APPEALS, LEGAL WRITING, & ORAL ADVOCACY

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EFFECTIVE ORAL ADVOCACY AND EXAMPLES

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8.8 How to Prepare for Argument and Argue

As a preliminary matter, each party should bring the research upon the basis of which his brief was prepared up-to-date, utilizing the Shepards, Lexis or Westlaw system. If additional authorities of significance are discovered at the last minute,[38] this may be stated during the argument. Some court rules require that such authorities be brought to the attention of the court and opposing counsel beforehand in an explanatory letter or supplemental memorandum, enclosing a copy of the authority if it is not reported. If there is time, this is the most reasonable procedure since it enables the judges and opposing counsel to examine the new authority before the argument and makes unnecessary a more extensive oral analysis than it would otherwise warrant.[39] This would be a good procedure to follow unless something different is prescribed by the rules of the court to which the appeal is taken.

The steps to be followed in preparing for oral argument may be, and usually have been, simply stated: The arguer should read and become fully familiar with the record, the authorities cited by all parties, and the briefs. He should prepare an outline or notes, but not write out his argument, and argue from the notes or outline. He should be aware that questioning is likely to interrupt him and disrupt what he had intended to say, realize that answering the questions is his most important function, and accordingly be prepared to rearrange the argument on the fly.

Observations of other lawyers and my own experience, however, have convinced me that while many and perhaps most able advocates follow the above pattern, many others do not, and that a more detailed and critical exposition of the different techniques of preparation would be helpful. For the methods most suited to the personalities and abilities of some lawyers may not be best for others.

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[38]Unreported Supreme Court cases are printed within a day in the *United States Law Week,* published by The Bureau of National Affairs, Inc., and in the Commerce Clearing House *Supreme Court Bulletin.* Summaries of some lower court opinions also appear in *U.S. Law Week.* Recent unreported cases in specialized appeals often appear in the special services covering those subjects.

[39]Seventh Circuit Rule 11, for example, requires a letter to the court citing the authority, referring to the pertinent page of the brief and stating "in a single brief sentence the proposition the authority supports" but with "no other argument or explanation." If the authority cited is not yet published, a copy shall accompany the letter. The original and six copies shall be sent to the court, with a copy to opposing counsel. The same procedure is to be followed if the authority is discovered after argument.

In order to enlarge my knowledge of how others prepare their arguments, I addressed a questionnaire to approximately one hundred lawyers who I had reason to believe were able appellate advocates.[40] Ninety-six responded, and I am indebted to them for a substantial enlargement of my knowledge of the variations in how good lawyers prepare and argue their appeals. The following discussion is based upon these responses, as well as upon what others have written on the subject and my own experience.

As indicated, no single method of preparation is utilized by all lawyers. The differences in individual techniques may conform to personal qualities or preferences, or to ignorance of the various methods which are available and which other lawyers use. Furthermore, different cases and circumstances call for different approaches. How to handle a record may depend on whether it has 100 or 10,000 pages, on whether the arguing attorney tried the case, was the brief writer, or neither, on whether he heard or read the testimony, on whether he wrote the brief two years or two months before the oral argument and on how well he can recall the details. How much written preparation for argument by way of sparse or detailed notes or text is called for may depend on whether the argument can be limited to a few minutes on one point—and some can—or must cover a number of facts and points which can only with difficulty be crammed into the time allowed.

The following steps, or most of them, are those followed by most arguers, although a few halt their preparations at each of the stages.

(a) Becoming Familiar With the Material

The first step in preparation is for the arguer to thoroughly familiarize himself with the case, that is, with the briefs, the record and the authorities. How he does that will depend on the factors mentioned above. If he wrote the brief himself, he will need much less time than if he did not. That would normally mean that he had previously read the record and authorities, and that he may have made notes or a digest as he did so. His recollection, recorded or not, may make it less necessary for him

[40]The selections were based on my own knowledge and the suggestions of others, including some judges.

to repeat the entire process, unless the passage of time has dimmed his memory too greatly. That may, of course, happen, since in some overloaded courts the time lag between the last brief and the oral argument may be many months and sometimes even years.

Seldom will a lawyer, even one who did not try a case, come into it after the briefs are completed (although that occasionally happens as it has to me). Thus he will have either written the brief or carefully reviewed it. Accordingly, even a lawyer brought into the case newly for the appeal normally will have studied the briefs and other material while the briefs were being prepared. If he did not, he certainly should when he begins his preparation for the oral argument.

Even the lawyer previously familiar with the case should reread that material if he possibly can. He will usually study the briefs first, as they already represent the distilling of the record and the authorities into the arguments on the issues to be presented.

If possible, the record should be read or reread in full. In some cases where an appendix, excerpts, abstract or the like contains the items which the parties have designated as the significant portions of the record, and where there is reason to believe that other parts of the record are of no consequence, reliance on the designated material may be sufficient. If the record is too voluminous to read in full—and in some kinds of cases records containing thousands of pages are not uncommon —and if the pertinent passages have not already been designated, the arguer must at a minimum read the passages which the record references in the briefs indicate to be important. He should concentrate, of course, on the portions of the record which relate to points in dispute, not facts as to which the briefs agree. Thus, although the desirability of knowing the entire record is generally proclaimed to be essential, many arguers admit that they limit themselves to the items which they believe to be significant or in dispute.

The arguer should, of course, read the record or the significant portions himself, and if they are of any length, digest them himself. A digest prepared by someone else will not impress itself on his mind. With modern dictating equipment now available and not merely pencils and paper, preparing a digest is no longer as tedious as it was in the past.

Reading all of the authorities cited in the briefs, or discov-

ered thereafter, is often also said to be a "must." But the experienced lawyer knows that only a few cases are likely to be mentioned by counsel or the judges during oral argument, and that as a practical matter familiarity with every case cited may not be important. Selecting the crucial cases is usually not difficult. Briefs are full of citations supporting propositions not in dispute, such as the scope of review or the principles of construction of statutes or contracts.

If he does not read them all, the arguer must lean over backward to be sure that he will be familiar with any authority which may possibly be mentioned by his adversary or a judge. He must not take the "ostrich approach to the cases cited against him."[41] "Authority" in this context means not just case citations but any material—legislative, scholarly or even scientific—upon which the court or counsel might rely. The arguer must read this material himself and, if necessary, digest it. If he cannot count on remembering them, the digests should be close at hand during the argument.

In addition to reading authorities cited in briefs, counsel not already generally familiar with the field of law involved will benefit by educating himself through reading more broadly so as to fit the case into its legal perspective and to become aware of the policy considerations which may influence the judges. Such knowledge may be very comforting if the judges probe deeply during the argument.[42]

Merely to have a young lawyer read and digest masses of cases for the senior who is to argue is a horrible practice and a waste of time. Unless he has read the cases himself, the senior will not recall enough from his young associate's notes to handle the cases during the argument. He must read the principal authorities, which can usually be identified from the briefs. If the senior cannot or does not read *all* the cited authorities himself, he should at least know what they stand for. If this is not apparent from the brief, a memorandum from a colleague may be sufficient for relatively unimportant or noncontroversial authorities.

The precise order in which briefs, authorities and record are studied at the beginning of the preparation is not of vital importance. Most lawyers reasonably begin with the briefs,

[41]Fitzgerald and Hartnett, *supra* note 3, at 53.
[42]*Id.* at 54.

which identify the issues and put the relevant parts of the record and the authorities in the same argumentative context as will be required for the argument. The record and the authorities each acquire greater meaning from knowledge of the other, but obviously both cannot be read first or at the same time. Reading the record or the significant portions thereof probably should precede reading the cases, at least for counsel unfamiliar with either, since a fresh lawyer coming into the case is likely to know less about its facts than about the law. If he already knows a good deal about both from prior familiarity with the case, which is reread first is immaterial.

(b) Rough Outline of Points—The Process of Selection

After counsel has determined that he is sufficiently familiar with the facts, the authorities and the arguments presented by both sides, he should prepare a rough outline of the points which might be argued.

This is the time for appraisal and selection, not necessarily for working out details. Which points should be omitted from the argument because they are too weak or too vulnerable, because other points are stronger, because they do not lend themselves to oral presentation, or simply because all the points cannot be covered in the time allotted? Inherent in the process of determining the points to be argued is an evaluation of the merits of each. The opposing arguments, as presented below, as well as any holes in one's own reasoning, whether previously noted by the opposition or not, must be candidly appraised—and sometimes that is hard to do. This process need not be performed in solitude. Discussions with colleagues or co-counsel familiar with the case and also with others not familiar are not only helpful but often essential. The effort should be to make an educated guess as to how the appellate judges will react to each argument, and to choose the arguments which are most likely to be persuasive to the ear.

Points which because of their complexity or their dependence upon figures or detailed analysis of evidence or authorities can better be understood through reading and study should be left to the briefs. If such a point is important, the oral arguer cannot ignore it, but its substance should be summarized with a statement that it can best be understood from examination of the detailed analysis in the brief. See Sec. 8.11, p. 404, *infra*.

In sum, this is the time for thinking more than writing, although usually it will result in a written outline of points to be covered. It may take anything from a few minutes to a number of days depending upon the magnitude and difficulty of the case.

This process of selection and evaluation never ceases until the end of the argument itself. The preparation of the argument in further detail often focuses attention on different facts and authorities and produces new ideas, both favorable and unfavorable, which must then be fed into one's mental computer and the prior thinking rearranged to take them into account.

(c) Preparing in Detail

At this point individual methods of preparation diverge. Only a few brilliant and audacious advocates have the temerity to argue without having in front of them notes of any sort (except perhaps a reference to what they may want to quote), and most of them will prepare and study written notes prior to appearing in court. They do not memorize the argument in advance, but have good enough memories and ability to speak fluently to be able to proceed on the basis of this preparation without more. Everyone else, so far as I know, uses an outline or notes of some sort, and that includes many lawyers of great ability and experience who have good memories but would regard relying on memory alone as completely foolhardy. No one should try it unless in other contexts he has proved his ability to undertake such a performance successfully. For anyone else, an argument prepared in that way would almost certainly sound inadequate.[43]

Memorizing is dangerous, even if one's memory is up to it. For any interruption by the court may throw the memorizer off his stride, and determining just what to come back to or how to rearrange may be difficult without notes. Furthermore, memo-

[43]The advice of Fitzgerald and Hartnett is that arguing without notes, even if you can do it, has serious drawbacks. "[E]ven good memories can play tricks, and in the pressure of an oral argument, a significant point may be overlooked if notes are not available. Counsel who have felt themselves to be impervious to nervousness during oral argument can receive just the unsuspected jolt that rattles their mental poise and drives from their minds the carefully memorized outline of argument. As a result, an important point may be overlooked."

You may "discover—too late—that your logical sequence has been destroyed" and you are "not going to impress anybody very much, because the court will recognize it as a rather ostentatious demonstration or stunt, while at the same time, you will be flirting with real trouble for your client's case." *Id.* at 60.

rizing is not worth the mental strain. Writing detailed notes or a text, inserting catchwords, and reviewing and revising several times will make both the thoughts and the key phrases so familiar that only an occasional glance at the notes or outline should be necessary. Having them before you, however, is very comforting in case your memory fails or the need to reply to questions or to your opponent requires a switch to another subject or other rearrangement.

A few lawyers have nothing before them while arguing except a short outline noting the points to be covered.[44] Many prepare notes or an outline in detail, using either descriptive headings for the points to be discussed or catchwords which will jog the memory. Almost as many, either after preparing an outline or in lieu of doing so, write out a draft of argument. A substantial number of lawyers do it sometimes one way and sometimes the other depending on the magnitude of the case. Many prepare different parts of the argument in different ways, relying on notes for items easy to explain and written sentences where careful expression is essential.

Most, but by no means all, of those who write drafts of their arguments then annotate the text with notes, catchwords, underscoring or other emphasis, either in the text itself, in the margin or at the beginning of each paragraph. Some then argue with the text thus annotated before them, making sure that the notes and catchwords are in some emphatic form which can easily be read, such as solid capitals or underscoring or placement in the margin. Others have the paragraph headings or catchwords copied separately from the text, and have only those notes before them during the course of the argument. Others have before them only the full text of the prepared argument, while a few rely on separately prepared notes without the text.

Whichever of these techniques is followed, the argument should not be read. The rules of many courts specifically so state,[45] while others declare that the court looks upon it with disfavor.[46] Judge Goodrich has advised that counsel

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[44]Mr. Carson favored having "before you during the argument [only] a page in the nature of a table of contents to refresh your memory and give you assurance . . . although the briefs and records should be within reach to be referred to if a question calls for them." Carson, *supra* note 5, at 75.

[45]Illinois Rule 352(c) provides: "Reading at length from the record, briefs, or authorities cited will not be permitted." To the same effect, see New Jersey Rule 2:11-1(b).

[46]United States Supreme Court Rule 38.1 provides, in italics added for emphasis when the rule was recently revised: "*The Court looks with disfavor on any oral argument that is read from a prepared text.*"

> "should not read his brief to the court. Over and over again one may hear it said from the appellate bench: 'Please do not read us your brief, Counsel. The court may not be able to think but it certainly can read.' . . . The protest against brief reading goes also to a somewhat lesser extent to the reading of any prepared manuscript. Surely a lawyer doing court work can learn to talk to a court from notes without having to put a paper between himself and his judicial audience."[47]

Able advocates who write their arguments are perfectly aware that reading of the argument is not only disfavored by judges but also unhelpful to clients. Most of those who have prepared a text use it or the annotations based upon it just as others use an outline, glancing down when necessary as they shift from one point to another. Some say they do not stick close to the prepared language, and others that they do in the absence of questioning. But that does not mean that they are reading. For, as I can personally attest, the process of preparing a text, annotating it with headnotes and catchwords, and continually reviewing and revising up to the last moment enables one to stick pretty close to the prepared language without reading it or appearing to read it, and without having memorized it.

I have tried all of these methods except having no notes at all or relying on sparse notes which merely indicate the topics to be covered. At the end of my preparation even the latter probably would have been sufficient, but since the catchwords and more detailed notes could better refresh my memory and since they had already been prepared, I preferred to use them.

When I first began to argue I would prepare only a detailed outline. But as I wrote the outline I found that I was thinking in actual sentences, though merely writing down the topical or key words for each thought. This led me to write the full sentence instead, though with no intention of reading it. I would leave ample space between paragraphs. After revising the text for clarity and substance, keeping in mind that it must flow simply enough for oral presentation, I would then insert in the space between the paragraphs the catchwords which would best remind me of the substance of what followed. These words and phrases[48] in solid capital letters would seldom exceed one line which could be seen easily at a glance during the argument.

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[47]Goodrich, *supra* note 4, at 26.

[48]Persons whose handwriting is as bad as mine must rely on typed notes. Persons who can always read their own handwriting may find that sufficient, but even for them typing would almost certainly be easier to follow.

More often, however, a day or two before the argument I would have the headings typed separately from the text and use them alone as the argument notes. In order to make such notes entirely self-sufficient, I would insert at the appropriate place any short passages which I might wish to quote from statutes, authorities, documents or testimony, so that I would not have to interrupt the argument by turning to the briefs or record. I would also include in the notes or the margin the record references or case citations which I might wish to mention orally in answer to questions or otherwise.

This technique, which I found was also used by a few of the other persons who responded to my questionnaire, has a number of advantages. The process of preparing in this manner gets the material into my head, not memorized but firmly enough so that occasionally glancing at either the annotated text or the annotations is sufficient to keep the argument flowing.

Writing the text in words and phrases which I have time to think about and improve converts the ideas or topics into the form in which they can be best expressed without having to think of the words completely extemporaneously as the argument proceeds. Usually a method of expression carefully worked out in advance will be superior analytically to what I can produce off the cuff. If during the argument I think of something better, either because of questioning or a sudden inspiration, I am free to use it. I have learned from experience, however, that more often than not it would have been better to stick to the previously prepared version.[49]

It is, of course, true that effective oral speech is not necessarily the same as written. The arguer who writes out a textual draft must keep that at the front of his mind, and take advantage of colloquialisms and informality not appropriate for a written presentation. Homey, down-to-earth words and common metaphors may be effective orally though not suitable in formal writing. He can and should insure that his argument will not sound like a written or memorized draft. Going through the argument aloud on the basis of the headnotes or text, a subject treated in the next subsection, enables the arguer to eliminate passages which would not sound right when expressed orally. Hearing

[49]To the same effect, see Fitzgerald and Hartnett, *supra* note 3, at 67, quoted at p. 430, note 111, *infra*.

oneself recite will usually be sufficient for this, although critical listeners can be even more helpful.

Many able advocates believe that writing the argument in advance will reduce or eliminate spontaneity, interfere with the desired maintenance of eye contact with the judges and result in a stilted presentation. Both in other writings and in comments on my questionnaire, they have expressed strong disapproval of writing an argument in advance. The advantages of not writing an argument should be stated in their own words.

Colonel Wiener has declared that

> "an oral argument loses much of its spontaneity if it is written out in advance. It is more natural—and hence more effective—if it is delivered from notes."[50]

In his usual firm fashion, he elaborates:

> "I have no hesitation at all in saying 'No,' emphatically 'No,' to the suggestion that an argument be written out in full. If your argument is fully written out, you will read it, and reading one's argument is high on the list of Things Not to Be Done."[51]

Judge Prentice Marshall agrees:

> "Do not write a manuscript of your oral argument; you are going to speak it, not read it."[52]

Others have said that a prepared text is incompatible with the need for adaptability to questioning, and that more of a variable structure for the argument is required; that the most effective argument is one in which the advocate looks at the judges and speaks directly to them with infrequent glances at his notes, except when a short quotation is necessary.

An experienced lawyer from Florida has stated:

> "I never write a full draft of the proposed argument. I consider this to be a very bad way to prepare for argument, since it tends to delude the lawyer into the notion that he will be able to make an uninterrupted presentation to the court. The appellate advocate should recognize that he is liable to be interrupted at any time and diverted from his normal course of argument, and the lawyer who attempts to argue as if he were delivering a speech is likely to be confused by questions from the court, and to have difficulty in regaining his balance. In other words, the temptation would be to return to the prepared text and resume argument as if no

[50]F. Wiener, BRIEFING AND ARGUING FEDERAL APPEALS, p. 283 (1967).
[51]*Id.* at 310.
[52]Marshall, *supra* note 3, at 9–13.

questions had intervened, which more often than not results in a clumsy argument and a waste of time in rearguing matters which have already been discussed in the question and answer period with the judges. . . . I think it is most important for the advocate to be looking at the judges, rather than at his notes, during most of the course of his argument. Appellate argument, after all, is a stylized form of persuasion and I think it is the advocate's job to try to capture and hold the attention of each judge, as if engaged in a private discourse. The lawyer who primarily reads from his notes or texts removes himself from this personal interaction with the judges on the court, who simply become an audience rather than individuals who are engaged in intellectual exercise."

In the main, these experienced advocates are correctly describing the effects of arguments which are read to the court. They often assume, or seem to assume, that a previously prepared written argument will be read, or will sound as if it is being read. That does not follow, and is not necessarily so.

A distinguished California lawyer who always writes out a draft of the argument states:

> "The advantage of this to me is that writing out the argument tends to make for brevity and a logical progression of the points, and, equally important, gives the arguer an assurance that what he has in mind can be succinctly expressed in language that makes sense. It helps to guard against fuzzy thinking and gaps in logic."

He further states that after then using the text to fill in notes in his outline, he uses only the revised outline. Although he reviews the text, outline and the notes a number of times in advance of the argument,

> "I never-never-never read it to the court or even have it before me at the podium. . . . However, having written out the argument, one tends to use the same phraseology in arguing from the notes that has been previously written into the draft, and this makes for a facility in statement which would be lacking if the argument had not been written out."

An advocate of renown declares:

> "The manner in which I prepared for argument always depended on the time available, and to some extent upon my familiarity with the subject. If time permitted, I would write and rewrite and rewrite and rewrite the oral argument. The process clarifies one's thoughts. It provides sentences and phrases which can be drawn spontaneously from one's mind during the course of the argument and in answering questions. . . . I cannot believe that I have really made my thoughts precise until I have written them down on a piece of paper and rewritten them seven or eight times in

order to remove the lack of precision. I keep up the process until the case is called."

He has the argument before him but does not read it.

"[I]f one has worked and reworked the prepared text, what he says will correspond to the text pretty closely even though he neither memorizes nor reads it."

Another lawyer who has been on both sides of the bench states that though he frequently writes his arguments he never reads them but only refers to them as often as necessary to maintain an orderly sequence. When questions require him to depart from the prepared arrangement, he must be able to resume at whatever point then seems appropriate. "The discipline of writing out the argument," he adds, "helps to point up any flaws and occasionally yields a felicitous locution."

Mr. Justice Jackson's comments on various arguing techniques contain perhaps the best summation of what should and should not be done:

"The manner of delivery must express the talents and habits of the advocate. No one method is indispensable to success, and practice varies widely. Few lawyers are gifted with memory and composure to argue a case without papers of any kind before them. It is not necessary to try. The memorized oration, or anything stilted and inflexible, is not appropriate. Equally objectionable is the opposite extreme—an unorganized, rambling discourse, relying on the inspiration of the moment. If one's oral argument is simply reading his printed brief aloud, he could as well stay at home. Almost as unsatisfying is any argument that has been written out and is read off to us, page after page. We like to meet the eye of the advocate, and sometimes when one starts reading his argument from a manuscript he will be interrupted to wean him from his essay; but it does not often succeed. If you have confidence to address the Court only by reading to it, you really should not argue there."[53]

Justice Jackson's own practice as an advocate

"was to prepare notes, consisting of headings and catch-words rather than of details, to guide the order of argument and prevent important items from being overlooked. Such notes help to get back on the track if one is thrown off by interruptions. They will tend to limit rambling and irrelevance, give you some measure of confidence, and at the same time let you frequently meet your judges eye to eye."[54]

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[53]R. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A.J. 801, 804, 861 (1951).
[54]*Id.* at 861.

Although Justice Jackson frowned upon reading or memorizing an argument, his analysis does not preclude the use of a written draft during the course of preparation if the argument eventually given is not read.

Those who do prepare a written draft, as I now do, find that it provides a more concise and logical organization which can be compressed more easily into the short periods of time now allowed than can a presentation based upon notes or an outline alone. It tends to keep the speaker from rambling.

Fewer pages of notes will be needed, of course, if only the key or catchwords—in substance, an outline—typed apart from the text are before counsel while he argues. Using large legal size pages also helps keep the number of pages down. The smaller the number of pages before counsel when he argues, the less turning or discarding of pages during the argument will be required.

My own personal practice is to have the headings or catchwords typed in capital letters on such large pages. The process of thinking out the key or catchwords, attaching them to, and separating them from, each paragraph of the text and then reviewing both together insures that the notes based upon such catchwords will sufficiently remind me of what I want to say without tying me to the exact text.

Enough has been said to show that there is no single right way to prepare an oral argument, though there are some wrong ways. The latter include failure to master all aspects of the case, including the record and the authorities, failure to take into account the time limitation, failure to think out the best organization and select the few points which can and should be covered orally, and reading an argument to the court. Whatever the nature of the final stage of preparation, it should not be regarded as a single step, but as a continuum which does not terminate until the argument has been completed. For the arguer should leave ample time before the argument for review and revision, both for the improvement in substance which accompanies rethinking, whether in the mind or on paper, and for greater familiarity with the contents, which will reduce the need for reliance on either notes or text.

Counsel should be aware that different methods of arguing have been utilized by able lawyers and select the technique with which he is the most comfortable. This may require experimentation and change, as it has with me. What is required is a

mastery of the subject, and a combination of a well-organized presentation prepared in advance with the ability to be completely flexible in the light of questions from the court and the argument of one's adversary.

(d) Rehearsing

An essential part of the process of improving the argument once it has been prepared, in any form, is rehearsal in advance. To my surprise, the majority of those responding to the questionnaire stated that they rehearsed, sometimes several times, some before a moot court of lawyers, some before their wives, but most to themselves, either aloud or silently. The reasons for this have been eloquently stated by Mr. Justice Jackson:

> "Do not think it beneath you to rehearse for an argument. Not even Caruso, at the height of his artistic career, felt above rehearsing for a hundredth performance, although he and the whole cast were guided and confined by a libretto and a score. Of course, I do not suggest that you should declaim and gesture before a mirror. But, if you have an associate, try out different approaches and thrash out every point with him. Answer the questions that occur to another mind. See what sequence of facts is most effective. Accustom yourself to your materials in different arrangements. Argue the case to yourself, your client, your secretary, your friend, and your wife if she is patient. Use every available anvil on which to hammer out your argument."[55]

Judge Prentice Marshall suggests speaking the argument to yourself several times with the door closed, then "test-marketing" the product on a "partner, secretary or spouse . . . . The lawyer, hopefully, will react as a judge. If your (non-lawyer) spouse understands the argument, certainly the court will. The point is to perform at least once to an audience, and get the audience's reaction."[56]

Colonel Wiener has explained:

> "No lawyer would dream of filing with the clerk the first rough draft of his brief. Why then present to the court the first draft of your oral argument? Many lawyers, too many of them, do just that —which is why such a lot of sorry oral arguments are heard in Federal appellate courts throughout the land.
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> "There are, of course, some virtuosos, some people who have a flair for the extemporaneous. If you are one of those fortunate

[55] *Id.* at 861.
[56] Marshall, *supra* note 3, at 9–12.

> few, the paragraphs that follow are not for you. But if you are a simple, run-of-the-mill fellow, like the rest of us, a carefully rehearsed and prepared and revised presentation will always be better than one that is just rolled off the cuff.
>
> "Preparation and rehearsal will save you from going off on unprofitable or even untenable side issues, will spare you the waste of precious minutes on nonessentials, and will substantially assist you in eliminating unhappy turns of phrase."[57]

Rehearsals permit the arguer to time his "remarks, to smooth out infelicities, to ascertain where to expand and what to eliminate."[58] I add that Colonel Wiener, who was my colleague in the Solicitor General's office for several years, is by no means "a simple, run-of-the-mill" lawyer, but a sophisticated legal scholar with an exceptional memory. If *his* arguments benefited from prior rehearsals, others should benefit by his example.

Most appellate advocates do not rehearse very many times, or before an outside audience at all. Undoubtedly a dress rehearsal, so to speak, under the fire of questioning by colleagues who are likely to be much more contentious than the actual judges, is the most effective and helpful technique. Those who rehearse but not to that extent either do not think that necessary or hesitate to inflict themselves upon innocent, though usually interested, bystanders. They may benefit by the use of tape recorders which can be replayed for persons not shocked by the sound of their own voices.[59] Videotape may even be better, though looking at oneself could be distracting, and the incremental improvement not worth the additional cost.

Almost every lawyer who rehearses does so in part to ascertain approximately how many minutes the prepared argument will take. Most measure it on the clock—and this is so whether they mutter or read or improvise from a written draft or outline or nothing at all, to themselves or to colleagues who interrupt with questions. A few have learned by experience how long an oral presentation of one page of text or outline takes; if they are sufficiently skilled at arithmetic, they can then determine the total time by multiplying this factor by the number of pages. These processes will provide only a minimum approximation, as the lawyer, of course, knows, but this nevertheless provides the

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[57] F. Wiener, BRIEFING AND ARGUING FEDERAL APPEALS, pp. 295–296 (1967).

[58] *Id.* at 307. These objectives can be attained even more fully, in my view, with which Colonel Wiener disagrees, if the argument has been written out and reduced to notes before the rehearsal.

[59] Fitzgerald and Hartnett, *supra* note 3, at 60.

best possible basis for ascertaining in advance the length of the prepared argument and thus knowing how much may have to be eliminated.

Even reading aloud to himself a prepared first draft of a text which he does not intend to read in court enables counsel to know roughly whether slicing is necessary, and how much. I have found that when questioning has not been intense, as sometimes happens, the argument given comes pretty close to the rehearsal time. When the rehearsals persuade me that the argument has not been sufficiently curtailed to permit its presentation in substantially less than the time allowed, I prepare for the anticipated questioning by eliminating items or by using brackets or other marks to identify the materials which can be discarded if necessary.

8.9 Style of Speaking—and Dressing

The oral argument is a combination of a speech and a conversation. The precise proportion of each will not be known in advance and will vary from case to case. The atmosphere, however, is more conducive to a conversational tone than to oratory. Since the audience—or at least the part you care about—is small and not very far away, resounding oratory would not be proper even if there were time for it. On the other hand, the distance is often too great for an ordinary conversational tone, and the lawyer is expected to keep going on his own when the judges choose not to initiate a colloquy. Thus, the argument has ingredients both of formal presentation and informal discussion.

The first essential obviously is that the arguer must be heard. That requires speaking more loudly than in a normal conversation, but not very much more. The judges will seldom be more than 15 feet away, and they will not appreciate a voice which seems to be addressed to persons in the back of the courtroom. Some courtrooms have amplifiers, but most do not. Find out whether yours does, and if it does, remember to stay near the microphone.[60] Whether it does or not, do not wander from the lectern.

If you have a knack for good public speaking so much the better, so long as it does not carry with it a public speaker's

[60]The microphone may be for the benefit of the court, not the audience, and may be connected with a recording machine which will enable the judges to play back the argument.