

1-1-1977

Preparation and Presentation of the Oral Argument in a Court of Review, 13 New Eng. L. Rev. 265 (1977)

Michael Closen

Marc Ginsberg

John Marshall Law School, 9ginsberg@jmls.edu

Follow this and additional works at: <http://repository.jmls.edu/facpubs>



Part of the [Courts Commons](#), [Legal Profession Commons](#), and the [Litigation Commons](#)

Recommended Citation

Michael Closen & Marc Ginsberg, Preparation and Presentation of the Oral Argument in a Court of Review, 13 New Eng. L. Rev. 265 (1977).

<http://repository.jmls.edu/facpubs/311>

This Article is brought to you for free and open access by The John Marshall Institutional Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of The John Marshall Institutional Repository.

Preparation and Presentation of the Oral Argument in a Court of Review †

Michael Closen*
Marc Ginsberg**

In this article, Professor Closen and Attorney Ginsberg address the widespread problem of deficient oral arguments in courts of review. Attention is given to the rules of procedure governing oral argument as well as an appropriate format for the arguments. Further, the authors offer practical suggestions designed to help one achieve skillful oral advocacy with special emphasis upon questions from the bench.

Increasing numbers of appellate cases are being decided without oral argument either because the parties decline to argue orally or the courts deny them the opportunity.¹ Furthermore, a few courts have reduced the amount of time allowed for the parties to argue.² This is a regrettable trend.

†Due to the focus of this article, it was necessary to use personal pronouns frequently. For style and clarity, the authors have chosen to employ one gender referent throughout. Accordingly, all male pronouns should be read to include the female referent as well.

*Assistant Professor of Law, The John Marshall Law School; B.S. Bradley University, 1971; M.A. Bradley University, 1971; J.D. University of Illinois, 1974; Law clerk to the Illinois Appellate Court for the Fourth District (1974-76 & 1977-78); Lecturer in Law, University of Illinois (Spring term, 1974).

**Law Clerk to the Illinois Appellate Court for the First District; Instructor in Law, The John Marshall Law School; B.A. University of Illinois, 1972; M.A. Indiana University, 1975; J.D. The John Marshall Law School, 1977.

1. See ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, *Standards Relating to Appellate Courts* (1977), § 3.35 "Oral Argument," pp. 56-57; Godbold, *Twenty Pages And Twenty Minutes — Effective Advocacy On Appeal*, 30 SW. L. J. 801, 801-02 (1976); Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257, 265-69 (1973); *SJC To 'Summarily Affirm'*, MASS. L. WEEKLY, Dec. 5, 1977, at 1, col. 3.

2. In certain instances, the time limits for oral arguments have been reduced from the usual 30 minutes to only 15 or 20 minutes. "The Fifth Circuit, of necessity, now schedules the majority of its oral argument cases for twenty minutes to the side." Godbold, *supra* note 1, at 816. An earlier authority reported that to facilitate a determination on the advisability of oral argument, the Fifth Circuit has delineated four classes of cases, including those "in which the court concludes

[O]ral argument gives important service to the imperatives of appellate justice. Specifically, it heightens the judges' sense of personal responsibility. It provides them with an opportunity to test their own thinking in a direct way with counsel available to correct error. Some judges assimilate ideas more readily by oral than by written transmission; and some ideas are more readily transmitted by oral means. Thus, the quality of decisions is likely to be enhanced.³

Although brief writing is the key medium for argument by the parties on appeal,⁴ oral argument can enhance the decision-making process⁵ if counsel artfully prepares and makes the presentation. Unfortunately, counsel does not often achieve this goal,⁶ and therefore, more attention should be directed to the art of developing and presenting the oral argument.⁷ While the general lack of skill in appellate practice has been attributed to the belief of many attorneys that the preparation of a record and brief is dull and uninteresting,⁸ this explanation obviously has no application to the oral argument, which should be an exciting and challenging element in the appellate process.

The purposes of the oral argument are to supplement the persuasive impact of the briefs and to provide the court with the opportunity to clarify and test the arguments. These goals can be accomplished by counsel's selective emphasis of the important portions of the briefs and by explaining arguments in response to questions from the court. The reason that counsel may desire to orally supplement the briefs or that the court may need to verbally examine the theories of a party is that frequently the briefs are not well-written. Indeed, the oral argument "is a medium of communication that is superior to written expression for

only 15 minutes oral argument per side would be helpful." Haworth, *supra* note 1, at 275.

3. P. CARRINGTON, D. MEADOR, AND M. ROSENBERG, *JUSTICE ON APPEAL* 17 (1976).

4. This article will not directly discuss brief writing. On that subject, see generally BOARD OF STUDENT ADVISORS, HARVARD LAW SCHOOL, *INTRODUCTION TO ADVOCACY: BRIEF WRITING AND ORAL ARGUMENT IN MOOT COURT COMPETITION* (1970); M. PITTONI, *BRIEF WRITING & ARGUMENTATION* (3d ed. 1967); E. RE, *BRIEF WRITING AND ORAL ARGUMENT* (4th ed. 1974); F. WIENER, *BRIEFING AND ARGUING FEDERAL APPEALS* (1967).

5. ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, *supra* note 1, at 56; oral argument not only improves the appellate decision-making process but also contributes to the public visibility of the appellate process and, thus, to judicial accountability. *Id.* See also Jacobson, *The Arizona Appellate Project: An Experiment in Simplified Appeals*, 23 U.C.L.A. L. REV. 480, 481-82 (1976).

6. In 1947, Mr. Justice Wilkins of the Supreme Judicial Court of Massachusetts commented that "[a]lthough appellate argument is a common occurrence and represents the culminating competitive effort in the legal contest, it is probably a fact that this is the least qualitative accomplishment of the bar as a whole." Wilkins, *The Argument of an Appeal*, 33 CORNELL L. Q. 40, 44 (1947). Similar remarks have been made over the years. See Honigman, *The Art of Appellate Advocacy*, 64 MICH. L. REV. 1055, 1068 (1966); Jacobson, *supra* note 5, at 484.

7. For further reading on the subject of oral argument, see note 4 *supra*. Regrettably, the trend away from oral argument is likely to have a negative, rather than a positive, impact upon its quality.

8. Honigman, *supra* note 6, at 1068.

many appellate counsel and many judges.”⁹

Although oral argument occurs in an adversary setting, counsel should strive to foster a conversational atmosphere. The oral presentation should approximate a discussion, a free exchange of ideas between counsel and the court. Certainly, the oral argument should not be a speech *to* the judges but rather a conversation *with* them. Only where a dialogue develops will counsel be able to fully achieve the objectives of emphasizing and clarifying issues.

Of course, counsel must be cautioned that to appeal a case is not necessarily synonymous with an obligation to argue it orally. In the interest of judicial economy, counsel should stand on the brief particularly in those instances in which there is no significant controversy.¹⁰ Thus, if the facts are simple or undisputed, or if there is a clear legal precedent, a case should be submitted, if at all, on the briefs alone.

On the other hand, the great majority of cases will involve factual disputes and uncertainties concerning controlling precedents and will, therefore, be appropriate for oral argument. This article attempts to guide counsel in the preparation and presentation of the oral argument in a court of review. First, the general rules of court are considered along with the format for the arguments. Next, suggestions are made with respect to the appellant's argument, the appellee's argument, and the appellant's rebuttal. Then, various categories of common questions frequently asked by courts are identified and discussed. Finally, comments are offered regarding the actual delivery of the oral presentation.

I. RULES OF COURT

Many of the rules governing oral argument have been codified, and counsel should be certain to become familiar with the rules of the court in which he will argue. Thorough knowledge of the rules of appellate practice will spare counsel the substantial embarrassment of finding that he has violated a clear procedural rule. Although each jurisdiction, and even the courts of review within a jurisdiction, may have adopted individual appellate rules governing oral argument, there exists considerable uniformity throughout the country in both the state and federal courts.¹¹

9. ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, *supra* note 1, at 56.

10. If a potential appellant realizes that there is no major controversy presented by the adverse judgment of the trial court, a frivolous appeal should not be filed. The subject of frivolous appeals has received recent comment, Godbold, *supra* note 1, at 805, including the sanctioning of the frivolous appellant. See Note, *Heller v. Osburnsen: Slapping Down the Frivolous Appellant*, 38 MONTANA L. REV. 377 (1977).

11. Compare (in terms of time allowed, content of argument, stylistic requirements, etc.) SUP. CT. REV. R. 44, 45 and FED. R. APP. P. 34 (including the rules pertaining to the individual circuits); and CAL. PRAC. C. R. 22, 28(f); and ILL. SUP. CT. R. 352; and MASS. R. APP. P. 22, and N.Y. R. APP. P. ¶¶ 600.11(f), 670.22, 731.6, 732.6.

In almost every appellate court, a party who has filed a brief is automatically entitled to exercise the privilege of presenting an oral argument and will be informed of the actual date and time by the clerk.¹² Some courts have the additional requirement that a party make a formal request for oral argument.¹³ However, in either instance, the filing of a brief is a condition precedent to entitlement to argue orally.¹⁴ Within a reasonable time prior to the date set for oral argument, counsel may by motion or notice seek postponement of, or withdrawal from, the argument.¹⁵ Certainly, to relinquish the opportunity will not constitute a waiver of the issues on appeal or a voluntary dismissal of the appeal, for the case is then submitted exclusively upon the briefs. Only one side in a particular case may choose to present an oral argument, and such procedure is recognized and approved by the rules.¹⁶

Oral argument is a privilege and not a right.¹⁷ Therefore, a court of review may deny the parties an opportunity for an oral argument and dispose of the case solely upon the written briefs. While this procedure should be used sparingly, it will be employed in those cases which involve no substantial question.¹⁸ Although one may decline to present an oral argument (or fail to request that opportunity where necessary), the appellate court may nevertheless order the parties to argue orally.¹⁹ Such a mandate may issue where a case is especially significant or controversial and the court determines that it would be assisted by counsel's arguments.

The length of the oral arguments varies somewhat from court to court. However, as a general proposition, each side is allowed thirty minutes to argue its position.²⁰ If only one party is to present an argu-

12. See, e.g., SUP. CT. REV. R. 44(6) (oral argument will not be heard if there is no brief filed) and 45(1) (the Court looks with disfavor on the submission of cases without oral argument); TEX. R. C. P. 423.

13. See, e.g., ILL. SUP. CT. R. 352(a).

14. See *Jacksboro Nat'l Bank v. Signal Oil & Gas Co.*, 482 S.W. 2d 339, 342 (Tex. Civ. App. 1972); *Smith v. Virginia Transit Co.*, 206 Va. 951, 147 S.E. 2d 110, 112 (1966); ILL. SUP. CT. R. 352(a).

15. See FED. R. APP. P. 34(a) (postponement); ILL. SUP. CT. R. 352(a) (waiver); MASS. R. APP. P. 22(e) (postponement), 22(g) (waiver).

16. Such recognition and approval is evidenced by reduced time limits for oral argument if only one side argues. See ILL. SUP. CT. R. 352(b). See also MASS. R. APP. P. 22(e) (permits the appellate court to hear the oral argument of one side if the other fails to appear).

17. See *F.C.C. v. W.J.R., The Goodwill Station, Inc.*, 337 U.S. 265 (1949); *Sabatini v. Travelers Insurance Co.*, 1976 Mass. Adv. Sh. 384 (1976), 341 N.E. 2d 880, 882 (1976) (no constitutional right to appellate oral argument), and cases cited therein. *But see Note, Oral Argument — A New Constitutional Right?*, 37 LA. L. REV. 1260 (1977).

18. See ILL. SUP. CT. R. 352(a).

19. See, e.g., SUP. CT. REV. R. 45; FED. R. APP. P. 34(f); ILL. SUP. CT. R. 352(g); MASS. R. APP. P. 22(g).

20. See SUP. CT. REV. R. 44(3); FED. R. APP. P. 34(b); CAL. PRAC. C. R. 22; ILL. SUP. CT. R. 352(b); MASS. R. APP. P. 22(b); TEX. R. C. P. 498. In the Texas Courts of Civil Appeals, each side may be permitted an hour for oral argument with an additional twenty minutes in conclusion by

ment, slightly less time may be allotted.²¹ The appellant presents the argument first, and the appellee or respondent follows. The appellant is then given additional time for a rebuttal (generally limited to ten or fifteen minutes).²² Although a specified amount of time may be established by rule, there is no requirement that a party use all of it, and as will be recommended later,²³ counsel should not prolong the argument simply to use unexpired time. Furthermore, the court may terminate an argument in progress when in its discretion greater discussion is deemed unnecessary.²⁴ Although the rules permit counsel, in advance of the date of oral argument, to request additional time for presentation,²⁵ courts seldom grant such petitions. If, during the course of the argument, the court recognizes that counsel needs additional time, the court may continue to question beyond the established time limits or inform counsel that additional time will be permitted to complete the argument. Otherwise, counsel is obliged to conclude immediately at the end of the allotted time.

While there may be a temptation to read at length from case law, briefs, or the record on appeal, such practice is usually ineffective and almost universally prohibited by rule.²⁶ This prohibition is not designed to hamper counsel in making a thorough presentation, but rather to encourage explanation and clarification of his own theories. Issues or arguments which counsel attempts to raise but which are unmentioned in the briefs will be prohibited or disregarded by the court.²⁷ This principle seeks to protect one's opponent from surprise and allows the adversary an opportunity to prepare a response in advance.

II. THE FORMAT FOR THE ARGUMENTS

At oral argument, the appellant is given the opportunity to speak first followed by the appellee or respondent, and the appellant is given the opportunity to speak last in a rebuttal presentation to the court. Although no specific format for each presentation is prescribed by the rules, it should generally follow the organization of the briefs.²⁸

appellant. TEX. R. C. P. 426.

21. See, e.g., ILL. SUP. CT. R. 352(b).

22. SUP. CT. REV. R. 44(2); FED. R. APP. P. 34(c); CAL. PRAC. C. R. 22; ILL. SUP. CT. R. 352(b); MASS. R. APP. P. 22(c).

23. See p. 274 *infra*.

24. See FED. R. APP. P. 34(b); ILL. SUP. CT. R. 352(b); MASS. R. APP. P. 22(b).

25. See SUP. CT. REV. R. 44(3); FED. R. APP. P. 34(b); ILL. SUP. CT. R. 352(b); MASS. R. APP. P. 22(b).

26. See SUP. CT. REV. R. 44(1); FED. R. APP. P. 34(c); ILL. SUP. CT. R. 352(c); MASS. R. APP. P. 22(c).

27. See *Henningson, Durham and Richardson v. Prochnow*, 13 Ariz. App. 411, 477 P.2d 285, 289 (1970); *Marr v. Postal Union Life Ins. Co.*, 40 Cal. App. 2d 673, 105 P.2d 649, 656 (1940).

A. Appellant's Argument

The appellant's first presentation should contain the following elements. First, it is appropriate to give a short introductory greeting to the court. Counsel's first words might be the traditional "May it please the Court" or the less formal "Good morning, Your Honors" or some other fitting remark. Next the attorney should announce his name and identify the client whom he represents.

Second, a statement of the nature of the case should be presented. This should be a very short summary of one or two sentences identifying the kind of action involved and the judgment or order being appealed.

Third, the issues to be discussed should be listed. This procedure allows counsel to inform the court of the organization to be used during the argument. Counsel should number and state each of the issues in the sequence in which they will be argued. Furthermore, counsel should identify any issue which will not be mentioned but upon which he will stand on the brief. In this way, counsel alerts the judges to those issues which he does not care to address (and concerning which he does not wish to be questioned). Of course, the judges are not bound to comply and may question counsel about any matter.

Fourth, a brief statement of the facts should be given. A careful presentation of the facts is critical to an effective oral argument because the appellate court will decide the case based upon its unique facts and not upon abstract legal propositions.²⁹ In addition, a clear statement can be significant in creating an excellent first impression, especially in those courts where the judges are unfamiliar with the case. Although the summary should be thorough and objective, it should also be concise in order to allow sufficient time to present the argument of the case. However, a statement of the facts should not be made to those courts which study a case before oral argument and inform counsel that they have done so.³⁰ Unfortunately, not all courts warn counsel in advance, and therefore, the advocate should be aware that the recital may be interrupted by the court with instructions to forego further summary. While such a comment should not be viewed as a criticism of the presentation, counsel should move directly into the argument.

Fifth, the substantive argument is given. Counsel should begin by restating the first issue in declarative form and then presenting the argu-

28. See, e.g., ILL. SUP. CT. R. 341(e); SUP. CT. REV. R. 40; FED. R. APP. P. 28.

29. The context of the controversy is extremely important.

It is not enough that counsel understands perfectly what he is saying in his written and spoken words. All is in vain unless the court understands But in a significant percentage of cases the advocate is so intent upon the ultimate aim of persuasion that he overleaps the threshold step of making clear to the court what he complains of, how it came about, what he wants the court to do about it, and why.

Godbold, *supra* note 1, at 803.

30. See p. 272 *supra*.

ment on that point. After finishing the first point, counsel should restate the second issue, argue it, and so on until the conclusion of the entire argument or until the time has expired. Each issue should end with a summary statement or conclusion which ties the argument together and allows counsel to move smoothly into the next issue.

Sixth, counsel should present a conclusion at the end of the entire argument requesting the specific relief sought. This conclusion should be only one or two sentences long. Even if time for the oral argument has expired, counsel should still provide a conclusion (which takes only a matter of seconds), thus leaving a favorable last impression and emphasizing the relief desired.

B. Appellee's Argument

The format of the appellee's presentation (which is the appellee's only opportunity to address the court) should be as follows. First, the appellee should present opening remarks similar to those given by the appellant including greeting the court, announcing his name, and identifying whom he represents. Second, the appellee should number and state the issues to be argued. Also, the appellee should identify any issues which will not be argued but upon which he will rely on the brief. Third, he should consider the statement of facts if one was presented by the appellant. Appellee may agree with the appellant's statement and indicate this agreement expressly or impliedly by omitting this segment of the argument. If the appellee does not fully agree, he should note any inaccuracy or omission of the appellant's statement (with the caveat that 'nit-picking' is counter productive). However, the appellee should never attempt to repeat the entire statement of facts. Such duplication merely wastes time which can more effectively be devoted to the argument itself. Fourth, the appellee should present the arguments on the issues. He should number and state each contention and then argue it in the same format followed by the appellant. Fifth, the appellee should present a conclusion requesting the appropriate relief, which is usually to affirm the trial court. However, there will be instances in which the appellee will be able to partially concede the relief sought by the appellant.³¹

C. Appellant's Rebuttal

After the appellee has concluded the presentation, the appellant has the opportunity to give a rebuttal if desired. This should be a very brief

31. In a civil case, a defendant-appellee might concede that there is liability but argue that the relief sought is inappropriate. In a criminal case, the government-appellee might argue that there is criminal liability but concede that the sentence imposed is excessive. Of course, both parties should seek relief in the alternative wherever appropriate.

address. Indeed, the appellant should dispense with the amenities used to introduce the appellant's and the appellee's arguments. If given, a rebuttal must be strictly limited to a refutation of those arguments raised by the appellee during the oral presentation. Counsel should begin immediately to refute the opponent's arguments point-by-point, following the organizational pattern of appellee's issues. Appellant may not use the rebuttal to reargue the case or to raise points which were not covered during the first presentation. Although there is no requirement that appellant give a rebuttal (even if rebuttal time has been reserved), it should be presented if the appellee has said anything to which a response appears necessary.

III. SUGGESTIONS FOR THE ARGUMENTS

This section offers certain pertinent suggestions regarding the preparation and presentation of the oral argument. These guidelines apply equally to the arguments of the appellant, the appellee, and the appellant's rebuttal.

Since there is usually a period of time between the filing of the briefs and the oral argument, counsel must be certain to update the research relied upon in the brief. This includes verification³² of the continued validity of authorities cited and examination of recent developments in case and statutory law. However, because the scope of oral argument is limited to theories and authorities raised in the briefs,³² counsel should file a motion to supplement the briefs when it is determined that additional cases should be argued.³³

Counsel should be advised that a court's pre-oral argument preparation of the case spans a wide range: from a total lack of familiarity to a thorough knowledge. The extent of judicial preparedness can at times be discerned from personal experience with the court, from the experiences of other attorneys, or from a direct inquiry with the clerk of the court. In the absence of reliable contrary information, counsel's safest strategy is to assume that the court is unfamiliar with the case and to present a comprehensive argument, including a detailed statement of the facts.

Although the thirty minutes for argument theoretically may seem more than sufficient, most advocates will find it barely adequate for a superficial discussion of their cases, due to questioning from the court. However, a skillful advocate will not be frustrated by time constraints but will structure the argument to accommodate them. Counsel must be highly selective in choosing which issues, theories, and authorities to develop, recognizing that although several may have been examined in

32. See p. 269 *supra*.

33. FED. R. APP. P. 27, 28(c) (and notes of Advisory Committee Rules); ILL. SUP. CT. R. 361.

the briefs, only a few can be argued effectively. Thus, only the most significant theories and authorities can be discussed. In addition, it must not be forgotten that considerable emphasis should be placed upon the facts of the case. The greatest concern of the court of review is to decide the case before it, and that case is defined by its peculiar facts.³⁴

The most important points should be at the top of the list of issues to be argued. In this way, should time expire before counsel has completed the argument, counsel can be confident that the critical issues will have been discussed, and must simply rely upon the brief as far as the remaining points are concerned. To do so will not result in a waiver of those remaining points.

Both parties should present affirmative and negative arguments. An affirmative argument is made when counsel asserts legal theories in support of his case without attacking the argument of opposing counsel. A negative argument is an attack upon opposing counsel's legal theories and authorities. Employing both techniques is more effective than using either alone, particularly when these arguments are clearly delineated rather than muddled together.

Counsel must refrain from interrupting the oral argument of his opponent. Objections similar to those made at the trial level are not permitted during the oral argument. Therefore, counsel must be attentive to the opponent's address, including questions from the court and the answers provided, so that counsel can adapt the argument to emphasize points of judicial concern and to rebut the responses of the opponent to the court's inquiries. In this manner, counsel can capitalize on a unique opportunity to rebut directly his opponent's case, an opportunity which may be lost if counsel merely rehearses the argument silently while the opponent addresses the court. The following procedure is recommended. While the appellant is speaking, appellee should follow along on an outline of material for presentation and add notations at appropriate places concerning significant points disclosed during the opponent's argument. Of course, appellant will not have prepared an outline for the rebuttal before the oral argument actually begins, because the rebuttal is restricted to refuting points presented by appellee during his oral argument. Thus, until the appellee addresses the court, appellant will not know what to rebut. Appellant's outline for the rebuttal speech must be prepared while the appellee speaks and in response to what the appellee argues. The skillful advocate will refer to specific points raised by the opponent. This technique will not only impress the judges but also will identify and contrast the positions of the parties more clearly than if each side merely had presented its argument

34. See p. 270 *supra*.

with no mention of the opponent's viewpoint.

Although not required, appellee should address at least the same issues as addressed by the appellant, although not necessarily in the same order. Appellee's omission of any issues argued by appellant would clearly disclose weaknesses in the appellee's position. While appellee is not required to follow the organization of issues established by the appellant, he should follow the general rule, suggested earlier, that the most important issues be argued first.

Finally, counsel should sit down when he has completed his planned presentation and has nothing more to say. To ramble on solely to fill the time remaining for the argument is to invite disorganization, contradictions, and confusion.

IV. QUESTIONS FROM THE COURT

The characteristic which distinguishes an oral argument from other kinds of public speaking situations is the opportunity of the judges to interrupt counsel to ask questions. Although this fact tends to incite anxiety in counsel, an attorney should welcome questions. When a judge asks a question, he indicates an interest in the case and identifies those portions of the argument which he considers significant. Counsel then knows where to place the emphasis of the argument. Moreover, questions from the court help counsel to clarify the arguments. The judges will tend to ask questions in areas of uncertainty and controversy.

On occasion, appellate judges assume the role of devil's advocate by aggressively questioning one side in order to ensure that no flaws exist in that party's position. Judges will usually have a preliminary sense of which side should win, and they may wish to test that side in order to convince themselves that they are correct. Therefore, the attorney who suffers the most brutal questioning will frequently be the one who wins. On the other hand, there will be occasions when judges will assist counsel by asking helpful questions which lead to favorable responses (questions which move the argument forward or suggest a new way to explain a point).³⁵ Counsel need not be reluctant to accept such assistance.

When asked a question by the court, counsel must answer directly and immediately. If counsel attempts to evade a question, the judge will simply ask again and tell counsel to answer the question as asked. When an appellate judge makes an inquiry, he considers it relevant at that point, and thus does not want to be told that the question will be answered later. Counsel must be cautious not to antagonize the judges, for they will always win an argument. Indeed, counsel must be respectful and courteous to the court at all times (even when counsel believes

35. Godboid, *supra* note 1, at 818.

that the judges are not comprehending the argument or are suggesting irrational, unsupported, or inequitable positions). On the other hand, there is no requirement that counsel withdraw from a position simply because the court displays some opposition to it. Counsel should stand his ground firmly. Also, counsel must not attempt to question the judges. Judges question, counsel answers, and these roles do not change.

In preparation for the argument, counsel should attempt to anticipate the questions that are commonly asked. In this regard, there are several categories of common questions which can be identified.³⁶

(1) *Facts of the Case.* Because the court is most concerned with the disposition of the particular case at hand (as opposed to a hypothetical legal proposition), inquiries from the court will most frequently be directed to the facts of the case. Questions of this sort will be directed toward both the procedural occurrences in the lower courts and the facts which precipitated the suit. Of course, counsel should be completely familiar with the facts of his case, but in order to assure that he can quickly obtain any factual information requested, he should have the record, the excerpts, and the briefs readily at hand at the podium. Also, the court will occasionally ask counsel where a certain fact can be located in the briefs or record, and counsel must be ready to quickly refer to the record or briefs to find it.

(2) *Information about Authorities.* At oral argument, counsel should not present the full citation for the authorities he argues. Instead, counsel should refer to authorities by name only. If the court wishes to have more information about an authority, the court will ask for it or will ask counsel where the authority appears in the brief or an opponent's brief. Counsel should have available full information regarding cases, statutes, and other forms of authority. Regarding cases, counsel should know the case names, citations, years of decisions, and courts which decide the cases. Because counsel does not memorize such information, counsel should write the necessary data on paper or note cards and have them available at the podium for quick reference. Again, the briefs should be at the podium so that counsel can note the location of certain authorities in the briefs if asked to do so by the court.

(3) *Supportive Case Analogies.* When counsel cites a key case in support of his position, the court will frequently question him to test the validity of the analogy between the cited case and the one on appeal. Counsel should be ready to completely analyze such case authorities, in-

36. A partial list of categories of questions to be anticipated can be found in INTRODUCTION TO ADVOCACY: BRIEF WRITING AND ORAL ARGUMENT IN MOÖT COURT COMPETITION, *supra* note 4, at 77-80.

cluding their facts, reasoning, and holdings. Information in this regard should be included on the notes prepared by counsel (with reference to category No. 2 above).

(4) *Controlling Statutes and Constitutional Provisions.* Because a court of review prefers to defer to the legislature whenever possible, it will want assurance if a statute or constitutional provision governs the procedural or substantive aspects of the case. Counsel should be familiar with any applicable statutes or constitutional provisions, and should have a full text copy of them available at the podium, including committee comments and legislative histories when available.

(5) *Opponent's Argument.* If counsel has not thoroughly attacked his opponent's case, or before counsel has had an opportunity to do so, the court may inquire of counsel as to the validity of a particular case analogy or theory of his opponent. Counsel must be thoroughly familiar with his opponent's argument and prepared to rebut it.

(6) *Policy Considerations.* Courts of review are always concerned with the consequences of their decisions (even though they may not articulate such interests in their published opinions). Thus, the policy considerations involved in a case on appeal as well as policy questions of "where to draw the line" regarding the causes of action on appeal are frequently the subject of questions during oral arguments. Generally, counsel will be well-advised to keep the policy lines drawn as closely as possible to the boundaries of the case, for to admit that expansive policy effects will result from a favorable decision is to assume a burden substantially greater than that directly associated with the case on appeal.

(7) *Relief Sought.* The court will be concerned with the question of what specific relief is sought by a party as to each of the issues argued. Counsel should be prepared to identify and justify any relief requested as well as alternative forms of relief which might be available to satisfy his client. After all, the fundamental reason for arguing on appeal is to seek some form of relief from the court of review, and counsel must therefore understand fully the relief available to both parties.

Apart from the difficulty of dealing with the answers to the questions themselves, there is the problem of the impact of the questions on counsel's prearranged organization of the argument. Seldom will a judge's questions perfectly fit into the organization planned by the advocate. Questions will deal either with material that has already been covered or with issues not yet treated. The skillful advocate will be flexible and will adapt the organization to the questioning of the court. Counsel should attempt to use the questions of the court to develop the argument and to keep the argument flowing as though the questions sought answers which comport precisely with counsel's organization. In

this manner, counsel can use the questions to his advantage. Certainly, the effectiveness of counsel's argument will be damaged if it becomes a series of abrupt questions and answers lacking continuity.

To assist in overcoming any organizational problems created by judicial interruptions, counsel should prepare enough material to exhaust nearly all of the allotted time for the oral argument. Counsel should then determine what material is especially important for presentation and what is less significant. Identifying material in this fashion will help counsel recognize what material may be deleted from the presentation if considerable time is spent with questioning by the court. Counsel should avoid repetition of ideas. Thus, if counsel has been asked by the court about a point which was to be covered later in the argument, counsel should not treat that point again when he later comes upon it.

Once counsel's time has expired, he is obliged to sit down. Thus, if he has not had the opportunity to discuss some issues, they will simply not be discussed at all. While it is within the court's discretion to give counsel more time to discuss such issues, counsel cannot depend upon the court's exercise of that discretion.

V. MANNER OF DELIVERY

The final subject is the actual manner of delivery. Naturally, counsel should abide by the usual formalities of the courtroom setting, such as showing respect to the judges (by referring to them as "Your Honor," "Mr. Justice," or "Judge"), by dressing appropriately, and by rising when the court enters and leaves the courtroom.

As noted earlier,³⁷ reading at length is prohibited by the rules. Reading from a manuscript would deprive counsel of the spontaneous, conversational effect desired. Counsel should use only brief notes, such as an outline of the key points to be covered. Also as noted above, counsel should take the record, briefs, abstracts, practice rules, and any other important materials to the podium for quick reference when necessary during the course of the argument.

In presenting the oral argument, counsel should speak in a voice which is loud enough to be heard and confident in tone but which does not amount to shouting to the court. The "calm voice of reason" should predominate in the court of review rather than the dramatic presentations observed by some juries. Similarly, counsel's gestures should be reserved, and the advocate should restrain from pacing. A podium or table will be present in the courtroom, and counsel should restrict himself to the area immediately behind the podium or table. If

37. See note 26 *supra* and accompanying text.

counsel has a tendency to gesticulate or pace, he might restrain himself from such gesturing or pacing by placing his hands on the podium or table. Counsel should maintain eye contact with the judges in order to read their feedback. If counsel notes that the facial expressions of the judges show uncertainty or disagreement, he should attempt to explain his points more completely or differently. If counsel observes that the judges are smiling or nodding their heads as he is discussing an issue, he will know not to treat that issue in greater detail but to move on to a more controversial point.

Finally, rehearsal of the oral argument should be done in moderation — once or twice at most. Rehearsal is largely a useless effort because counsel's organization and presentation will be disrupted by questions from the court. Furthermore, too much will tend to make one's presentation of an argument stale rather than spontaneous and interesting. The best preparation counsel can do will be to become completely familiar with the facts of the case and the theories to be argued.

VI. CONCLUSION

The trend away from oral argument (both its elimination and the reduction of the time allowed) should be accepted with great caution and with narrow limitations, should be studied carefully, and should be reversed where possible. Although the written brief is the primary method for presenting a case to a court of review, the oral argument can be a significant element in the decision-making process on appeal. "[A]n appellate judge knows that he cannot cross-examine a brief; he knows that he cannot obtain from a printed document the clarification of issues and positions that the questioning of counsel will afford."³⁸

If the advocate adheres to the suggestions for preparation and presentation of oral argument offered in this article, he will be more likely to make this oral presentation the significant element it was intended to be. This skillful advocate will demonstrate (1) an understanding that a conversational atmosphere should be fostered, (2) an appreciation for the severe time limitation imposed by the rules of appellate practice, (3) a thorough familiarity with the case, (4) an understanding that the facts of the case should receive the greatest emphasis, (5) an understanding of how to deal with questions from the court, and (6) the ability to recognize significant material which should be presented (and less important material which should be deleted) during the oral argument.

38. F. WIENER, *supra* note 4, at 278.