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Your Skills: Top 10 Tips to Prepare for Oral Argument

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The court of appeal has set your case for argument in 30 days. How should you prepare? Here are our "Top Ten" suggestions:

(1) Reread the briefs and the trial court's ruling.

By the time the court sets your case for argument, many months may pass since you filed your briefs. To prepare for argument, one good starting point is simply to reread the briefs, in order, as some judges have told us they do. Doing this provides a good overview that balances the big picture and the fine points. Other judges tell us they begin by reading the trial court's rulings or statement of decision. That makes sense, too. If you're the appellant, focus on where the court went wrong; otherwise, remind yourself of the key law and evidence that led the court to reach the right conclusion. Once you've read the briefs and the trial court's opinion, you're ready to take the next step.

(2) Re-familiarize yourself with what is (and isn't) in the record.

Next, review the "record," i.e., the appendix (or clerk's transcript or excerpts of record) and the reporter's transcript (or at least the summaries). You don't have to read every word, but pay special attention to the evidence and any rulings by the trial court. It's amazing what you will discover by going to the next level of detail in recalling what your case is about. In terms of building confidence, there's no substitute for getting back in touch with, for example, the actual language of the disputed contract provision, and the overall chronology of events. Rereading the closing arguments at trial can also be helpful in reconstructing the key issues and what the "fight" was all about. Reviewing the record can also help you avoid the dreaded question, "Counsel, where is that in the record?"

(3) Make an outline (but not a "script").

Almost never, of course, will an appellate court allow you to make an uninterrupted "presentation" of your argument. Nonetheless, it could happen. Even if it doesn't, preparing an outline will help you organize your thoughts and decide which issues are really the most important. By "outline," we don't mean a script or a word-for-word prepared speech. Or even a lengthy document with detailed headings and subheadings. An effective outline is more like a thematic summary of your most important points in the order that, given sufficient time, you will make them. Even if you don't end up using the outline, the exercise of preparing it will help you focus and feel prepared and confident. And if the unexpected happens and you do encounter Mount Rushmore, you're all set.

(4) Prepare "greatest hits —facts" and "greatest hits — law."

On one page, write down the five to 10 best facts in your case, complete with record citations and perhaps even short quotations. Then, do the same with your three or four best legal authorities, again with pin cites and verbatim quotes of the particularly helpful

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language from the opinions. As with the outline, this exercise may or may not actually help you, in the moment, in argument. Given the right question from your panel or assertion by your opponent, however, having the key facts and law at your fingertips — with pertinent citations — can build great credibility. Even if that opportunity doesn't arise, going through this exercise is a great way to help you focus on what's most important about your case.

(5) Review and update your most important authorities.

However obvious this may seem, it's still essential to review your most important cases. You don't have to read every case. But rereading the most important four or five, from start to finish, is a good idea. Make sure you also update the key cases. There's nothing worse than emphasizing a case and how important it is than to have your opponent point out it has been overruled or superseded by new authority. Alas, we've seen this happen.

(6) Write a "questions and answers" memorandum.

A great way to prepare is to pose questions — and write short answers — on as many questions as you reasonably think might come up at argument. Try to keep your answers as short as possible and create answers that are more like "thought bites" than paragraphs. (At the argument, you just won't have time for lengthy answers.) Doing this may help you look at your case in a new way and distill your key points to their essence. If time permits, you might also write a similar memorandum from your opponent's perspective. Warning: despite all your best efforts, it's almost guaranteed the court will ask a question that wasn't on your list. When that happens, just look the panel in the eye, and do the best you can.

(7) Decide how to start.

Particularly if you are the appellant who has to break the silence, it's a good idea to script out how you will begin. You should avoid lengthy (and usually boring) formal recitations and instead focus right away on what's most important. Something like, "Your Honor, I'd like to get right to the heart of the matter. What matters most in this case is _____." This direct approach maximizes the value of that magical time, just when you are getting started, when the court is likely to be most receptive. It also helps you to set the agenda rather than play defense. At least for a while.

(8) Talk with your friends and colleagues.

There's no better way to prepare for argument than to talk about your case with other people. Barge into someone's office, interrupt what they're doing, and say, "I've got an argument in the court of appeal tomorrow. Ask me anything." Then talk about the case, how to make your pitch, and listen to what your friend or colleague says. You'll be surprised at what you learn, and you will get in the habit of having a real conversation about your case. This approach is much more helpful than reading more cases or practicing before a mirror.

(9) Think about making a tactical concession.

Nothing builds credibility more than conceding a point that is not reasonably in dispute or acknowledging a weak point in your case. You might try something like, "Although I disagree with my opponent on many things, I do agree that _____." Or, "The trial court applied the correct legal test and focused on the right evidence. It just reached the wrong conclusion." Or, "I acknowledge the fourth district ruled the other way earlier this year." You get the idea. This approach can be both disarming and effective. Just make sure you don't concede anything that is game-changing. (Nothing worse than seeing a footnote in the court's opinion to the effect that, "At oral argument, counsel acknowledged her appeal lacked merit.")

(10) Know your panel.

Most times, although not always, you'll know who the members of your appellate panel will be. If you do, check their judicial biographies, talk with other lawyers who have appeared before them, and find out if they've written opinions on the key issue or issues in your case. If you've not appeared before the panel before, you might also observe them in action on another day before your case is scheduled. Being prepared is a great way to feel prepared. And feeling prepared builds confidence. In rare cases, you may also be able to remind a panel member of a case where he ruled in your favor. On the other hand, if a panel member has previously taken an unhelpful position on an important issue in your case, you might as well know that going in.

Follow these ten steps and you'll be prepared and feel prepared. And remember, when the late Supreme Court Justice Otto Kaus was asked for the secret to being a success as an appellate lawyer, he had a simple answer: "Represent respondents." Exactly. Good luck!

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