

Appellate Issues



WWW.AMBAR.ORG/AJCCAL | AUGUST 2013 | SUMMER EDITION

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ORAL ARGUMENT: NOT A USELESS EXERCISE

By D. Alicia Hickok

The most commonly repeated remarks on oral argument are "You can lose a case at oral argument, but you cannot win it" and "Oral argument is not important." And the statistics show that fewer and fewer oral arguments are being heard in federal courts of appeals, in part a reflection of burgeoning dockets. To test whether oral argument has in general become merely routine and extraneous, I – and others on my behalf – solicited the input of appellate judges throughout the country, both di-

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CAMERAS IN THE COURTROOM: WHY SCOTUS SHOULD FOLLOW STATE SUPREME COURT PRECEDENT

By: Gaëtan Gerville-Réache and Kristina Araya

In this country, courtroom proceedings have traditionally been open to the public. The Internet, however, has created a whole new dimension of public access. Thirty-two courts of last resort now video-record their oral arguments.⁽¹⁾ Most of those courts – twenty-six of them – broadcast their oral arguments to the internet or television.⁽²⁾ Twenty-nine main-

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EDITOR'S NOTE

By David J. Perlman

This *Appellate Issues*, once again, breaks new ground. Its theme is oral advocacy. But more than the theme, it's the authors' creativity and ideas, both their own ideas and those garnered from a wide range of sources, that are cutting edge.

Alicia Hickok assesses the common view that oral argument has rela-

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rectly and by list-serve. Judges responded from the Third and Ninth Circuit Courts of Appeals, from the Alaska, Indiana, Pennsylvania and Texas Supreme Courts, and from the Arizona, California, and Missouri Courts of Appeals. I am extremely grateful to each of the judges who took the time to answer my questions – some of whom were willing to allow me to interview them and others of whom responded in writing to my questionnaire. Almost all of them asked to remain anonymous; accordingly, I have attributed the comments, if at all, only to the type of appellate court on which the judge sits.

Although this is a small subset of the appellate judges throughout the country, the insight the judges provided was invaluable, painting a picture of oral argument as an essential element of the decision-making process – at least in some circumstances.

What I heard repeatedly is that four factors affect the impact of oral argument.

- Is the oral argument being held in a court that affords discretionary review? If so, oral argument is expected to be important and typically is.
- Does the case require statutory or contract construction? If so, the judges often find oral argument helpful because it permits them to test hypotheticals and place them in context in ways that the briefs cannot.
- Are the lawyers willing to answer questions directly, and are they thoroughly acquainted with the law and the record? If so, oral argument can affect the outcome of particular issues or the scope and tenor of the opinion even in a case where the outcome of the appeal does not change.
- Is there something in the record or the procedural history that may not have been fully developed in the briefs? Oral argument offers judges

the opportunity to tease out those concerns – and counsel can either alleviate those concerns or find to their detriment that they are outcome determinative.

More broadly, there is an important distinction between asking whether oral argument changes a judge’s mind and whether it is helpful. To change one’s mind implies that one has already reached a conclusion. As the judges explained, there are times when judges hear oral argument and have not yet reached a conclusion, either because of a lack of clarity or unaddressed issues in the briefs or record, or because the questions are very close and uncertain. In those cases, oral argument allows judges to hear from counsel (and the other judges who are sitting) what consequences a broad or narrow resolution to the issue might have and to test policy considerations and hypotheticals. There is no other point in the appellate process where judges have that opportunity, because both briefs and excerpted records are fixed representations of the material counsel wishes the Court to consider.

The judges were asked to quantify the times oral argument changed their mind or was helpful. The range of responses is set forth, broken out by type of court.

How Often Does it Change Your Mind?	How Often is it Helpful?
<u>State Supreme Court</u>	
20-30% of time.	Most of the time.
In close cases.	Over 60 percent of the time.
Rarely.	75 percent of the time.
Only if something is unclear in the briefs.	2/3 of the cases (the other 1/3 are resolved without argu-

Rarely, although it can bring to light matters not otherwise apparent from the briefs.

Federal Court of Appeals

Occasionally.	At least 75 percent of the time.
More often than not it does not, but it can, particularly if something in the record becomes clear.	60 percent – especially to solidify.
Rarely.	100 percent: important to ensure everything is understood and nothing is missed.
Rarely, unless the case is close.	10 percent.
	Almost always helpful, and importantly, it serves the purpose of promoting collegial decision-making.

State Court of Appeals

Where case law is distinguishable or non-persuasive.	Half the time.
Rarely on outcome, but sometimes on issues or how to address.	10 percent.
More important when outcome is uncertain.	10 percent.
Rarely turns the case around but often modifies the result.	Less than half.

Every appellate lawyer can recount moments when a question was asked at oral argument that was completely outside the trajectory of the points the lawyer wished to emphasize – whether it be the contract (or statutory) construction case where a judge asks about a clause or a particular use of terminology that was not in anyone’s brief or where a judge asks whether following one case would lead to a change in some other area of the law. Sometimes they seem like questions out of left field. This project showed, however, that far from being outliers, such questions reflect careful judicial scrutiny of the issues at hand, and they provide a real opportunity for lawyers who can be alert to the reasons for the questions and responsive to them. Conversely,

judges were understandably frustrated at lawyers who would not or could not answer their questions head on.

In that regard, I was struck by the fact that when I requested that the judges recount the most memorable oral arguments they had heard, the single most common theme was that the lawyers had listened to the court’s questions and had answered them directly (or not). Accordingly, I heard many stories of “memorable” arguments where the litigants had behaved memorably – but memorably poorly, such as:

- Pointing a finger at a Justice and saying, “You are wrong; you are wrong.”
- Starting rebuttal by saying I know this is rebuttal and I only have a few minutes but there are some things I need to cover and you were asking so many questions I did not get to cover them, and one of you asked a really good question, and I want to address that.

On the other hand, judges also recounted the characteristics that made arguments memorable for their quality:

- In a criminal case where the standard of review was significant, the appellee stated in a straightforward way that there was no reversible error and sat down; on the other hand, there was a case where no party had explained the ramifications of a decision on the bankruptcy bar and it was the amicus that was the most helpful.
- Lawyers handled an argument in an unwinnable case with grace and without overreaching; in such cases, the appellant’s focus on minimizing the effect of a decision is often powerful.
- In a Medicare funding case, a lawyer began an argument with: “Let me explain for a moment the Medicare reimbursement system.” It was an area with which the bench was unfamiliar, but by the time the appellant finished, it was apparent that a decision for the appellee would disrupt the entire system.

- At times, there are lawyers on both sides who handle an intricate argument brilliantly, sometimes so much so that the bench asks few questions. One characteristic of such lawyers is that they are wise and prescient enough to know their Achilles' heel and delve at it immediately to explain it away.
- An appellate lawyer argues well who has mastered the record at trial and has really thought about the case – not just about his or her own arguments but the opponents' – and who can speak to the implications of a decision when there are policy questions or questions of first impression.
- The outstanding arguments occur when the bench asks tough questions and counsel responds directly, with authority and with logic, and without trying to evade the question. In one instance, a client had done something unkind. Rather than try to avoid it, counsel admitted that the client had done so, but showed why that occurrence should not impact the decision.
- There are times when a lawyer concedes a point and at the same time enhances his or her credibility by being honest – and thus makes his or her legal argument that much more persuasive.
- It is always memorable when a lawyer is honest and does not try to pull the wool over judges' eyes.

If, indeed, candor and full engagement with the issues are memorable, the logical inference is that far too many oral arguments are characterized by overreaching and insistence on advocating for one's own way of framing the question, despite attempts by the bench to place the issue into a larger legal framework. This might explain both how the adage that cases can be lost but not won at oral argument took hold and why state Supreme Court justices whose dockets tend heavily toward discretionary review found oral argument critical in more of their cases

than did judges from courts that hear appeals of right.

My questionnaire did not ask judges how a lawyer shows an appellate court that his or her client's appeal warrants oral argument. There are certain courts in which the litigants can choose whether to have oral argument or not. Interestingly, judges from such courts encouraged litigants to choose oral argument, pointing out that the litigant typically will not know if the case is close or uncertain or if there are record questions bothering the court. Only oral argument gives the litigant a chance to address those concerns and answer those questions.

But in most courts, it is the judges, not the parties, who decide whether a case should be argued or merely submitted. From the answers I received, there are some takeaways for lawyers to think about as they are drafting their briefs: Obviously, as word limits force tighter and more constrained briefing, counsel needs to focus on the most critical issues and needs to address each concisely. But counsel should not ignore the aspects of the questions at hand that make oral argument particularly likely to assist the Court.

If there is a question of contract or statutory construction, do not bury or downplay it.

If there are policy implications or if the decision will impact other areas of the law, do not assume that you can wait until oral argument to tell the court that its decision will have repercussions beyond the facts before it.

If a question is one of first impression, or if cases need to be distinguished or found to be non-persuasive, do not ignore them in the brief.

Check the tenor of your brief to ensure that it is not strident or hyperbolic.

And, bottom line: be candid in your writing so that the Court can anticipate your candor at oral argument.

...Continued from page 1: *Cameras in the Courtroom*

tain online video archives. For appellate advocates, their performance in oral argument has become visible to the entire world. For appellate judges, working on camera has become an everyday fact of life. Believe it or not, as appellate advocates, we think this is (on the whole) a good thing.

The federal courts, however, have not followed suit. Neither the United States Supreme Court nor any of the thirteen federal circuit courts of appeal video record their oral arguments. When crowds of citizens flocked to the Supreme Court in March of this year for the arguments on same-sex marriage, most were left waiting on the steps for the online audio recording. Why does the Supreme Court make it necessary to journey to Washington for the mere *prospect* of witnessing historic debates unfold, when it could easily guarantee a view from our desks?

The Justices' chief concern seems to be that the presence of cameras could change the dynamic of oral argument for the worse. They fear cameras will tempt advocates to grandstand and engender misleading video clips, a concern that could chill their own participation. At the same time, the Justices see little value in adding video to the audio recording already available online. The Court continues to resist cameras in the courtroom because it sees the risk of potential disruption, however small, with no counterweighting benefit. A decade of experience with cameras in the state courts, however, suggests otherwise.

Actually, it is more likely that cameras are changing oral advocacy for the better. If cameras really created a moral hazard for advocates and the Press, or chilled questioning from the bench, these problems would have materialized in the highest state courts by now. That hasn't happened. What *has* happened is that oral advocates are using the cameras as an observation window into the highest courtrooms, watching colleagues and judges, and using what they learn to improve their craft and better prepare for oral argument.

What are the Justices afraid of?

Though some disagree, most of the Justices on the

United Supreme Court view oral argument as an essential step in their decision-making process. The Court is deciding difficult cases, and the dialogue in the oral argument can strongly influence how the Justices vote.⁽³⁾ As Justice Scalia has said, "[t]hings . . . can be put in perspective during oral argument in a way that they can't in a written brief."⁽⁴⁾ And no matter how hard they may try to digest the issues, the Justices can still fall short in their understanding of the law or the facts; as Justice Rehnquist observed, "[o]ral argument can cure these shortcomings."⁽⁵⁾ The Court rightly wants to avoid potential distractions that may detract from the efficacy of their proceedings. The Court's two principal concerns about introducing cameras—grandstanding and media distortions—go to the heart of this protective instinct since both can affect the performance of advocates and justices. While this instinct is understandable, it is inconsistent with the fact that states have served as guinea pigs for well over a decade and suffered no ill effects.

Grandstanding

Several Justices believe introducing cameras will create a temptation for grandstanding that did not previously exist.⁽⁶⁾ Chief Justice Roberts and Justices Alito and Kagan have expressed concern that cameras in the courtroom would change the behavior of advocates for the worse.⁽⁷⁾ According to Justice Alito, "Some lawyers arguing before the court in televised cases would use the occasion to address the television audience for political or other purposes."⁽⁸⁾

Experience in the state courts shows, however, that video broadcasting does not erode decorum in the courtroom. When Justice Robert L. Brown of the Supreme Court of Arkansas surveyed state supreme courts that provide video broadcasts, he found that "no state that currently provides video of its oral arguments cites grandstanding as a problem."⁽⁹⁾ Similarly, research has not revealed any accounts of justices playing to the cameras. Attorneys and justices alike may actually behave more professionally because clients and the public are viewing the procedure. There are, of course, exceptions. In one in-

stance, an advocate in the Ohio Supreme Court referred to an argument as “for you viewers at home.” The justices promptly chastised him, much to his publicly-broadcasted embarrassment.⁽¹⁰⁾ Lesson learned. If not all attorneys take seriously the ethical obligation to refrain from conduct intended to disrupt the tribunal,⁽¹¹⁾ all of them shy from public disgrace and the threat of disbarment. Stories of grandstanding are exceedingly rare, and only likely to become more so.

The Justices should not expect advocates to behave any worse in the United States Supreme Court. To the contrary, they should expect them better behavior. As one critic has said, “it seems logical that lawyers arguing a case before the Supreme Court would be motivated to do what will be effective with the Justices in order to win their case rather than scoring some television points in favor of boosting their careers or landing a Hollywood role.”⁽¹²⁾ Grandstanding is not a serious concern.

Chilling Effects

Justices have also expressed concern that media will take their statements out of context and mislead the public or distort the Court proceedings.⁽¹³⁾ Justice Scalia explained that the public is unlikely to watch oral arguments in their entirety, from “gavel to gavel.”⁽¹⁴⁾ Instead, the majority of the public would view clips on the nightly news. Justice Scalia has argued that these video clips would be uncharacteristic of what the Court does, and “it will misinform the public, rather than inform the public, to have our proceedings televised.”⁽¹⁵⁾

Research shows, on the other hand, that video recordings will not significantly increase media distortion of Supreme Court proceedings.⁽¹⁶⁾ To start, sound bites from audio recordings released the same day as oral arguments in high profile cases have not been seriously distorted by the media.⁽¹⁷⁾ Even without video clips, the media already filters Court proceedings by focusing on certain cases and on certain aspects of the court’s decisions.⁽¹⁸⁾ Adding video to the audio already available is unlikely to increase that the risk of media distortions.

Though none of the justices have said so, the Court may feel a bit camera shy. So do we advocates. Few

relish watching themselves on a video recording, much less television. But when you consider that the oral argument is already performed in front of a 140-person gallery, with reporters furiously taking notes, and every word recorded and accessible online, it seems unrealistic to think that adding a few stationary cameras could trigger glossophobia. There are no reports that cameras have stymied the oral argument exchange in the thirty-two other courts of last resort, where so many justices must run for re-election. We have the utmost confidence that the permanently appointed Justices of the United States Supreme Court would not become shrinking violets.

Who are the cameras for anyway?

All agree that the purpose of cameras in the courtroom would be to provide greater public access to the court’s proceedings. But the debate so far has revolved around a narrow view of what purposes that public access could serve.

The Justices insist that the proceedings are already open for public observation.⁽¹⁹⁾ For those unable to obtain a seat, or for whom travel to Washington, D.C. is impractical, written transcripts of oral arguments are available the same day.⁽²⁰⁾ Audio recordings are typically released on the Friday following the argument, although audio is occasionally released the same day for high-profile cases.⁽²¹⁾ The Justices see little value added in video recording their proceedings.

Proponents of cameras, on the other hand, argue that it is less about transparency and more about attracting the public’s eye. They respond that audio recordings and written transcripts do little to satisfy the contemporary public’s expectations. Listening to audio recordings of oral argument is like listening to a Broadway show on the radio. Maybe it sounds the same, but you miss half the performance. Proponents also contend that audio recordings and written transcripts do not translate well to televised news, which the public largely depends on to report the most relevant material.⁽²²⁾ Consequently, Supreme Court proceedings may not receive the attention they deserve.

It is not hard to see why the Court would be unsym-

pathetic to the notion that it should install cameras just to grab the public's attention. Realistically, few of the Court's oral arguments "deserve" mass media attention, and when they get it, the attention span lasts only a minute or two. When the Court released same-day audio in the Defense of Marriage Act case, for instance, National Public Radio replayed only 2 minutes of it. It is hard to believe the oral argument got so little playtime just because it wasn't available in video. Except for the occasional quippy comment—like Justice Ginsburg's "skim milk marriage" retort—oral argument dialogue just isn't the sort of stuff that makes the nightly news. ⁽²³⁾

Both sides fail to appreciate, however, that a segment of the population would watch more than just clips; they would watch oral arguments from "gavel to gavel," and not just for entertainment, but to learn about and participate in their government. There is more to public access than fostering transparency and satisfying fickle media-interests. Michigan did not begin live streaming of its Supreme Court's oral arguments this spring for mass entertainment or because a record of the proceedings was not already available to the public. It did so to enhance public awareness and involvement. As Michigan's Chief Justice Robert P. Young, Jr. observed: "If the public can see this court in action, now from their own PCs and in the convenient settings of home, office, or school, they will be better informed about their government."⁽²⁴⁾ Some will watch to understand how oral arguments are conducted. Some will watch to better understand the issues in particular controversy before the court. And a select group will watch to become better oral advocates. Cameras offer more than just entertainment, or a window for observation. They also serve a pedagogical role, one that may actually improve the oral argument process.

How advocates use cameras to improve oral advocacy

The best appellate advocates come to court prepared with more than just a thorough understanding of the record and the law. They also bring specialized communication skills and an appreciation of the background, personalities, interests, and sensitivities of those sitting behind the bench. Common experience dictates that familiarity with the setting and the jus-

tices permits an advocate to better connect with the justices during questioning and more effectively bring his persuasive skills and case knowledge to bear.

Until cameras were introduced, such familiarity came only with experience in that particular court (or traveling to the court to sit in on oral arguments, which few advocates have time for). But in courts where review is discretionary and only a small percentage of cases are selected for review, such experience can be hard to come by.⁽²⁵⁾ Typically, only the solicitor general's office and a handful of prosecutors and private practitioners will appear in the highest courts more than infrequently.

While watching the court on video is no substitute for actual argument experience, it might be the next best thing. Those appearing for the first time find that the video provides a sense of the space, the size of the bench, the distance between the podium and the justices, and even how the light system works. Watching several oral arguments can accustom the advocate to a justice's unique mannerisms, postures, and facial expressions. Even advocates regularly appearing in the court can find this useful when a new justice appears on the bench.

Familiarity with a justices' usual deportment can reduce the risk of being distracted by her meaningless but perhaps unsettling demeanor in the heat of oral argument. For example, a justice may regularly cross her arms because she is cold or just finds that position more comfortable. Another justice may regularly frown when presenting hard questions regardless of that justice's true sentiments. An advocate who is unfamiliar with these tendencies may misinterpret them as signs of disapproval. He then starts to worry that the argument is falling short and overcompensates or loses focus. Becoming familiar with the justices' comportment during other oral arguments can minimize such miscues.

Watching other oral arguments on a particular topic can also give the advocate a better sense of the justice's attitudes toward certain types of cases than he could obtain from listening to audio recordings or reading court opinions. Do certain justices lean in while questioning the criminal defense attorney and

sit back while listening to the prosecutor's presentation? Does one justice tap his finger on the bench or lean in when questioning the insurance company in a no-fault case? It is dangerous to make too much of these signals, but it is also nerve-wracking to encounter them unexpectedly during your own oral argument. Mentally preparing for a hot bench or an adversarial justice can go a long way toward maintaining one's composure and focus during oral argument. It can also inform the advocate's oral argument strategy.

Cameras allow advocates not only to observe the justices but also other oral advocates, particularly the masters. Scientific studies reveal that "simply observing someone performing an action activates the same brain areas that are activated by producing movements oneself."⁽²⁶⁾ This effect is enhanced if a person watches the other's actions with the intent of later imitating them.⁽²⁷⁾ Watching great advocates perform may be one of the best ways to learn persuasive posture, hand gesturing, eye contact, etc. It is no coincidence that the best training seminars bring in recognized experts in the art of oral advocacy to perform.

Often cameras offer an even better perspective than attending the oral argument in person. In some courtrooms, the cameras face the oral advocate, allowing you to observe the argument from the perspective of the justices. From that angle, one can better observe, for instance, an advocate's facial expressions in reaction to a difficult question or how the advocate makes eye contact with the justices to keep them engaged.

Advocates can even use video archives of their own performances for self-evaluation. We usually are not fully aware of distracting tendencies during oral argument, such as rocking or gripping the podium, until we see ourselves on camera. Short of a practice seminar, it is difficult to imagine a better way for appellate practitioners to improve their oral advocacy skills than to watch the best oral advocates perform and compare those performances to their own.

Conclusion

We do not claim that cameras have revolutionized appellate oral advocacy—not until they're used for

videoconferencing anyway (heaven forbid). But the experience of so many state courts so far appears to have been nothing but beneficial for the public, the court, and the appellate advocacy profession. If only the United States Supreme Court would come on board. Imagine the bevy of masterful performances cameras in the highest court would bring, where some of our best oral advocates appear in our highest federal courts on a regular basis. We expect cameras would do at least as much good there—if not much more—especially for appellate advocates who take advantage of the resource. (We know some who would.)

Chart of State Virtual Courts

State	Cameras in the Courtroom?	Link to Live Streaming of Oral Arguments
Alabama	No	N/A
Alaska	Yes (live and archived video)	Gavel to Gavel Alaska , 360 North, http://www.360north.org/alaska-supreme-court/
Arizona	Yes (live and archived video)	Arizona Supreme Court Streaming Media Archive , Arizona Judicial Branch (2013), http://www.azcourts.gov/AZSupremeCourt/LiveArchivedVideo.aspx .
Arkansas	Yes (live and archived video)	Supreme Court of Arkansas Streaming Media Archive , Arkansas Judiciary (2013), https://courts.arkansas.gov/courts/supreme-court/oral-argument-videos .
California	Yes (archived video and audio)	Broadcasts , California Courts the Judicial Branch of California (2013), http://www.courts.ca.gov/2961.htm .
Colorado	No (archived audio)	Colorado Supreme Court Oral Arguments , Judicial Branch State of Colorado, http://www.courts.state.co.us/Courts/Supreme_Court/Oral_Arguments/Index.cfm .
Connecticut	Yes (live and archived video)	CTN Online Media Files (On-Demand), Connecticut Network, http://ct-n.com/ondemand.asp?dir=SC
Delaware	No (archived audio)	Supreme Oral Arguments Audio Recordings , Delaware State Courts, http://courts.delaware.gov/Supreme/audioargs.stm .
Florida	Yes (live and archived video)	Live Court Video , Florida Supreme Court (2013), http://www.wfsu.org/gavel2gavel/live.php .
Georgia	Yes (no live video, archives only)	Oral Arguments , Supreme Court of Georgia, http://www.gasupreme.us/media/oa/ .
Hawaii	No (archived audio)	Oral Arguments Recording Archive , Hawai'i State Judiciary (2013), http://www.courts.state.hi.us/courts/oral_arguments/recordings_archive.html .
Idaho	Yes (live video, no archives)	Idaho Supreme Court Calendar , State of Idaho Judicial Branch, http://www.isc.idaho.gov/appeals-court/isc-calendar .
Illinois	Yes (archived video and audio)	Supreme Court Oral Argument Audio & Video , Illinois Courts State of Illinois, http://www.state.il.us/court/Media/On_Demand.asp .
Indiana	Yes (live and archived video)	Oral Arguments Online , Indiana Courts, https://mycourts.in.gov/arguments/default.aspx?court=sup .
Iowa	Yes (live and archived video)	Oral Argument Video , Iowa Judicial Branch (2013), http://www.iowacourts.gov/Supreme_Court/Oral_Argument_Video/ .
Kansas	Yes (live and archived video)	Kansas Supreme Court Live and Archived Oral Arguments , Kansas Judicial Branch, http://www.kscourts.org/kansas-courts/supreme-court/arguments.asp .
Kentucky	Yes (live video, no archives)	Oral Arguments , Kentucky Court of Justice (2013), http://courts.ky.gov/courts/supreme/Pages/OralArguments.aspx .
Louisiana	Yes (live video, no archives)	Home , Louisiana Supreme Court, http://www.lasc.org/ .
Maine	No (live audio, no archives)	Supreme Court Live Oral Argument Audio Streaming , State of Maine Judicial Branch, http://www.courts.state.me.us/maine_courts/supreme/stream.shtml .
Maryland	Yes (live and archived video)	MD Court of Appeals Webcast , Maryland Court of Appeals, http://www.courts.state.md.us/coappeals/webcasts/index.html .
Massachusetts	Yes (live and archived video)	Oral Arguments Before the Massachusetts Supreme Judicial Court , Suffolk University Law School, http://www2.suffolk.edu/sjc/ .
Michigan	Yes (live and archived video)	Virtual Court , State Bar of Michigan (2013), http://www.michbar.org/courts/virtualcourt.cfm .
Minnesota	Yes (archived video)	Minnesota Supreme Court Oral Arguments – Videos , Minnesota Judicial Branch, http://www.tpt.org/courts/ .

State	Cameras in the Courtroom?	Link to Live Streaming of Oral Arguments
Mississippi	Yes (live and archived video)	Live: Supreme Court Oral Argument Webcasts , State of Mississippi Judiciary, http://courts.ms.gov/appellate_courts/sc/scoralarguments.html . Archive: Judicial Data Project , Mississippi College Judicial Data Project, http://judicial.mc.edu/vidbrief.php .
Missouri	No (live and archived audio)	Cases Docketed in the Supreme Court of Missouri , Missouri Courts, http://www.courts.mo.gov/page.jsp?id=1977 .
Montana	No (live and archived audio)	Audio of Oral Arguments , Montana Judicial Branch, http://courts.mt.gov/arguments/oral_audios.mcp .
Nebraska	Yes (live and archived video)	Live & On Demand: State Government , Nebraska PBS & NPR, http://www.netnebraska.org/basic-page/television/live-demand-state-government .
Nevada	Yes (live and archived video)	Live Video, Supreme Court of Nevada , http://supreme.nvcourts.gov/
New Hampshire	Yes (live and archived video)	Supreme Court Webcast , New Hampshire Judicial Branch, http://www.courts.nh.gov/cstream/index.asp .
New Jersey	Yes (live and archived video)	New Jersey Supreme Court Webcast , New Jersey Courts, http://www.judiciary.state.nj.us/webcast/index.htm .
New Mexico	No	N/A
New York	Yes (live and archived video)	Court of Appeals , State of New York, http://www.nycourts.gov/ctapps/ .
North Carolina	No	N/A
North Dakota	Yes (live and archived video)	Listen to the Supreme Court , North Dakota Supreme Court, http://www.ndcourts.gov/court/webcasts.htm .
Ohio	Yes (live and archived video)	Live: Supreme Court of Ohio Flash Live Stream , Supreme Court of Ohio and the Ohio Judicial System, http://www.supremecourt.ohio.gov/videostream/flash.asp . Archive: Supreme Court of Ohio , The Ohio Channel (2013), http://www.ohiochannel.org/MediaLibrary/Collection.aspx?collectionId=108262&action=clear .
Oklahoma	No	N/A
Oregon	Yes (live and archived video)	Supreme Court Oral Arguments , Oregon Judicial Department (2013), http://oregoncourts.mediasite.com/Mediasite/Catalog/catalogs/default.aspx .
Pennsylvania	Yes (archived video)	The Pennsylvania Supreme Court on PCN , Pennsylvania Cable Network (2013), http://pcntv.com/blog/2013/05/09/the-pennsylvania-supreme-court-on-pcn/ .
Rhode Island	No	N/A
South Carolina	Limited video archive (one case per month)	Supreme Court Case of the Month , South Carolina Judicial Department, http://www.sccourts.org/caseOfMonth/index.cfm
South Dakota	No (live and archived audio)	Live Real Audio Sessions , South Dakota Unified Judicial System (2009), http://www.sdjudicial.com/Supreme_Court/liveaudio.aspx .
Tennessee	No	N/A
Texas	Yes (live and archived video)	Texas Supreme Court Oral Arguments & Meetings , Texas Bar CLE , http://www.texasbarcle.com/CLE/TSC.asp .
Utah	No (live and archived audio)	Live and On-Demand Oral Arguments from the Utah Supreme Court , Utah Courts, http://www.utcourts.gov/courts/sup/streams/ .
Vermont	No (archived audio)	Vermont Supreme Court Oral Arguments , Vermont Judiciary, http://www.vermontjudiciary.org/LC/audioarguments.aspx .

State	Cameras in the Courtroom?	Link to Live Streaming of Oral Arguments
Virginia	No	N/A
Washington	Yes (archived video and audio)	<u>Archive</u> , TVW, http://www.tvw.org/archives .
West Virginia	Yes	<u>Argument Webcast</u> , West Virginia Judiciary, http://www.courtswv.gov/supreme-court/webcast.html .
Wisconsin	Yes (live and archived video)	<u>Video Archive</u> , <u>Wisconsin Eye</u> , http://www.wiseye.org/Programming/VideoArchive/ArchiveList.aspx?cv=34 .
Wyoming	No (live audio)	<u>Live Courtroom Broadcast</u> , Wyoming Judicial Branch (2010), http://courts.state.wy.us/ViewPage.aspx?PageURL=listen/broadcast.html .
Washington, D.C.	No	N/A

- (1) See *Cameras in the Court: A State-By-State Guide*, Radio Television Digital News Association (2013), http://www.rtdna.org/content/cameras_in_court.
- (2) *Id.*
- (3) Timothy R. Johnson et. al., *Oral Advocacy Before the United States Supreme Court: Does It Affect the Justices' Decisions?*, 85 Wash. U.L. Rev. 457, 496 (2007).
- (4) *Id.* at 458.
- (5) *Id.* at 458.
- (6) Lisa T. McElroy, *Cameras at the Supreme Court: A Rhetorical Analysis*, 2012 B.Y.U. L. Rev. 1837, 1873-98 (2012).
- (7) See Edward L. Carter, *Supreme Court Oral Argument Video: A Review of Media Effects Research and Suggestions for Study*, 2012 B.Y.U. L. Rev. 1719, 1731 (2012).
- (8) Sonja R. West, *The Monster in the Courtroom*, 2012 B.Y.U. L. Rev. 1953, 1973 (2012).
- (9) Joe Mathewson, *Put U.S. Supreme Court Arguments on TV*, <http://www.cnn.com/2012/02/02/opinion/mathewson-televiser-supreme-court> (last visited June 15, 2013).
- (10) Robert L. Brown, *Just a Matter of Time? Video Cameras at the United States Supreme Court and the State Supreme Courts*, 9 J. App. Prac. & Process 1, 13 (Spring 2007).
- (11) See Model Rule of Professional Conduct 3.5, Impartiality and Decorum of the Tribunal.
- (12) See Carter, 2012 B.Y.U. L. Rev. at 1752.
- (13) See *id.* at 1731.
- (14) See *id.* at 1725.
- (15) *Id.* at 1725.
- (16) See *id.* at 1754.
- (17) *Id.*
- (18) *Id.*
- (19) *Id.*
- (20) Supreme Court of the United States, *Argument Transcripts*, http://www.supremecourt.gov/oral_arguments/argument_transcripts.aspx (last visited June 15, 2013).
- (21) Supreme Court of the United States, *Argument Audio* http://www.supremecourt.gov/oral_arguments/argument_audio.aspx (last visited June 15, 2013).
- (22) Joe Mathewson, *Put U.S. Supreme Court Arguments on TV*, <http://www.cnn.com/2012/02/02/opinion/mathewson-televiser-supreme-court> (last visited June 15, 2013).
- (23) NPR, *Excerpts from Oral Arguments in Defense of Marriage Act Case*, <http://www.npr.org/2013/03/27/175502102/excerpts-from-oral-arguments-in-defense-of-marriage-act-case> (last visited July 10, 2013).
- (24) Roberta M. Gubbins, *Michigan Supreme Court Enters Electronic Age*, <http://www.legalnews.com/oakland/1374012/> (last visited July 10, 2013).
- (25) Only a few states, like Montana, provide for appeals by right to their highest courts.
- (26) Sarah-Jayne Blakemore et. al., *The Learning Brain: Lessons for Education*, *Developmental Science* 8:6, 459-471, 463 (2005).
- (27) *Id.*

...Continued from page 1: Editor's Notes

tively little impact on a case's outcome. With support from Irene Bizzoso and Robert H. Thomas, she surveyed appellate judges throughout the country and artfully distills the results in "Oral Argument: Not a Useless Exercise."

Gaëtan Gerville-Réache and Kristina Araya, after thorough research, masterfully write on cameras in the appellate courts. The experience of state supreme courts videoing their proceedings casts doubt on the rationale for not utilizing video technology to expand public access to the United States Supreme Court. On the subject of covering appellate arguments, Robert H. Thomas describes his pioneering work live-blogging oral arguments; his article is as much a history of his getting started as a how-to for interested bloggers.

Wendy McGuire Coates interviewed several appellate practitioners to provide advice on how to manage too much of a good thing — that is, back-to-back

arguments. Deena Jo Schneider also packs the advice of several experts into a single piece, recapping the panel on oral argument she moderated at the ABA Midyear Meeting.

Christina Crozier writes from the invaluable perspective of a young lawyer. In the appellate endeavor, there's no room for complacency: "A well-prepared associate can out-perform even a veteran advocate."

Finally, Timothy J. Vrana offers a lyrical recounting of the whole experience. When you're relaxed and confident at the podium, and things are going well, "you're saying to yourself, "this is just the best!"

To each of the authors, my thanks.

SOCIAL MEDIA AND APPELLATE COURTS: OUR EXPERIENCE BLOGGING ORAL ARGUMENTS

By Robert H. Thomas

It has toppled governments in the Middle East. It's where politicians announce they are running for office (and, where some do things that result in their leaving office). It's also where people share pictures of themselves. Or their families. Or their dinner. And their cat. It's "social media," the generic and evolving term used to describe the various online services people use to publicly communicate and share with the world their inner thoughts, and it is being increasingly used to cover activities in courtrooms. Appellate courtrooms are no exception. Social media is being used to cover appellate oral arguments in state and federal courts, both live and after-

the fact and both in-person and remotely.

Live Blogging Hawaii Supreme Court Oral Arguments

The state courts of Hawaii, including its appellate courts, allow media in the courtrooms with advance notice and leave of the court. Under the court's rules, traditional media could cover cases of public interest with either a video or still camera. But the rules did not expressly cover the "live blog" situation where someone sat in the audience with a laptop computer and a cellular modem and conveyed the proceedings to the public in real-time.

It's called a "live blog" because it's done as it occurs,

and the format is written and transmitted via a blog – a website where the author posts his thoughts about, well, just about anything. Perhaps the most well-known law blog is Bloomberg’s SCOTUSblog (www.scotusblog.com), a blog that covers the U.S. Supreme Court. My law blog (www.inversecondemnation.com) covers land use, eminent domain, environmental law, appeals, and related topics, and although much more modest an enterprise than SCOTUSblog, has a fair share of followers and subscribers.

Because the Hawaii Rules of Court did not specify whether live blogging was media subject to the leave of court requirement, the first time we live blogged, in 2008, we decided to “just do it” and see if anyone minded. On the day of argument in a high-profile appeal in an environmental case of statewide importance, I took my laptop and cellular modem (a Verizon MiFi, if anyone is interested in the technical details) to the Hawaii Supreme Court courtroom, sat in the back of the public gallery where the law clerks usually sit, and fired up what is perhaps the most common live-blog application, *Cover It Live* (www.coveritlive.com), which allows a moderator to report and control the conversation, while anyone with a web browser can follow along on the internet and comment and ask questions. The parties in oral arguments in the Hawaii appeals courts are usually allotted 30 minutes per side, so to report accurately the Justices’ questions and advocates’ responses, demands an ability to type fairly quickly and to keep up with the action.

The value of live blogging appellate arguments lies in both conveying what is happening and providing commentary and analysis to give the audience a deeper view of the proceedings than either a live video or audio feed. The live blog format allows an interactive experience, with the public following along and asking questions in real time.

For an example of how it looks, here’s the archive of that first experiment in live blogging: <http://www.inversecondemnation.com/>

[inversecondemnation/live-blog-superferry.html](http://www.inversecondemnation.com/live-blog-superferry.html). Since then, we’ve covered several high profile appeals in the Hawaii courts using this method, although the court clerk has now asked that we receive leave of court to do so through a simple application form. I’m glad to report that we’ve never been denied permission to cover court proceedings. We’ve also live-blogged the Hawaii Senate confirmation hearings of Hawaii Supreme Court justices, and U.S. Supreme Court Justice Samuel Alito’s remarks to the Hawaii Bar Association.

Blogging Webcast Oral Arguments

We’ve also leveraged technology to live blog appellate arguments from courts nationwide that webcast their oral arguments. For example, New Jersey, New York, and Texas broadcast most appellate arguments live on the internet. Live blogging these arguments is even easier than in-person blogging since it can be accomplished from the comfort of an office with nothing more than two open browser windows: one to view and listen to the arguments, the other with the *Cover it Live* application.

Another advantage to remote live blogging is that it allows for multiple moderators spread across the country who can simultaneously provide commentary and analysis, each logging in from their own location. Beyond that, there is little difference between an in-person report and one covering a webcast argument. Here’s an archived example of our coverage of a 2010 argument in the New York Court of Appeals

<http://www.inversecondemnation.com/inversecondemnation/2010/06/2pm-et-today-live-blog-of-columbia-eminent-domain-arguments-ny-court-of-appeals.html>.

Delayed Blogging Ninth Circuit Oral Arguments

Unlike those courts and Hawaii’s courts, federal courts such as the Ninth Circuit generally do not permit live media coverage of appellate arguments, even though it may later make video available on

the internet. So when an *en banc* hearing arose in a case we'd been following that was of interest to our blog readers, we could not use the live blog format. Instead, we attended the oral arguments at the court's Pasadena courthouse, took copious notes, and then immediately reported what happened and our thoughts about the court's questions and the advocates' responses with a blog post.

This method loses the immediacy and interaction of a live blog, but has the benefit of giving more time for detailed analysis. The report on that experience is available here:

<http://www.inversecondemnation.com/inversecondemnation/ninth-circuit-rent-control-taking-case-guggenheim-en-banc-oral-argument-report.html>.

Social Media Integration

While the *Cover it Live* platform is the core of our efforts at covering appellate oral arguments, we employ other social media tools such as Twitter and Facebook to promote the live blogs both in advance and afterwards. And, in one instance, my law partner "live Tweeted" an argument.

Why Do This?

I conclude with our reasons for doing this, since it

does take preparation time and some effort: it's supported by the same reasons we integrate social media into our overall marketing efforts.

First, it connects us with an audience interested in the areas in which we practice. It also connects us with members of the traditional media who tend to see lawyers who are interested in current legal issues as experts in their fields. Does this result in clients? Sometimes but not always.

Second, it is excellent as informal "continuing legal education" because in order to prepare to live blog an appeal and provide analysis and commentary, you must have thoroughly prepared by reading the rulings of the courts below, the briefs of the parties, and the major controlling cases. Nothing like leading what amounts to a discussion of the issues in a case to make you do your homework.

Third, we view it as a public service. While appellate arguments are public, most are not easily available to those who do not take the time to visit the courthouse on argument day. Live blogging and other forms of social media coverage bring the world of the appellate courtroom to the public at large, giving an "insider's," lawyer's view of how these courts make decisions. We hope that this offers the public an informed view of appellate courts, lawyers, and the law in general.

A "HOW TO" WHEN PREPARING FOR MULTIPLE ORAL ARGUMENTS

By Wendy McGuire Coats

Dear Appy The Appellate Lawyer,

Next month I'm scheduled for oral argument and this morning I received notice that I have oral argument in a different case the day before. I've never prepared two arguments so close together. Any guidance would be greatly appreciated.

Thanks,

Too Much of A Good Thing

Dear Too Much of A Good Thing,

For advice on structuring your preparation for this gauntlet of argument, I reached out to: Ann C. Lebowitz of the Law Office of Ann C. Lebowitz in Philadelphia, PA; James R. Layton, Missouri Solicitor General, University of Missouri School of Law adjunct professor teaching Appellate Advocacy, and former Chair of CAL; Linda L. Morkan of Robinson & Cole LLP and Co-chair of Appellate Advocacy

Section of the Connecticut Bar Association; Jerry Ganzfried of Holland & Knight and former Chair of CAL; and Roger D. Townsend of Alexander Dubose & Townsend LLP and 2013 President of the American Academy of Appellate Lawyers.

All have experience with multiple or successive oral arguments ranging from arguing two cases in two cities within 36 hours to arguing back-to-back cases as the petitioner before the Texas Supreme Court where the advocate finished rebuttal, stayed at the lectern, and simply replaced the notes from case one with the notes for case two and argued again.

Know Your Immersion Process

Preparing for oral argument is an immersion, a full soak, deep dive back into the nitty-gritty record facts and the distinguishing details of case holdings. The process is geared towards a clear, though no small goal: *know it all*. Ms. Morkan describes this as being able to “see everything together at once” and “feel like it’s at the tips of your fingers.” But with arguments back-to-back in two days, you have to “know it all” twice as well.

The panel consensus is that preparing for multiple arguments requires not only more time collectively but also requires more time to prepare each case individually. So, get ready to start your preparation earlier than usual.

Because readying yourself for multiple arguments in quick succession requires significantly more uninterrupted preparation time, Mr. Townsend highlights that an appellate specialist wholly dedicated to appeals is typically at an advantage. “When you’re focused solely on appeals,” Mr. Townsend explains, “you’re less likely to receive motions or discovery documents requiring immediate responses, and consequently, you’re less likely to have your oral argument preparation time interrupted, which is imperative when preparing multiple cases.”

Create a Rotation Schedule

Preparing for multiple oral arguments requires a

strategic plan with scheduled steps. There is no time for happenstance or waffling. Do not be tempted to casually bounce back and forth between reviewing cases, reviewing the briefs, jotting down notes, and doing some oral work. This is no time to “sneak up” on your oral argument preparation. Successfully preparing multiple cases requires a methodical process. Listing out the individual steps you will accomplish before oral argument is a good place to start. If you have not developed a detailed routine at this point, you may find the following processes helpful in creating your immersion to-do list.

Mr. Townsend first reviews the briefs, outlines the key flash points in the dispute, and incorporates key record citations and key case cites into a formal outline that lays out the major contention, minor contention, and conclusion for each issue. Next, he drafts a fully scripted – verbatim – text of his argument weaving in key facts and legal points while also crafting answers to likely questions from the bench. The draft undergoes several revisions as Mr. Townsend updates it with additional citations to the record and case authority. Mr. Townsend frequently reads this script both aloud and silently and explains that as he crystalizes arguments and phrases, his script becomes structured around issue-specific sound bites.

Ms. Morkan begins with rereading the briefs and the lower court decisions, updating all of the cases, and dealing with new cases or changes in the law since the briefing was completed. She then outlines the issues and arguments. Unlike Mr. Townsend, Ms. Morkan does not transform her outline into a scripted argument. Instead, she creates multiple drafts of her outline while adding to and culling down the document.

Both Mr. Townsend and Ms. Morkan emphasize that it is the exercise of creating the written document, and not the document itself, that is important to their oral preparation. Mr. Townsend’s script never makes it to lectern. Once his script is complete, he

creates one page of notes for the actual argument. For a three-issue case, Mr. Townsend's single page typically will have 20 lines of text with three to four key words per line. Ms. Morkan reflects that even though she hardly ever looks at her outline during argument, the physical writing process of revising her outline, imagining her argument, anticipating questions, and preparing responses is crucial to her preparation.

Both processes illustrate that many appellate advocates first engage in a detailed writing process before transitioning to oral preparation. Mr. Townsend begins by reading his script aloud with emotion in order to practice a conversational but formal, controlled, and relaxed delivery that does not sound like "reading." A professor gave him the advice of speaking aloud while standing close to a wall so that he could hear the words bounce back at him. This gives him an opportunity to hear and evaluate his delivery's tone, pitch, and speed. It also aids him in finding the emotionally persuasive moments in his argument.

Mr. Ganzfried notes that transitioning from written to oral preparation allows the advocate time to discover and correct difficult phrasing. Many times acronyms, scientific language, or long case names, which are easily written can prove difficult to pronounce or simply clumsy to say. Now is the time to tighten language so that it is comfortable to articulate and captures the essence of the arguments.

Ms. Morkan focuses her oral preparation on hearing herself answering questions. By posing anticipated questions to herself aloud and then answering them, Ms. Morkan refines and tightens her responses especially to the anticipated difficult questions. During oral argument, she has found that appellate courts appreciate the oral preparation work that counsel has done in advance. Having cleanly polished answers ready adds persuasive force. As Ms. Morkan said, "It communicates to the court that you knew that question was coming. Your answer was prepared, ready, and memorable. You're not up there

'talking yourself' into an answer."

Need extra time to prepare for these cases? Do not overlook your commute. Both Mr. Townsend and Ms. Morkan find that part of their oral argument preparation takes place in the car. After getting his script into its final form and practicing it aloud several times, Mr. Townsend records himself delivering his argument and listens to it in his office and while driving. Ms. Morkan finds that the car is a good time to practice posing questions and answering them repeatedly until she has tight, clean answers. Rehearsing in the car is ideal because it provides a set amount of uninterrupted time in a private closed cavernous practice space that helps you to really hear your delivery.

For many advocates, a moot is one of the last steps in argument preparation.

Ms. Morkan estimates that she moots about half of her cases. Mr. Townsend typically participates in an informal moot session where he talks through the issues followed by a formal moot four days before the argument. This provides an opportunity to revise and tighten his single page of notes.

As Solicitor General of Missouri, Mr. Layton expects all of the attorneys in his office, including himself, to moot their cases the week before argument. Before his moot, Mr. Layton, like Mr. Townsend, has culled his notes down to three pages with very few words – 30 to 40 – per page that act as prompts for quotes, cases, and record cites.

Peak on the Right Case at the Right Time

Once your plan is in place, scheduling time for each task is of central importance. With a month to prepare, none of the advocates recommend dedicating two weeks to one case and then switching over to the second case with the remaining two weeks. Instead, at the beginning of your preparation period you should rotate back and forth between the cases. Your goal at this stage is to simultaneously start getting both cases in your mind. Some rotate mornings

and afternoons so that they interact with each case a little bit each day, while others start by alternating full days.

Mr. Ganzfried cautions that the advocate must consider the relative difficulty of the two cases at the front end of preparation. If the cases differ in complexity or scope, or if the advocate was involved at the trial level with one case but not the other, the scheduling should reflect these considerations.

Having two arguments does not necessarily warrant equal time to both. Nevertheless, rotating back and forth between both cases should occur all the way through the oral practice portion of your to-do list. Meticulously scheduling your multi-step preparation process will ensure that your preparation is building incrementally on both cases. Disciplining yourself to stick to your plan will also help you avoid getting into the groove of preparing one case and not wanting to switch over to the second.

As you get closer to the argument date, disregard the tempting “first in time, first in right” rule. Ms. Morkan, Mr. Townsend, Mr. Layton, and Mr. Ganzfried all agree that you should finalize and master your second argument first. This can be a difficult self-imposed rule to follow when the natural anxiety of your first argument approaches.

Mr. Layton recently put into practice the “master the second case first” approach and it involved two of the most significant cases his office handled before the Missouri Supreme Court in the last few years. Originally, he was scheduled to argue the two cases in separate weeks but due to a snow day, the cases were reset for the same week, one on Wednesday and one on Thursday. The Friday before argument week, he had completed his note making process and oral practice, including a formal moot of the second case. He then put Thursday’s argument (case two) away and turned to Wednesday’s argument (case one). Monday and Tuesday were dedicated solely to preparing Wednesday’s argument, which also included a formal moot. He argued the first

case on Wednesday morning and then allowed himself an hour or so of post-argument debriefing before returning to the next day’s argument preparation. Because the bulk of Mr. Layton’s preparation on both cases had taken place in parallel, he was able to finalize his preparation on the second case, put it down for a few days, and then confidently pick it back up again.

When preparing your two back-to-back arguments, the three takeaways are: (1) Have a specific and detailed plan. (2) Schedule your immersion process expecting to spend more time on each case than you otherwise would. (3) Prepare your second case first.

Nuggets for Another Day

Based on your question, your instinct to argue both cases as scheduled is correct. In this situation, our panel agrees that not asking to reschedule one of the arguments is the professional approach. Our advocates perceive that appellate courts likely would be unsympathetic to continuing argument simply because more time would make the preparation process easier.

That said, when it is physically impossible for an advocate to be in two places at once or the advocate cannot get from argument one to argument two in time, seeking to reschedule is appropriate, especially if you are the only attorney handling the case. If you have cases developing on similar timetables making for a potential argument overlap, you might consider contacting the clerk’s office as soon as you receive the first hearing date.

Also be sure to check your local rules. Some courts have a formal notification process regarding conflicts. The Massachusetts Appeals Court *Clerk’s Guide – Oral Arguments* states:

Approximately three to four months prior to the Notice, the online docket will reflect the case being placed in "ready status." Once the case is placed in ready status, the Clerk should be notified of any circumstances in the upcom-

ing five months that would constitute "grave cause" for a continuance, such as pre-arranged medical procedures or pre-paid vacations. To the extent possible, the Clerk will endeavor to schedule the oral argument to avoid conflicts. Once the Notice issues, conflicts that would qualify as "grave cause" for a continuance should be called to the Clerk's attention by motion, with a copy to opposing counsel.

Similarly, the United States Court of Appeals for the Fourth Circuit in its *Pre-Argument, Review, Calendar-ing & Oral Argument* provides:

Counsel are notified about 10 weeks in advance that their case has been tentatively assigned to a particular argument session. The notice advises counsel that any motions which affect the calendaring of the case (such as motions to continue or motions to submit on the briefs) must be filed within 10 days of the date of the notice. Local Rule 34(c). During the 10-day tentative calendar period, counsel notifies the clerk's office regarding any dates they are unavailable for argument during the scheduled week and files any motions which may affect the calendaring of the case. (Entry: Notice re: conflict with proposed argument dates).

Mr. Ganzfried, however, warns that some appellate courts, like the Fourth Circuit, take the position that in the event of an advocate's conflict or unavailability, any attorney appearing on the brief should be prepared to argue. In the Fourth Circuit, once a case has been calendared for a certain date, a continuance will not be granted because of a "prior professional commitment." Instead, the Fourth Circuit may direct another lawyer from the same firm to argue the appeal if counsel of record cannot be present. Local Rule 34(c); *see also* Local Rule 28(c) (court will interpret listing of an attorney on a brief as a representation that he or she is capable of arguing the appeal if lead counsel is unavailable).

This can present a client management issue when a conflict in the argument schedules arises and both clients expect the same attorney to argue their case, but the appellate court is not inclined to reschedule when other attorneys on the brief are available to argue. So be sure to know, check, and comply with your local rules. If you are concerned that a potential scheduling conflict looms, err on the side of graciously and politely over-communicating with the appellate clerks in the hope of avoiding an actual conflict.

What if you must argue successive arguments in front of the same panel? The rotation approach to your preparation still stands. Prepare the cases simultaneously and then finalize the second case first before switching to case one while also taking into account the varying complexity of the two cases. Practically speaking on the day of argument, you will face the added challenge of being fully vested and "on" for the first argument while needing to maintain that same energy level when turning to the second case. You likely will not get to exit the courtroom and debrief but will need to quickly transition (maybe even immediately) to argue again. Ms. Lebowitz noted that when in this situation the advocate must not signal in any way to the court either displeasure or satisfaction with the court's reception of either the arguments presented or the advocate's performance in the first case. Similarly, while seemingly obvious, the advocate must consciously ensure that the post-argument adrenaline rush of case one does not inadvertently spill over into case two. In the wake of case one's conclusion, Ms. Lebowitz cautioned, whether the argument went well or not, the advocate must never lose her "game face."

In closing, remember that your actual oral argument will be relatively short when compared to the length of your preparation. But your preparation ensures that you use your limited time wisely and that you make every moment count persuasively for your client. Mr. Ganzfried shared that there is a certain temperament well suited for appellate work. Mr.

Ganzfried explained, “When attorneys tell me that they want to work on appeals, I may say to them ‘ok, think of a case you have been working on for many months, or maybe even for several years, and now consider that you’ll have 15 minutes to explain what someone new to the case would need to know in deciding the result.’ Many will say, ‘I couldn’t do that. I would need more time to cover everything I need to say.’ But if an attorney calmly responds and says something like, ‘Ok, sure that sounds about right’ well then, I know I’m talking to someone who appreciates the challenge of being an appellate lawyer.” The appellate lawyer inherently understands that oral argument is not about saying everything you want to say or rehashing the lengthy briefs. It is not closing argument. Oral argument is an advo-

cate’s opportunity to focus the court on the crucial points of law and key facts that direct the outcome in the client’s favor. It takes discipline and practice to say only what needs saying and to say it memorably.

Multiple arguments on one day and successive oral arguments over the course of several days are the birthplace of an appellate lawyer’s war stories. I look forward to hearing yours.

Best of Luck,

Appy The Appellate Lawyer

“EFFECTIVE ORAL ADVOCACY: WHAT YOU REALLY NEED TO KNOW”

By Deena Jo Schneider, program moderator

I had the pleasure of moderating the program at the 2013 ABA Midyear Meeting entitled “Effective Oral Advocacy: What You Really Need to Know.” The program, which was sponsored by the Council of Appellate Lawyers, featured Judge Andre M. Davis of the United States Court of Appeals for the Fourth Circuit; Justice Elizabeth Lang-Miers of the Texas Fifth District Court of Appeals; and Roger D. Townsend, a partner in the Houston office of Alexander Dubose & Townsend LLP.

The panel members have had very significant experience in oral argument, especially at the appellate level. Judge Davis, who was a trial judge for 22 years in the United States District Court for the District of Maryland and in Baltimore, also was an appellate attorney for the Department of Justice, an Assistant U.S. Attorney for the District of Maryland, and a private practitioner. Justice Lang-Miers practiced for 28 years at the firm now known as Locke Lord, LLP before joining the bench in 2003. And

Roger D. Townsend has been certified in civil appellate law by the Texas Board of Legal Specialization since 1987. The following is just a sampling of these individuals’ many prominent positions in the judiciary and the bar: Judge Davis has served as Chair of the Conference of Federal Trial Judges and on the Executive Committee of the Maryland Judicial Conference, Justice Lang-Miers as Chair of the Appellate Judges Conference of the ABA’s Judicial Division and on the Executive Committee of the Board of Directors of the State Bar of Texas, and Mr. Townsend as President of the American Academy of Appellate Lawyers and Chair of the Appellate Practice and Advocacy Section of the State Bar of Texas.

Judge Davis began the program by offering what he called his personal “six R’s” of oral argument. Starting with three negative R’s, he said first that counsel should never *read* during oral argument, except (perhaps) for 20 words of a statute or regulation. Second, counsel should not *recite*, i.e., deliver a prepared speech as opposed to having a conversation

with him. Third, counsel should not *repeat* themselves; if they do not have something new to say, they should sit down. Judge Davis then provided three positive oral argument R's for counsel, beginning with *respect* for the court, judges, client, and record, which he noted he and the other judges on his court will return. Second, counsel should *retreat* if it seems they have lost an issue and move on to another point. Finally, counsel should work to *recover* their footing by offering him something fresh a few minutes later or during rebuttal to provide a different take on what might have appeared to be a lost point.

Justice Lang-Miers focused her opening remarks on how counsel should prepare for oral argument. She quoted United States Supreme Court Justice Robert Jackson as saying that as Solicitor General he made three arguments in every case: the one he planned, which was logical, coherent, and complete; the one he actually presented, which was interrupted, incoherent, disjointed, and disappointing; and the utterly devastating one he thought of after going to bed that night. Providing a judge's as opposed to lawyer's perspective, Justice Lang-Miers noted that in her experience, most judges prepare for oral argument using the briefs as a workbook. If counsel does not plan to follow the organization of the brief during argument, it is important to tell the court that at the outset so the judges can keep on track and counsel does not waste the value of their preparation. Counsel should also consider in advance how the opinion must read to reach his or her desired result and then use that as a practical focus for guiding the court during the argument, including when responding to questions.

Mr. Townsend reminded the audience of the old saying that a person who wants to learn to catch a fish should ask a fish, not a fisherman, and suggested that judges may be in a better position to tell lawyers how to conduct themselves during oral argument than other lawyers. He then gave a brief overview of how he approaches argument. It is im-

portant to be respectful and try to keep on track in light of the time limits, focusing on the relevant law and material facts on each of the issues. At the same time, counsel needs to be prepared to engage in a conversation with the court and earn its respect by showing that he or she knows the issues, the record, and the law, and has thought through the problems in the case. This will give the judges comfort that they will not be making a mistake by ruling in the way counsel advocates. Counsel should also figure out in advance the minimum necessary to win, which then allows concessions on unnecessary points while respectfully standing ground on the points that matter.

Responding to my question as to what determines whether oral argument will be held in an appeal and how important it is, Judge Davis noted that the Fourth Circuit now hears argument in the smallest percentage of its 5,000 cases of any federal circuit: about 9%. The court heard many more arguments when he clerked there, and when he joined the bench, he thought he would put more cases on the argument calendar. After serving for three years, he has concluded that the court does a pretty good job of hearing argument in cases where the likely benefit exceeds the likely cost. Counsel may request or disclaim argument, but the decision whether to hear argument in a particular case is the court's. Staff attorneys screen the cases carefully and also work up those that are not assigned to be argued. Any judge on a panel may put a case on the argument calendar; the other judges may then elect whether to remain on the panel or disclaim further interest in the case.

The Fourth Circuit now hears four cases a day six times a year, giving each side 20 minutes and almost always finishing before lunch. It is the only circuit where the judges come off the bench after each argument to shake counsel's hands, which is viewed as a means of preserving respect and civility.

Justice Lang-Miers stated that counsel must request argument in the Court of Appeals of Texas. Most,

but not all, requests are granted through a judicial screening process. Her court tries to hear as many arguments as possible, but has a substantial non-argument docket as well. As the legislature has created more interlocutory and expedited appeals, the court has established an accelerated docket to deal with cases with statutory priority. Justice Lang-Miers personally loves oral argument and thinks most other judges also enjoy it. A good presentation can be very persuasive and particularly valuable in a case of first impression. She has seen arguments occasionally change judges' minds and believes the process helps improve the quality of opinions.

Following up on this discussion, I asked what factors go into appellate courts' decision to hear argument and whether a denial means that the decision below will be affirmed. Judge Davis noted that while the appellate reversal rate varies from jurisdiction to jurisdiction, the overall rate in civil cases is in the low single digits. Judges on the Fourth Circuit are reluctant to impose on litigants and counsel the financial cost and exertion of coming to Richmond for argument where the outcome of the case seems very clear based on existing precedent. However, the single-judge opt-out procedure may result in argument being held even in some such cases, especially where the stakes are high or the parties are corporations not likely to be concerned about cost. Argument is also generally granted when an appeal involves a serious constitutional challenge or criminal law question. Additionally, the court is now putting more cases on the argument calendar to fill in gaps in Fourth Circuit jurisprudence that resulted from the shortage of judges on the court for a number of years.

I then asked Mr. Townsend whether he ever opts not to request oral argument or agrees to a shorter than normal time limit. He responded that when representing an appellant, he always asks for argument because some judges have indicated they will not take a case seriously absent such a request. In these circumstances, he uses the statement request-

ing oral argument to summarize the problem with the decision on appeal and preview his substantive argument. When representing an appellee, he tries to give the court his honest view as to whether oral argument is appropriate and why.

In response to a question from the audience about oral argument in the trial court, Justice Lang-Miers stated that in her view the basic rules and skills are the same in all courts. One difference between trial and appellate courts is that an appellate court is focusing on just the part of the case that is before it, whereas a trial judge or jury has a much broader view. Additionally, while arguments in the trial court are likely to be very fact-based, arguing the facts on appeal is probably not a good use of counsel's time.

Judge Davis agreed and noted that another important R is the record, which is created in the trial court and not on appeal. In his view, as a general matter state courts are skeptical of or even hostile to summary judgment because of their profound respect for the jury trial process. In contrast, federal courts are more willing to grant summary judgment, especially after the Supreme Court's trilogy of cases in 1986 permitting this. It is important to argue the evidence as opposed to the facts on a summary judgment motion; rather than proving a point, counsel need only muster sufficient support to get to the jury. Both Judge Davis and Justice Lang-Miers stressed the importance of preserving issues properly and creating a good record. Appellate counsel should make sure that trial lawyers they work with regularly understand how best to develop cases in light of the standards of review that will apply on appeal depending on the nature of the issues and the proceedings below.

A follow-up question from the audience concerned the criteria used by appellate courts to filter the cases in which argument will be heard and the propriety of denying litigants a full opportunity to present their case. Judge Davis agreed that in an ideal world, argument would be held in more cases, or at

least when it was requested. But every error that is briefed is not a reversible error. Counsel often argue points that are not critical to the decision below or for changes or evolution in the law. Judge Davis carefully scrutinizes all the cases assigned to him and votes to hear argument when there is a plausible argument that what the district court did constituted reversible error. Given the standard of review, an appeal from a judgment on a jury verdict or a trial judge's ruling on a matter of evidence is unlikely to be successful. He does not consider it to be a good use of judicial or litigants' resources to have counsel come to Richmond and stay overnight to present argument for 20 minutes in such a case. Technological advances are making it possible to hold arguments with some counsel and judges participating from remote locations; as a result, argument may be heard in more cases in the future.

Justice Lang-Miers added that a court's argument docket has only a limited number of slots. The court fills them based on the priorities set by the legislature and the briefs in the cases before it, which it assumes present the parties' best arguments. The judges have many other obligations beyond hearing argument, including writing opinions and dealing with motions for rehearing and writs. If counsel believes there is a particular reason why a case should be argued, this should be explained in the statement requesting argument.

Another audience question was whether an appellate advocate is more likely to persuade the court based on fairness or legal principles. Mr. Townsend stated that a legally sound and logical argument is the key to success on appeal. Notions of fairness or explanations of how the requested rule will work in the real world will help to inform the argument but should not be its primary basis. Judge Davis agreed, reiterating that the job of appellate courts is to correct reversible error. A party's brief should tell the court how to rule in its favor based on a statute, rule, or precedent. Oral argument offers an opportunity to tell the court why it should rule in the party's fa-

vor, which touches on fairness but is not the rule of decision. Judge Lang-Miers added that judges do not make law but apply the law to the facts. The resulting outcome may not seem fair, but that is not a point of persuasion except to the extent it is incorporated into the legal standard.

One audience question concerned a new rule of Texas procedure generally limiting the length of trials in civil cases involving requests for less than \$100,000 in monetary relief to just eight hours per side. Justice Lang-Miers expressed the view that while this rule may present some issues, appeals from cases following it will probably be reviewed on an abuse of discretion standard, which is difficult to satisfy.

In response to another audience question, Judge Davis said that the percentage of cases in which his ultimate decision has been altered by oral argument is probably in the very low single digits. He comes to the bench well prepared to decide the case with a view of the law and the likely outcome that is not often modified. He prepares every case in the same way whether or not it is being argued, giving careful attention to the memos prepared by clerks or staff attorneys and doing independent research where appropriate. Even when argument does not change the result, the opinion may benefit from the discussion of the law and also be more sympathetic to the losing party. Judge Davis later noted that in the Fourth Circuit, judges generally do not discuss cases until the conference after the oral argument, when they express their views in reverse order of seniority and tentative decisions and opinion writing assignments are then made. In contrast, opinions are assigned before oral argument in the intermediate appellate court in Maryland and some other states.

Justice Lang-Miers noted that the judges on her court also prepare thoroughly for oral argument. The decision who will write the opinion is not made until afterwards, so every judge comes to court with the understanding that he or she may end up as the author and prepares accordingly. She personally reviews portions of the record as well as the briefs

and cases and writes a pre-submission memo to herself. There is a chance that argument will change a judge's mind, but the likelihood of this occurring is relatively small. The decisional process can be fluid, because after the initial conference the opinion author may look further into some of the issues and the panel may have additional conversation. While counsel may want to deliver a final filing as late as possible to avoid giving the other side extra time to respond, it is important to make sure the judges have time to review it as part of their argument preparation.

Judge Davis added in response to a similar question that argument is more likely to alter the result in an appeal when it reveals a fact or point that was not presented or well-developed in the briefs or when the briefs are not well-written. While it is not the court's job to make the world safe from poor lawyers, no judge wants to rule against an appellant because he or she had a lawyer whose brief did not explain what the case is really about and what went wrong in the court below. Justice Lang-Miers stated that an appellate court is more likely to change its mind on a discrete legal issue than a question of abuse of discretion, which is what most appeals present. In her view, the most effective appellate arguments occur when counsel have thought in advance about the easiest way for the court to rule in his or her client's favor, and then focus on the key issue and the specific points the court should consider to reach the desired result.

I asked the panel to discuss in more detail how counsel should prepare for and present an appellate argument. Mr. Townsend noted that the starting point is always the briefs because, as previously explained, the judges hearing the case will have a strong leaning based on what they have read and it will be very hard to shift them in a different direction. Thus, a lawyer should begin by presenting a solid case on paper. As an appellant, it is easiest to prevail if the dispute is over the law and the case is one of first impression. In contrast, a dispute over

the sufficiency of the evidence will rarely be successful. If the dispute is over the application of the law to the facts, it may be best to point out why the other side's suggested application would be unfair or unworkable in this case or focus on a procedural error that avoids judicial consideration of the facts.

Mr. Townsend noted that once counsel has identified the best arguments, every section of the brief should be built around them, including the statement of facts. At oral argument, counsel should proceed based on the same structure but highlighting the key points in sound bites. The presentation should be legally sound but also appeal to the judges' senses of fairness and pragmatism. As Edmond Cahn wrote long ago in *The Sense of Injustice*, it is much easier to argue that a particular result is unfair than that it is fair.

Mr. Townsend perceives three general values to oral argument. First, argument appears to provide due process to the client, who knows it had its day in court even if it lost the case. Second, argument presents the opportunity for counsel to address any questions the judges may have about the case after reading the briefs. (Ironically, however, a judge is likely to have fewer questions in better-briefed cases and have less confidence in the quality of the answers in cases that are not as well-briefed.) Third, where opinion writing responsibility is assigned in advance of argument to one of the judges on the panel, argument may be counsel's best chance to attract the attention of the other two judges.

Judge Davis added that a lawyer who prepares for argument properly will never be paid for all the effort because he or she will spend more time than is reasonably necessary reviewing the record, preparing the brief, participating in moot courts, updating the research, and having at hand the key record citations and the important cases. Justice Lang-Miers noted certain phrases counsel should never say, including "I wasn't trial counsel" and "the judge or jury didn't get it." She reiterated that the key to a good argument is putting yourself in the court's

place, thinking about what they need to do to reach the decision you want for your client, and avoiding extraneous matters.

The time allotted to this program ended long before the panelists ran out of pointers on oral argument. The speakers' give and take and the number of audi-

ence questions made for a lively pace and interesting discussion. I hope to be able to continue the conversation on another occasion.

PRESENTING YOUR FIRST ORAL ARGUMENT

By Christina Crozier

Congratulations! After several long years of toiling in the trenches, you have finally landed your first oral argument. This is the moment that you have been waiting for. It's new. It's exciting. It's also a little terrifying. Now what?

Preparation is everything.

The good news for young attorneys is that oral argument is less about experience and more about preparation. A well-prepared associate can out-perform even a veteran advocate.

There is no single way to prepare for an oral argument, but the following is a good roadmap for most people.

Start about two weeks in advance. Review all briefs and the record, and outline your main points. As you become increasingly familiar with your subject matter, refine your outline to a skeletal form that you can bring with you to the podium.

Now, try to imagine every conceivable question that the court might ask, and prepare answers for each question. When brainstorming, consider questions that cover: factual background, case law, the standard of review, public policy, error preservation, and what exactly you want the court to do.

In the final days leading up to the argument, you must practice. Stand up, and deliver your argument

out loud from start to finish. Figure out how you will transition from one topic to the next. Unless you are a public speaking prodigy, your argument will probably sound much better in your head than it does coming out of your mouth. Only practice will make the words come out smoothly.

Finally, if your resources permit, a mock argument can prepare you in ways that practice in front of the mirror cannot. There is nothing natural about being interrupted from your outline by a question, answering the question, and then returning to your outline. A mock argument will give you the opportunity to practice this unique skill.

Nobody has to know that you're a rookie.

With disciplined preparation, you will be ready on the day of your argument. A few final tips will help you give the impression that you know what you're doing.

First, don't bring an entire library with you to the podium. You will not have time to look anything up, and if you have properly prepared, all you will need is your outline.

Second, memorize the first few sentences of your argument. Nailing your introduction without looking at your notes will create a foundation for a solid argument and calm your nerves.

Third, remember that the tone that you use in an

oral argument is different from the tone that you might use in the trial court. Emotional arguments, jokes, and attacks on your opponent are sure tip-offs that you do not practice in the court of appeals often.

Finally, don't be afraid to bring some supportive spectators with you. Young attorneys are often concerned that having an audience of colleagues will make them more nervous, but they underestimate the value of a cheering section. Supportive colleagues can keep you occupied and relaxed before

the argument, and say nice things about your performance after the argument.

After all, you will want some witnesses see you knock this argument out of the park. Good luck!

RELAX, FOCUS, AND ENJOY

By Timothy J. Vrana

Oral argument: an event to dread or an event to savor? A time to sweat bullets or a time to shine?

Where is *your* head when you stand up and say, "May it please the Court?"

Your head should be relaxed, focused, and energized.

Tension, fear, and anxiety are natural emotions in a performance setting. Natural, but not helpful. They cause physiological changes that decrease a performance's quality.

But you can use tension, fear, and anxiety as great motivators in your preparation. For example: it's a beautiful day, you could use a little life-balance, why not leave the office two hours earlier than usual? Because you have oral argument coming up and you don't want to look stupid.

The time leading up to oral argument is the time to think about tension, fear, and anxiety. Use them to inspire yourself to prepare thoroughly. Prepare, prepare, prepare. Moot if possible. Identify the weak spots in your case and *know* that you'll be asked about them. Do not hope that the judges will

miss those issues. *Know* that the judges will ask all the tough questions, and *know* how you're going to respond.

Like any performer, your practice time will be significantly longer than your "performance." But if you are prepared, you shouldn't experience any tension, fear, or anxiety as you stand at the podium.

You will also be relaxed because you are in control of many external factors. You will look your best. You will get your hair done, have your clothes professionally cleaned and pressed, and shine your shoes. You will be well-rested because you will get to bed at a good time the night before, and you will sleep well because you're prepared. You will be well-fed. You will get to the courtroom early, remembering that you'll be going through security.

Relaxation is critical as you orally argue, but it's not everything. You must be totally focused on the judges and the subject matter.

Performers talk about being "in the zone" or "in the moment." You get there by totally immersing yourself in the people who sit before you and in the subject matter at hand. You don't notice the other people in the courtroom. It's just you and the judges.

You don't hear doors, briefcases, or computer bags opening and closing. Time becomes immaterial.

When you and your opponent and the judges lose yourselves in the case, oh my! One appellate judge reportedly returned to chambers after a scintillating oral argument and said, "I have just heard a symphony!"

Unfortunately, time constraints in many appellate courts affect this exhilarating experience. The white, yellow, and red lights, or the timer, can stop you just short of the nirvana just described. Immerse yourself, but keep an eye on the clock.

Your brief should have been focused. Your oral argument should be even more focused. Don't read a prepared statement. You and the judges know what the case is about. Discuss the outcome-determinative issues. Don't worry about anything else. You have nowhere else to go that is nearly as important.

The final piece is energy. Not theatrics. Oral argument is, after all, a conversation.

But energy! Goodness gracious, it doesn't get much better than oral argument. It is your Super Bowl, your Game 7. It is being at the foul line, with time expired, down one, shooting one-and-one. For an attorney, nothing is more intellectually stimulating than oral argument. Embrace it!

* * * * *

You're at the podium. Because you're prepared, you are relaxed and confident. You're focused: nothing else is going on in your mind. You're excited to be here. You're saying to yourself, "this is just the best!"

Now, you just talk with the judges. And if, because you're having such an extraordinarily wonderful experience, a smile comes naturally to your face, that's allowed, too.

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Oral Argument: Not a Useless Exercise

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She extends special thanks to Irene Bizzoso and Robert H. Thomas, whose outreach to judges greatly expanded the range of participation. "I could not have done this article without their assistance."

Cameras in the Courtroom: Why SCOTUS Should Follow State Supreme Court Precedent

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The authors thank Jason Byrne, a partner at Warner Norcross & Judd, LLP and chair of its Insurance Practice Group, for sharing his experiences using the court's video archive to prepare for oral arguments in the Michigan Supreme Court. They also thank Matt Nelson, chair of Warner's Appellate Practice Group, for his insights as a recent oral advocate in the United States Supreme Court.

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Social Media and Appellate Courts: Our Experience Blogging Oral Arguments

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A "How To" When Preparing for Multiple Oral Arguments

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"Effective Oral Advocacy: What You Really Need to Know"

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Presenting Your First Oral Argument

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Relax, Focus, and Enjoy

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