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Preparing for Oral Argument

While oral argument in the California state appellate courts is usually limited to 15 or 30 minutes for each side, it takes many hours of preparation. Peg Toledo's article a few months ago in this column discussed some useful tips for preparing for and handling oral argument in the appellate courts. This article provides additional insights and suggestions for preparation for oral argument.

Prepare Your Client

I usually encourage my clients to attend the argument, especially when I am representing individuals. An appellate argument is a fascinating experience for many people; most people do not have a chance to see one. It also provides clients with a deeper understanding of the process and how the justices may be looking at their case. It may be easier for a client to understand why he or she lost the case or lost on a particular issue after seeing the argument. In addition, your client may better understand why counsel must spend many hours preparing for the argument.

If your client is planning to attend an appellate oral argument, make sure to prepare the client so that he or she knows what to expect. The client does not participate in the proceeding and does not be get to sit at the counsel table with the attorney, so the justices may have no idea that the client is even there. I also like to give my clients an idea of what I am planning to argue. Clients should understand that oral argument in an appellate court is not the same as an argument to a jury, and emotional arguments are not very useful in that context. Moreover, clients should understand if there are alternative arguments being made or arguments that are based on more technical or procedural matters, rather than the merits of the case. For example, if you are arguing that the statute of limitations bars the action against your client, the client should understand that you aren't admitting that the client committed any wrongful conduct, but simply that the statute of limitations has expired.

Finally, if you have a client who has emotional difficulty with the subject matter of the case or traumatic injuries related to the case, you might want to discourage the client from attending the argument. The oral argument can be quite upsetting for a client under those circumstances, and there is no requirement that he or she attend.

Review the Record

It is imperative that you know the record on appeal. Ideally, if you have a long record, you should take extensive notes early on in the case when you begin your review.

You can refer back to these notes when preparing for oral argument. If you have a short record, it may be enough to review and tab the important documents in the record. But with a long record, if you do not have sufficient notes from your prior review, then it is a good idea to undertake a detailed review and prepare notes showing where you can find particular documents in the record. I am not a fan of placing tabs in the record where the record is two or more volumes. I would rather take notes, which helps me to understand and retain the information better, and I can refer back to the notes anytime I wish. Instead of handwritten notes, it is a good idea to have your notes in electronic form, for ease of reference and review.

I also find that a short, one-page timeline of events can be very useful when preparing for oral argument, especially if the chronology of facts may be confusing or complicated. I like to include the date, a description of the event, and where the information can be found in the record. That way, if the justices have questions to clarify their understanding of the facts, you can have a handy one-page timeline with citations to the record with you at the oral argument.

Have a Comprehensive Understanding of the Law

Likewise, it is crucial to have a comprehensive understanding of the legal issues in the case. Obviously, you must know the main statutes, regulations, and case law at issue. If you have an issue involving interpretation of a statute—which is more and more common these days—then you should not only know the language of the statute, but also understand the statutory scheme. Read the statutes around the statute at issue and try to understand how the entire statutory scheme works. Try to envision what situation the statute was enacted to address, and consider how it fits within your case.

With respect to case law, it can be helpful to create a chart of the main cases with a short description of the facts, holding, and anything else you want to emphasize about the case. A case law chart is particularly useful if there are a lot of cases, if the cases are complicated, or if you anticipate that opposing counsel will rely on certain cases that you will want to address in response. Again, the chart should be no more than a page or two at most, so that you do not take too much material with you at the argument. A case law chart could be longer if the goal is to use it for preparation and not to bring to the argument itself.

It is also important to ensure that the authorities you are relying upon are still good law. Take some time to check all of the main cases and statutes to make sure that there are no major changes in the law. Also, if there are new cases that have been issued since the end of briefing that may be helpful to your argument, you can file a notice informing the court of any new authorities you intend to use at argument. This notice

should be filed in advance of the oral argument, so that the court and other parties have sufficient time to review those cases.

Focus on the Toughest Issues

Once you have reviewed the record and the relevant law, the next step is to think critically about the most difficult aspects of the case. The court will almost always ask the hard questions about the most troubling issues. If you have not thought about the tough questions, you won't be prepared to answer them at oral argument.

I like to take a few hours just to brainstorm about all of the difficult questions the court might ask. I also tend to ask colleagues for their help as well, since they might see the case differently than I do. After I think of all of the questions that might be asked, I prepare written answers to all of the questions. I generally do so in note form, not as a script, unless I want to make sure to use a particular phrase or term.

Practice

Once I have reviewed the record, the case law, and thought about the questions, I prepare a general outline for the argument. Then I practice giving the argument several times. I usually make a lot of changes to my outline after practicing a few times. At some point, I usually ask a friend or family member to be my audience. I also sometimes ask other attorneys to hold a "moot court" practice session, interrupting me with questions, just as in a real oral argument setting. Practice is crucial to ensure a smooth and confident delivery.

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