

# THE IMPORTANCE OF APPELLATE ORAL ARGUMENT

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## I. INTRODUCTION

It has become increasingly rare for an appellate court to grant oral argument for an appeal. In fact, in a small number of jurisdictions, courts will hear an oral argument only when a party requests it or the court actually orders it.<sup>1</sup> Although numerous reasons exist for this diminution in the quantity of oral argu-

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1. See Stanley Mosk, *In Defense of Oral Argument*, 1 J. App. Prac. & Process 25, 25 (1999) (citing Kan. Sup. Ct. R. 7.01(c)(4); La. Unif. R. Ct. App. 2-11.4; Mich. App. R. 7.214(A); N.M. App. P. 12-214(A); N.Y. Ct. App. R. 600.11(f)(3); Okla. Sup. Ct. R. 1.9 and identifying some jurisdictions that do not allow an oral argument unless the party requests it or the court orders it). In *George W. Bennett Bryson & Co. v. Norton Lilly & Co.*, 502 F.2d 1045, 1050 (5th Cir. 1974), the court dispensed with oral argument, stating:

[T]his case turned almost entirely on factual matters and inferences therefrom. We were given the benefit of good briefs, and appellant, in its Reply brief, was given the opportunity to reiterate its contentions and to challenge appellee's analysis of the case. This was not a case turning on unique or largely legal issues. No voluminous records prevented us from reading the entire trial transcript and exhibits. This case did not involve issues of broad social policy, new questions of governmental prerogatives and personal freedoms, or matters of important precedential value. Rather, this controversy was determined by factual issues which we were not entitled to assess anew. . . . [O]ral argument was not necessary for a full and fair resolution.

See also 11th Cir. Loc. R. 34-3; Fed. R. App. P. 34(a) (both providing a party the opportunity to state the reasons the court should, or should not, allow oral argument).

ments, the most telling is the crushing workload appellate courts face today.<sup>2</sup>

Not only has oral argument become less common, but the time allotted for oral argument has decreased. In the early 1800s, Daniel Webster argued for the appellant in *Trustees of Dartmouth College v. Woodward*.<sup>3</sup> The oral argument in that case lasted three days.<sup>4</sup> Today, appellants and appellees are often limited to fifteen minutes or less of oral argument.<sup>5</sup>

Thus, the cases that make it to oral argument typically are the ones that raise “important” or complex issues or include facts that are so complex that the judges or justices on the appellate panel reviewing the briefs encounter enough difficulty that they require clarification. This is indeed a select few of the enormous number of cases that the appellate court reviews, and the appellate party who receives oral argument should treat the situation with the importance that the appellate court accorded it.<sup>6</sup> This Article will explore the importance of oral argument, and will offer suggestions on how to prepare for this critical event in the life of a case.

## II. ORAL ARGUMENTS

A typical question that often arises when discussing or preparing for an appellate oral argument is: “Can a case be won or lost at oral argument?” Perhaps the better question is: “Can I

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2. For example, in the Eleventh Circuit, 7,535 appeals were filed in 2001 and 7,067 were filed in 2000. Fed. Jud., *Federal Court Management Statistics (Eleventh Circuit)*, <http://www.uscourts.gov/cgi-bin/cmsa2001.pl> (accessed Feb. 4, 2003).

3. 17 U.S. 518 (1819).

4. Michael A. Wolff, *From the Mouth of a Fish: An Appellate Judge Reflects on Oral Argument*, 45 St. Louis U. L.J. 1097, 1098 (2001) (citing Seth P. Waxman, *In the Shadow of Daniel Webster*, 47 Fed. Law. 48, 48–49 (Nov.–Dec. 2000)).

5. Chief Justice William C. Hastings stated:

When I first went on the [Nebraska] Supreme Court in 1978, we allowed 30 minutes to a side for argument. We have now reduced that to 10 minutes a side, with some exceptions, and we have found that the quality of argument has improved tremendously.

Mosk, *supra* n. 1, at 26 (quoting Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 294 (1st rev. ed., NITA 1996)).

6. Some commentators who believe that this diminution in the quantity and length of appellate oral arguments reflects the judicial system’s belief that oral argument should no longer play a significant role in the appellate process. See Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 Iowa L. Rev. 1, 2–3 (1986) (discussing the reduction of oral arguments).

change a judge's mind at oral argument?" Although the answer to this question differs with every judge, an appellant or appellee who faces oral argument should approach his or her argument with the basic assumption that the answer to either question is "yes."<sup>7</sup>

For example, in the 1980s, Judge Myron H. Bright of the United States Court of Appeals for the Eighth Circuit and two of his colleagues on the Eighth Circuit tracked the number of cases in which oral argument changed the judges' minds.<sup>8</sup> In all of these cases, the judges had reviewed the briefs before oral argument and formed a tentative conclusion.<sup>9</sup> The judges then noted at the conclusion of oral argument whether their vote on the case at conference was consistent with the opinion they held before oral argument.<sup>10</sup> The result was that Judge Bright changed his mind thirty-one percent of the time, with the other two colleagues changing their minds seventeen and thirteen percent of the time, respectively.<sup>11</sup>

If oral argument can change a judge's mind—thus influencing your case—then the next question an appellate practitioner should ask is "How?" The obvious first response to this question is to be thoroughly prepared, which will be discussed in the next section. However, a not-so-obvious response could be "by acting as an invaluable resource at the judges' preliminary conference."

In the typical progression of an appellate case, the judges—and their law clerks—read the briefs and review the issues and cited authorities. They may also review the record or record excerpts provided to them. A judge then proceeds to oral argument,

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7. In commenting on the importance of oral argument, United States Supreme Court Justice Robert H. Jackson stated, "I think the Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations. Most of them form at least a tentative conclusion from it in a large percentage of the cases." Robert H. Jackson, *Advocacy before the United States Supreme Court*, 37 Cornell L.Q. 1, 2 (1951).

8. Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 Iowa L. Rev. 35, 40 nn. 32–33 (1986).

9. *Id.*

10. *Id.*

11. *Id.*; see Mosk, *supra* n. 1, at 25 n. 5 (citing Joel F. Dubina, *From the Bench: Effective Oral Advocacy*, 20 Litig. 3, 3–4 (Winter 1994) (stating, "[I]n many cases, the helpfulness of oral argument is overrated. It can, however, make the difference in a close case. . . . I have seen cases where good oral argument compensated for a poor brief and saved the day for that litigant. I have also seen effective oral argument preserve the winning of a deserving case."). Joel F. Dubina is a judge on the United States Court of Appeals for the Eleventh Circuit. *Id.*

and soon thereafter, conferences with the other judges on the panel to reach a tentative decision. It is at this conference that the judges share their views on the case, including their understanding of the facts and law.

A great way to approach an oral argument is to think of it as the preliminary conference for deciding the case. Oral argument is the first time that all judges on the panel meet to consider a particular matter. As Supreme Court Justice Byron R. White remarked,

All of us on the bench [are] working on the case, trying to decide it. . . . They think we are there just to learn about the case. Well, we are learning, but we are trying to decide it, too.<sup>12</sup> [I]t is then that all of the Justices are working on the case together, having read the briefs and anticipating that they will have to vote very soon, and attempting to clarify their own thinking and perhaps that of their colleagues. Consequently, we treat lawyers as a resource rather than as orators who should be heard out according to their own desires.<sup>13</sup>

Supreme Court Justice Antonin Scalia, when interviewed, also intimated that oral argument is an opportunity for a lawyer to participate in a preliminary conference of the case:

It isn't just an interchange between counsel and each of the individual Justices. What is going on is also to some extent an exchange of information among the Justices themselves. You hear the questions of the others and see how their minds are working, and that stimulates your own thinking. I use it, he added, to give counsel his or her best shot at meeting my major difficulty with that side of the case. "Here's what's preventing me from going along with you. If you can explain why that's wrong, you have me."<sup>14</sup>

Following the "oral argument as a preliminary conference model," an advocate at oral argument should attempt to engage in a conversation with the judges and be prepared to answer ques-

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12. Stephen M. Shapiro, *Questions, Answers, and Prepared Remarks*, 15 Litig. 33, 33 (Spring 1989) (citing *This Honorable Court* (WETA 1988) (TV broadcast)).

13. *Id.* (quoting Justice Byron R. White, *The Work of the Supreme Court: A Nuts and Bolts Description*, N.Y. St. B.J. 346, 383 (Oct. 1982)).

14. *Id.* (citing *This Honorable Court* (WETA 1988) (TV broadcast)).

tions that the judge may have.<sup>15</sup> When oral argument is viewed this way, its whole existence becomes an exercise in answering the judges' questions, and clarifying their understanding of the law. A lawyer should maintain a tone of "respectful equality,"<sup>16</sup> demonstrating in tone and demeanor that he or she is an intellectual peer of the judges on the panel.<sup>17</sup> This tone and demeanor leaves little, if any, room for rhetoric or the "dramatic flourish that we all dream of as advocates."<sup>18</sup> Chief Justice William H. Rehnquist described the ideal oral advocate as the following:

[S]he will realize that there is an element of drama in oral argument. . . . But she also realizes that her spoken lines have substantive legal meaning. . . . She has a theme and a plan for her argument, but is quite willing to pause and listen carefully to questions. . . . She avoids table pounding and other hortatory mannerisms, but she realizes equally well that an oral argument on behalf of one's client requires controlled enthusiasm and not an impression of *fin de siècle ennui*.<sup>19</sup>

As this "invaluable source" to the appellate panel during preliminary conference, a lawyer arguing the case should view himself or herself as the expert on every facet of the case. Assuming the panel asks questions, the judges will engage this expert in the Socratic method as they struggle with the issues involved.<sup>20</sup> On a "hot" bench, this expert will face a barrage of questions, some of which may appear hostile. A hostile question, however, may rep-

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15. Wolff, *supra* n. 4, at 1100.

16. Gary L. Sasso, *Appellate Oral Argument*, 20 Litig. 27, 30 (Summer 1994). Further, there are certain things that a lawyer should not do to maintain respectful equality. *Id.* A lawyer should never raise his or her voice, interrupt the judge, or show impatience. *Id.*

17. *Id.*

18. Wolff, *supra* n. 4, at 1102.

19. Shapiro, *supra* n. 12, at 33 (quoting William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 Mercer L. Rev. 1015, 1024–1025 (1984)).

20. Justice John M. Harlan stated:

[T]he job of courts is not merely one of an umpire in disputes between litigants. Their job is to search out the truth, both as to the facts and the law, and that is ultimately the job of the lawyers, too. And in that joint effort, the oral argument gives an opportunity for interchange between court and counsel which the briefs do not give. For my part, there is no substitute, even within the time limits afforded by the busy calendars of modern appellate courts, for the Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies.

John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?* 41 Cornell L.Q. 6, 7 (1955).

resent a judge engaging in a game of “devil’s advocate” to resolve an issue that is troubling him or her.<sup>21</sup>

Another type of question an appellate advocate may receive is one that, while directed at the advocate, actually addresses a concern that one member of the panel knows that another judge has. With this type of question, an effective appellate advocate should recognize that the judges are talking to each other—like they do in conference—and should either reinforce favorable points or distinguish unfavorable points and attempt to turn them in his or her favor.

The advocate should also recognize that he or she is attempting to persuade the panel to rule in his or her favor. To accomplish this, the advocate “must speak, look, and listen simultaneously.”<sup>22</sup> The only way an advocate can determine, and therefore attempt to affect, a judge’s view is by looking and listening. By looking at a judge’s body language, and listening to the questions he or she asks, an effective appellate oral advocate should be able to conform his or her argument to the judge’s viewpoint. Failing this skill, an advocate is left to guess the judge’s view and is ineffective in this preliminary conference.

This skill is monumentally important for the appellee. The appellee must listen to the appellant’s initial argument and watch the judges’ reactions to these arguments, and must ascertain key points that the judges either are having trouble resolving or that the appellant has missed. The appellee must also recognize the drama of the moment initially following the conclusion of the appellant’s initial argument. As Justice Walter V. Schaefer of the Illinois Supreme Court stated,

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21. Advocates sometimes encounter a “cold” bench that does not ask many questions. Generally, members of a “cold” bench have either not read the briefs, or think very little of the case or the lawyer appearing before them. Obviously, this is not a good sign. As one commentator stated:

Rejoice when the court asks questions. Again, I say unto you, rejoice! If the question does nothing more, it gives you assurance that the court is not comatose and that you have awakened at least a vestigial interest. Moreover, a question affords you your only chance to penetrate the mind of the court, unless you are an expert in face reading, to dispel a doubt as soon as it arises.

Hugh C. Griffin, *Practice Tips: Preparing for Oral Argument*, 17 *Brief* 54, 56 n. 3 (Fall 1987) (quoting Nicholas M. Cripe, *Fundamentals of Persuasive Oral Argument*, 20 *Forum* 342, 357 (1985)).

22. Steven D. Merryday, *Florida Appellate Practice: Oral Argument* 17.1, 17.11 (4th ed., Fla. B. 1998).

To me one of the most dramatic moments in the trial of a law suit comes when the appellee rises to make his reply. . . . For a half hour, under our rules, the appellant's ideas, his theories, the theory of the case, have dominated the court room. He sits down and in that rather charged atmosphere the appellee rises . . . and as he starts out you are on the edge of your chair. You think, well now, this . . . is going to be crucial; the case will turn on this and you listen eagerly for the first minute and the second and the third and nothing happens and he is repeating the same facts, and that man has lost the attention of the court which he had in a highly sensitized degree when he began. He has lost it and it is even money that he will never get it back. Just what to do depends upon the circumstances of the particular case, but this much I know, in that opening moment you have to strike for the jugular, you have to hit home. If there is something wrong with the statement of facts, by all means bring it out; if there is not, for heaven's sake don't just restate them because you are lost if you do, and the court will be doing something else during the balance of the time you argue.<sup>23</sup>

Finally, the court may ask a question that is intended to draw a concession from counsel. In this situation, counsel should be aware of a potential trap, but should also exercise complete candor to the tribunal. As Justice Robert H. Jackson stated,

The successful advocate will recognize that there is some weakness in his case and will squarely and candidly meet it. If he lost in the court below and needs appellate relief, that fact alone strongly suggests some defect in his position. If he is responding to a writ of certiorari, he should realize that several Justices have been tentatively impressed that the judgment below is dubious or in conflict with that of other courts, otherwise certiorari would not have been granted. The petitioner should never dodge or delay but give priority to answering the reasons why he lost below. The respondent should ask himself what doubts probably brought the case up and answer them. They will then be covering the questions that the Justices are waiting to hear answered. To de-

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23. *Id.* at 17.16 (quoting *Walter V. Schaefer, Appellate Advocacy*, 23 *Tenn. L. Rev.* 471, 474 (1954)).

lay meeting these issues is improvident; to attempt evasion of them is fatal.<sup>24</sup>

It is this type of questioning that the appellate practitioner should anticipate in preparing for oral argument, which will be discussed in the next section.

### III. PREPARING FOR ORAL ARGUMENT

As courts have restricted the number and length of appellate oral arguments, an attorney must recognize the remarkable situation that he or she faces. Preparing for this event, therefore, is monumentally important. Although every experienced appellate practitioner may have a unique method for preparing an oral argument, he or she should always base this preparation on two benchmarks: thoroughness and flexibility.

Before preparing for the oral argument, it must be decided “who” will argue the appeal. Oftentimes, trial counsel presents the oral argument on appeal. Appellate lawyers, who have experience in oral arguments, may be better suited to handle an appeal from the briefing stage through oral argument. Justice Jackson commented on the problems a trial counsel may encounter in handling an appeal:

Convincing presentations often are made by little-known lawyers who have lived with the case through all courts. However, some lawyers, effective in trial work, are not temperamentally adapted to less dramatic appellate work. And sometimes the trial lawyer cannot forego bickering over petty issues which are no longer relevant to aspects of the case. . . . When the trial attorney lacks dispassionate judgment as to what is important on appeal, a fresh and detached mind is likely to be more effective.<sup>25</sup>

In *Arabia v. Siedlecki*,<sup>26</sup> a recent *en banc* decision of Florida’s Fourth District Court of Appeal, Judge Gary M. Farmer, in his partial concurrence and dissent, stated,

My own experience in both roles suggests that most of the time the trial lawyer is well-advised to bring in another law-

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24. Jackson, *supra* n. 7, at 5.

25. *Id.* at 3.

26. 789 So. 2d 380 (Fla. 4th Dist. App. 2001) (en banc).

yer to handle the appeal. This is not because appellate law is so arcane that only the cognoscenti can handle it. It is really because the lawyer who handled the trial is often unable to discern the appellate forest from the trial trees. Issues that consumed the trial lawyer are often of marginal significance at best on appeal; issues that seemed trivial during trial may become critical on review.<sup>27</sup>

If trial counsel has the means to utilize an appellate lawyer, it is highly recommended that he or she do so, because of the substantial differences one encounters on appeal as compared to trial. However, only one attorney should make the argument; attorneys should avoid “splitting” the argument.<sup>28</sup>

Once that decision is made, an important component for preparing for bench questions is the tedious process of studying the record below, as well as all briefs, cited authorities, legislative history, and any scholarly commentary.<sup>29</sup> This time-consuming review will give the attorney arguing the case the opportunity to begin selecting the important issues that need to be mentioned at oral argument. Most importantly, this initial review should allow the attorney to become familiar enough with the appeal to answer any question that the appellate panel may have.

After this thorough review, the attorney should become more selective. That is, the attorney should determine the key issues that must be raised during questioning, making the argument as “simple” as possible for the bench. As Justice John M. Harlan stated,

Most cases have one or only a few master issues. In planning his oral argument the wise lawyer will ferret out and limit himself to the issues which are really controlling, and will

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27. *Id.* at 392 (Farmer, J., concurring in part and dissenting in part).

28. Justice Jackson commented on this practice, stating:

If my experiences at the bar and on the bench unite in dictating one imperative, it is: Never divide between two or more counsel the argument on behalf of a single interest. Sometimes conflicting interests are joined on one side and division is compelled, but otherwise it should not be risked. When two lawyers undertake to share a single presentation, their two arguments at best will be somewhat overlapping, repetitious and incomplete and, at worst, contradictory, inconsistent and confusing.

Jackson, *supra* n. 7, at 2.

29. Shapiro, *supra* n. 12, at 35.

leave the less important or subordinate issues to the court's own study of the briefs.<sup>30</sup>

In selecting these issues, the attorney should resist the temptation to simply follow the layout of the issues in the brief. Oftentimes, after further review of the record and caselaw, it becomes apparent that the more favorable issues and arguments are not the lead arguments in the brief.<sup>31</sup> All the while, however, the attorney should be preparing for questions on any of the issues raised in the briefs.

The next step an attorney should take in preparing a flexible presentation to the court is an attempt to anticipate the types of questions that the bench may ask. An advance "scouting" of questions will help lay the intellectual groundwork for weaving together planned remarks and responses to questions. This will also help avoid awkward moments during oral argument, when counsel may lose his or her place after tough questioning from the bench.<sup>32</sup> One commentator suggested considering the following "common sense" concerns of the court in attempting to predict questions from the bench:

- What is the case about? (What holding do you want? What rule do you want the court to adopt to justify that holding? Is there any other rule that would satisfy you?)
- How would your rule work? (What are the practical consequences of the rule? How would it change current practices? Can it be administered?)

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30. Harlan, *supra* n. 20, at 8; see Sasso, *supra* n. 16, at 28 (stating that "[w]hichever side you represent, you must tighten the focus even more when selecting points to be emphasized in oral argument. You will not have time to say everything that could be said about even two or three grounds for appeal. You may not even have time to address such grounds adequately. Take your best shot; focus your time and attention on the pivotal point or points. Then tell the court that you will rest on your brief on the remaining points, and offer to answer questions on those issues.").

31. According to Sasso, an attorney should do the following:

Resist the temptation to base the text and structure of oral argument on the contents of your brief. It usually is unwise to organize your argument exactly the way you organized your brief. This is so because briefs and oral argument have different functions and conventions. Writing and talking are different activities. What works in one does not in the other.

Sasso, *supra*, n. 16, at 28.

32. Shapiro, *supra* n. 12, at 35.

- What will the rule mean in future cases? (How far does your rule go? Where does it meet a limiting principle? Will lower courts have trouble applying it?)
- Can the court do that? (Is there a legally respectable argument for the rule based on traditional principles of interpretation? Is it consistent with what the court has said before? Does it conform to governing statutory or constitutional language and history?)
- Why should we do that? (What values and interests would be advanced by adoption of the proposed rule? Would opposing values and interests be fairly accommodated?)<sup>33</sup>

Once the attorney has spent time anticipating the questions the bench may ask, it is time to prepare a flexible outline. The outline should begin with concise statements covering the following areas: (1) the appellate posture of the case, (2) all of the issues raised, and (3) the pertinent facts. Next, it should highlight the main issues that the attorney has selected after his or her thorough review of the appeal. The outline should contain bullet points or some other form of concise statement that the attorney feels must be mentioned at oral argument. If the attorney was to make his or her presentation directly from these parts of the outline, the presentation should take approximately five minutes. The remainder of the outline may touch the remaining issues on appeal. The outline should be easy to read and reference. The attorney should prepare the outline to fit on a single legal-size page.<sup>34</sup>

The attorney may also wish to consider using demonstrative exhibits at oral argument. Exhibits are rarely used, and often detract from the argument. As an attorney has a limited amount of time to present his or her argument, struggling with an exhibit only lessens the time in which the attorney can have an impact on the bench. However, particularly when arguing over the language in a statute or contract, it may be helpful to have the language “blown up” for the bench to see.<sup>35</sup>

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33. *Id.*

34. See e.g. Griffin, *supra* n. 21, at 55 (stating that his favorite technique is to put key points on one legal-size page).

35. Wolff, *supra* n. 4, at 1106. Judge Wolff commented on the use of exhibits:

When you're in oral argument discussing a statutory provision, you might consider blowing up the language on a projector or a piece of foam board that you can put on an easel. But I must caution you: some of us have poor eyesight. I have seen, or more

Next, the attorney needs to rehearse the argument to improve its clarity and impact. A rehearsal will allow the attorney “to cut out fuzzy detail, long-winded explanations, lengthy quotations, and detailed case discussion,” while also providing “good practice in shifting smoothly between prepared comments and responses to questions.”<sup>36</sup> Rehearsal also will give the attorney some sense of how long it will take to make all the necessary points. Most attorneys will realize, after rehearsing the argument two or three times, that it must be trimmed down.

The attorney may consider participating in a moot court, which can be tremendously helpful. Many attorneys argue to a moot court panel several times. First, the panel should hear the attorney's complete argument to assess its strength and clarity. Moot court members will see problems, including gestures or fidgeting, of which the attorney may not be aware. The discussion between the attorney and the moot court members should help in determining the important issues for oral argument. Then, the attorney should rehearse the argument, with moot court panel involvement, without time limitation so that the attorney can respond to all questions that emerge and develop affirmative points during those responses. Finally, the attorney should practice the argument within the time constraints of the actual argument.

After the moot court session, the attorney may wish to refine and condense the oral argument outline. The moot court should occur at least several days before the argument, to give the attorney time to digest the suggestions of the moot court panel and to refine any arguments for the outline.

#### IV. CONCLUSION

As stated in the introduction to this Article, an appellate attorney who receives oral argument should treat the situation with the importance that the appellate court has accorded it. Oral argument may be the most critical aspect of your appeal, and it

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accurately not seen, quite a few exhibits with statutory language or contract provisions blown up so that the advocate and the judges could examine the language together. The only problem was that at a bench long enough for seven judges, the print is rarely big enough for all of us to see. So you can either give us an individual copy or refer to your appendix, to follow along, or you can let us sit there and be annoyed.

*Id.*

36. Shapiro, *supra* n. 12, at 35.

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should be treated seriously. Justice Harlan eloquently summed up the importance of oral argument as follows:

I should like to leave with you, particularly those of you who are among the younger barristers, the thought that your oral argument on an appeal is perhaps the most effective weapon you have got if you will give it the time and attention it deserves. Oral argument is exciting and will return rich dividends if it is done well. And I think it will be a sorry day for the American bar if the place of the oral argument in our appellate courts is depreciated and oral advocacy becomes looked upon as a pro forma exercise which, because of tradition or because of the insistence of his client, a lawyer has to go through.<sup>37</sup>

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37. Harlan, *supra* n. 20, at 11.