped. A moot court is an invaluable element of oral argument preparation because it gives you a chance to practice and refine your argument and highlights potential weaknesses in your presentation.

Finally, familiarize yourself with the appellate court's oral argument procedures. Each courtroom is run a little differently, so learn in advance what is expected of you upon your arrival to court. The best method for learning about courtroom procedures is to attend a session of arguments in that particular court. Attending an argument in person also gives you an opportunity to familiarize yourself with the court's location and parking area. The last thing you want on the morning of an oral argument is to be flustered or even late because of missed turns or parking difficulties. Save your energy for the argument.

Keep in mind that no amount of preparation can eliminate the possibility of surprises during oral argument. U.S. Supreme Court Justice Robert H. Jackson once said: "I used to say that, as Solicitor General, I made three arguments of every case. First came the one that I planned—as I thought, logical, coherent, complete. Second was the one actually presented—interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night."[1]

Such second-guessing will probably occur after every appellate argument. However, with thorough and thoughtful preparation, you can narrow the gaps between those three arguments significantly and have a much more enjoyable experience in the court of appeal. ■

[1] *Resolutions in Memoriam: Mr. Justice Jackson,* 99 L. ED. 1311, 1318 (1955).