Oral Argument Before the Third Circuit—The Privilege and Preparation

by Edward T. Kole

The United States Court of Appeals for the Third Circuit sits just a few blocks from Independence Hall, across the street from the National Constitution Center and Liberty Bell, in Philadelphia, PA. Appearing in any court is an honor and a privilege, but arguing on such hallowed ground is particularly exciting. Of course regardless of the historic significance of the venue, the objective of any practitioner is a ruling in their client's favor. This article will provide helpful tips for success before the Third Circuit Court of Appeals.

As with anything, the key to a successful argument starts with preparation. In order to master a case, a practitioner should:

a. **Start with the district court's decision.** Be sure to read and re-read the decision and master the court's reasoning.
b. **Become immersed in the briefs.** Know the case backwards and forwards.
c. **Go back over the appendix.** It may be years since the trial. Review the evidence and be as familiar with the documents as when the case was tried.
d. **Put together a binder of the cases on which both sides relied.**
e. **Update the research.** Make sure to be aware of any recent case law on the relevant subject matter up to the day of argument. If an important decision or legal development has occurred after the briefing schedule has concluded, consider filing a letter under Federal Rule of Appellate Procedure 28(j).
f. **Know the circuit panel.** The makeup of the panel is announced prior to the argument. Be sure to research the judges, look at their decisions, and talk to others who may have appeared before them.

Prepare an Outline

Do not expect to give a prepared speech and speak unabated; there will undoubtedly be many questions from the bench. Therefore, the best approach is to draft an outline rather than compose a full speech.

If possible, focus the outline on three areas: the key points to be made, the arguments that will be raised by the adversary, and the questions the court will likely raise. Make sure the outline incorporates the essential facts, relevant evidence and testimony, and key cases. Make it easy to read and keep in mind the court will normally permit 15 or 20 minutes for the presentation.

Practice the Argument

Once the case has been mastered and the outline has been prepared, practice the argument. A mock moot court is a valuable tool. If the practitioner's firm includes retired judges or attorneys who would fit the bill, ask them to read the briefs and lower court decision and conduct a mock argument. Otherwise, consider hiring retired judges or ask other attorneys for assistance.

The moot court, among other things, will allow the practitioner: 1) to see how the presentation works; 2) to practice responses to see how they resonate; 3) to see how comfortable he or she is with the material and whether moving from topic to topic can be accomplished with ease; 4) to identify unanticipated questions; and 5) to adjust timing, if need be.

Practicing an argument should be part of one's basic preparation. The argument outline should then be revised based on the outcome of this process.

The Argument Notebook

Practitioners often feel the need to bring the entire file with them because they fear not having a document that is needed when they appear in court. As a practical matter, one should

have the briefs, decision, trial/hearing transcript, appendices and copies of the relevant cases/statutes in the courtroom.

When speaking at the lectern, the author relies on an argument notebook, which generally includes the following:

- the argument outline;
- the lower court's decision, annotated with comments and tabbed for easy reference;
- a copy of the absolute key cases (highlighted for any meaningful quotes) with a brief summary in outline form of each case as a quick reference;
- any key statutes, annotated for easy reference;
- any really critical exhibits and any critical testimony.

In addition to the outline, it is advisable to bring the appellate briefs as well. The appendix can be out on counsel table should it be needed for reference.

Understanding the Clock/Light

Just like a traffic light serves as a guide to roadway safety, one's argument will be guided by a light with similar color designations. The light will be green during the first 80 percent of the practitioner's main argument. The light will turn to amber for the remaining 20 percent (or closing) of the argument. And the light will turn red at the conclusion. While the lights are there as a guide, the author finds it helpful to place a watch at the top of the podium to better monitor the passage of time and avoid running out of time without hitting all of the key points.

Oral Argument

When the time arrives for oral argument, the best preliminary advice is to not become overwhelmed by the moment.

Upon approaching the lectern, the practitioner must state his or her name and the name of the party he or she represents. If the practitioner is the appellant, he or she must indicate the amount of time desired for rebuttal.

While the author does not recommend prepared arguments, it is wise to prepare brief opening and closing statements in case they are needed. If given the opportunity by the court, beginning with a prepared opening starts the matter off on the right foot.

Of course the simple fact is that oral argument is, by and large, a give and take process, so practitioners should be prepared for questions and anticipate more of a conversation with the court.

The art of listening and responding to the questions posed is not always easy, but is critical to a successful argument. As the advocate, one may feel compelled to make certain points, but it is important to remember that the judges on the panel are the decision makers and their questions need to be addressed.

Consistent with this point, if a question is not clear, let the court know. And if a question cannot be answered as stated, let the court know and explain why. Ducking or refusing to answer a question can be a fatal error.

Also, while it should not need to be stated, always be respectful and deferential to the court and the adversary. Being argumentative to the court or pejorative toward an adversary will not only hurt the practitioner, it will hurt the client.

Lastly, although the opportunity may not present itself, if at all possible try to end oral argument on a high note.

Respondent/Rebuttal

While the aforesaid thoughts apply to the respondent, it is essential to listen not only to the adversary's argument, but to the questions of the court. A respondent needs to be malleable and able to adapt to any situation. One needs to be able to address the appellant's comments and, if possible, use those comments against them. Similarly, if possible, a respondent needs to be able to feed off of any comments by the court, where practicable.

Thus, a respondent needs to truly listen to the appellant's argument, take notes on what he or she has to now incorporate into the argument, and be able to mold it into the agenda of what needs to be addressed during the argument.

Again, the respondent needs to be especially careful of time. Pre-argument practice or moot court may not take into account addressing items that come up during an appellant's argument, which is all the more reason to remain mindful of the clock.

Lastly, regarding the rebuttal, the key words are 'brief' and 'essential.' Make the key points that need to be made, and make them strongly and succinctly. If there are key points to be made, showcase them. Do not bury them in a bunch of lesser points to clean up from the respondent's argument. Instead, use good judgment and discretion to focus on what truly matters.

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