2023 JUDGES' ROUNDTABLE: EFFECTIVE ORAL AND WRITTEN ADVOCACY IN STATE AND FEDERAL TRIAL AND APPELLATE COURTS

NEW YORK AMERICAN INN OF COURT
MARCH 8, 2023

TIMED AGENDA

I. Introduction of topic and judges (10 minutes) (Hon. Richard J. Sullivan, Hon. Barbara R. Kapnick, Hon. Ronnie Abrams, Hon. Joel M. Cohen and Hon. Magistrate Judge Jennifer E. Willis)

II. Effective oral advocacy (40 minutes) (Hon. Richard J. Sullivan, Hon. Barbara R. Kapnick, Hon. Ronnie Abrams, Hon. Joel M. Cohen and Hon. Magistrate Judge Jennifer E. Willis)

A. Dos and don'ts
B. Differences in arguments between trial and appellate courts
C. Differences in arguing before three and five judge panels
D. Differences in arguing substantive vs. discovery motions
E. Effective oral advocacy in settlement conferences

III. Effective written advocacy (30 minutes) (Hon. Richard J. Sullivan, Hon. Barbara R. Kapnick, Hon. Ronnie Abrams, Hon. Joel M. Cohen and Hon. Magistrate Judge Jennifer E. Willis)

A. Dos and don'ts
B. Length of submissions
C. Attitudes towards footnotes
D. Use of hyperlinks

IV. Question and answer period (10 minutes) (Hon. Richard J. Sullivan, Hon. Barbara R. Kapnick, Hon. Ronnie Abrams, Hon. Joel M. Cohen and Hon. Magistrate Judge Jennifer E. Willis)

Willis, Jennifer E.

United States Magistrate Judge
Southern District of New York

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Jennifer E. Willis was appointed as a Magistrate Judge of the United States Southern District of New York on January 28, 2022. Judge Willis received a B.A. from Columbia University in 1997 and a J.D. from New York University School of Law in 2000.

Prior to her appointment, Judge Willis worked as a public defender for 21 years. From 2000 to 2002 she was a staff attorney at the Committee for Public Counsel Services, in Massachusetts, and from 2002 to 2014 she was a felony trial attorney the Law Office of the Cook County Public Defender, in Illinois. She joined the Federal Defenders of New York in 2015 and rose to become the Director of Strategic Litigation in 2020. Over the course of her career, she tried over one hundred felony bench trials and approximately thirty-five felony jury trials.

In addition to being an exceptional litigator, Judge Willis is a passionate mentor to aspiring and new attorneys. Combining these two interests, she has become a frequent speaker and sought-after instructor in trial advocacy. She taught regularly at several national programs including at the National Criminal Defense College and at programs sponsored by the Defender Services Office Training Division. She is currently an adjunct professor at New York University School of Law.

RICHARD J. SULLIVAN

Richard J. Sullivan was sworn in as a Judge on the United States Court of Appeals for the Second Circuit in October 2018. Before that, Judge Sullivan served for eleven years as a trial judge on the United States District Court for the Southern District of New York in Manhattan. Prior to becoming a judge, he was General Counsel and Managing Director of Marsh Inc., the world's leading risk management and insurance brokerage firm. From 1994 to 2005, he served as an Assistant United States Attorney in the Southern District of New York, where he was Chief of the International Narcotics Trafficking Unit and Director of the New York/New Jersey Organized Crime Drug Enforcement Task Force. In 2003, he was awarded the Henry L. Stimson Medal from the Association of the Bar of the City of New York. In 1998, he was named the Federal Law Enforcement Association's Prosecutor of the Year. Prior to joining the U.S. Attorney's Office, Judge Sullivan was an attorney in private practice at the law firm of Wachtell, Lipton, Rosen & Katz in New York and a law clerk to the Honorable David M. Ebel of the United States Court of Appeals for the 10th Circuit. He is a graduate of Yale Law School and the College of William & Mary in Virginia. From 1986 to 1987, he served as a New York City Urban Fellow under New York City Police Commissioner Benjamin Ward. Judge Sullivan serves as the Chair of the United States Judicial Conference's Committee on Judicial Security and is a member of the Judicial Conference's Advisory Committee on Evidence Rules. He is on the executive board of the New York American Inn of Court and the Center for Law and Religion at St. John's University School of Law. He is an adjunct professor at Columbia Law School, where he teaches courses on sentencing and jurisprudence, and he previously served as an adjunct professor at Fordham Law School, where he taught courses on white collar crime and trial advocacy and was named Adjunct Professor of the Year.

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Appellate Division First Judicial Department
Supreme Court of the State of New York

Justices of the Court

Associate Justice Barbara R. Kapnick

Born in New York City, Justice Barbara R. Kapnick received her bachelor's degree cum laude from Barnard College and her juris doctor from Boston University School of Law.

She was elected to the Civil Court in 1991, appointed an Acting Supreme Court Justice in April 1994, and was elected to the Supreme Court, New York County in 2001. She was assigned to the Commercial Division in 2008, where she handled many high-profile cases, and was appointed to the Appellate Division, First Department in January 2014. Justice Kapnick was a member of the Advisory Committee on Judicial Ethics from June 2008 - June 2018, and now serves on its Ethics Faculty. She also served as Chairperson of the Board of Trustees of the New York County Public Access Law Library from 2008 to 2014. In December 2015, she was appointed to the Franklin H. Williams Judicial Commission, promoting racial and ethnic fairness in the courts, and in October 2017 she was appointed to the Commercial Division Advisory Council.

Justice Kapnick is the immediate past President of the Association of Justices of the Supreme Court of the State of New York and was the President of the Supreme Court Justices Association of the City of New York from 2013-2014.

She served as Presiding Member of the Judicial Section of the New York State Bar Association from June 2020-May 2021 and is a member of the Commercial and Federal Litigation Section. She is also a long-time member of the New York City Bar Association, where she currently serves on the Council on Judicial Administration.

Justice Kapnick is a Master of the New York American Inn of Court, past president of the Jewish Lawyers Guild, where she remains active as a member of the Board of Directors, and serves as a member of the Board of the Jewish Bar Alliance of New York. She is also a longstanding member of the New York Women's Bar Association and of the National Association of Women Judges.

A frequent lecturer for many Bar Associations, Justice Kapnick has received numerous awards, including the Benjamin N. Cardozo Award from the Jewish Lawyers Guild, the Harlan Fiske Stone Memorial Award from the New York City Trial Lawyers Association, the Women's History Month Flor de Maga Award from the Puerto Rican Bar Association and the Distinguished Jurist Award from the Defense Association of New York.

Web page updated: February 2, 2022

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Commercial Division – New York County / Manhattan

Biography of Justice Joel M. Cohen

Judge Joel M. Cohen was appointed to the Court of Claims by Governor Andrew Cuomo in June 2018 and was designated an Acting Supreme Court Justice in New York County by Chief Administrative Judge Lawrence K. Marks. He was assigned to the Commercial Division, New York County, as of January 1, 2019.

He received his B.A. in Economics from Binghamton University in 1983 and his J.D. summa cum laude from Georgetown University Law Center in 1986. He is a member of the Harpur Law Alumni Council and a past member of the Georgetown Law Alumni Board.

Judge Cohen was a litigation partner at Davis Polk & Wardwell LLP from 1996 until June 2018, prior to which he was an associate at the firm and, earlier, a law clerk for Judge Thomas A. Clark of the United States Court of Appeals for the Eleventh Circuit. In connection with pro bono representations in private practice, he was a recipient of the Thurgood Marshall Award from the Association of the Bar of the City of New York for the successful representation of a death row inmate and a Pro Bono Achievement Award from Sanctuary for Families for the successful representation of a domestic abuse survivor seeking alimony and child support benefits.

Abrams, Ronnie

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Ronnie Abrams was nominated to the United States District Court for the Southern District of New York on July 28, 2011 and entered on duty on March 22, 2012. Judge Abrams received a B.A. from Cornell University in 1990 and a J.D. from Yale Law School in 1993. Upon graduation, she served as a law clerk for the Honorable Thomas P. Griesa, then Chief Judge in the Southern District.

From 2008 until the time of her appointment, Judge Abrams ran the pro bono program at Davis Polk & Wardwell LLP, where she had previously worked as a litigation associate from 1994 to 1998. Judge Abrams served in the United States Attorney's Office for the Southern District of New York from 1998 to 2008, holding the positions of Chief of the General Crimes Unit from 2005 to 2007 and Deputy Chief of the Criminal Division from 2007 to 2008. While at the U.S. Attorney's Office, Judge Abrams received several awards and commendations for her work, including the Department of Justice Director's Award for Superior Performance as a Federal Prosecutor.

Judge Abrams was an Adjunct Professor at Columbia Law School from 2008 to 2012. She presently serves on the Public Service Committee of the Federal Bar Council and has previously served on the New York City Bar Association's Council on the Profession, and Pro Bono and Legal Services and Government Ethics Committees. She has also served as Counsel to the New York State Justice Task Force, one of the first permanent task forces to address wrongful convictions in the United States. In 2012, she received the New York State Bar Association President's Pro Bono Service Award for her Justice Task Force work.

In 2015, Judge Abrams co-founded and began to run the "Young Adult Opportunity Program," a judicially supervised pretrial program for non-violent young adults charged in the Southern District of New York. The Program supports the participants while providing them with access to employment, counseling, treatment and other resources. If they are successful in the Program, the participants may receive a shorter sentence, or even a reduction, deferral or dismissal of the charges against them.

Courtroom Deputy: Allison Cavale
Law Clerks: Zach Fields, Sam Frizell and Michelle Li

Judge Ranjan's brief-writing preferences

I appreciate well-written briefs. To that end, you may wish to consider some of my preferences, noted below.

1) **Active Voice.** Write in short sentences, with plain language, and use the active voice.

2) **Topic Sentences.** Each paragraph in your brief should start with a strong topic sentence, advocating your affirmative point. For example, don't start a paragraph by reciting the law (that should come after the topic sentence), and don't start it by saying what the other side argued (again, that should come after the topic sentence).

3) **Brevity**. Be brief. If you are butting up against a page limit, then that presents an opportunity to revise.

4) **Block Quotes.** Avoid block quotes.

5) **Adjectives and Adverbs.** Strive to eliminate these. Similarly, keep rhetoric in general to a minimum.

6) **Introduction.** The introduction is a critical part of your brief. Your introduction should be 1-2 pages and be a clear roadmap of the entire brief, laying out your main points in a succinct fashion. Don't waste space in your introduction with throat-clearing formalities (e.g., "Here comes Plaintiff, by her undersigned counsel...").

7) **Your Opponent.** When describing the other side's arguments, please use respectful language. For example, say "the plaintiff's argument is not well-taken," not "the plaintiff's argument is meritless, non-sensical, and disingenuous." Out of respect, when referring to an individual party, please consider calling him "Mr. Smith," not just "Smith." Also, don't personally attack opposing counsel.

8) **Legalese.** Do not use Latin or legalese; this includes words like "arguendo," "infra," and "supra." The only exceptions are where the names of a claim, defense, or doctrine are in Latin and there is no English substitute (for example, "negligence per se," "ex post facto violation," "motion to reinstate nunc pro tunc").

9) **Abbreviations**. Avoid abbreviations and defined terms. A brief is not a contract. For instance, if you represent Winston Steel Company, Inc. just say "Winston" in the brief. You don't need to define it as Winston Steel Company, Inc. (or "Winston"), and definitely don't abbreviate it with an ugly-looking acronym, like "WSCI." In this same vein, try not to call parties "Plaintiffs" or "Defendants," and instead use proper names, if possible.

10) **Know Your Standard.** The standard of review governing your brief will dictate how your arguments are framed. For example, if you are writing a brief in support of a motion to dismiss, you shouldn't say things like, "Plaintiffs cannot prove X." A motion to dismiss tests the sufficiency of the pleading, not the proofs—so, instead, you would frame your argument like, "Plaintiffs failed to plead X."

11) **Case Analysis.** Avoid excessive case analysis. Instead, make your point, then cite relevant cases with parenthetical explanations immediately after for support. I prefer direct quotations from the opinion to one-sentence summaries that you generate yourself. If there is an important case that needs to be discussed, emphasized, or distinguished, then you can engage in discussion of that case. This should be done sparingly, and only if the case is directly on point or if it is featured prominently in your opponent's brief.

12) **Citation Form.** Follow the Blue Book as a guide, but interpret it in a reasonable manner. Don't be a slave to it, especially on abbreviations. Just try to be rational and internally consistent in how you cite things.

13) **Headings.** Use short headings, and minimize the use of subheadings. Be consistent regarding the format of headings (some people initial cap certain words in headings, some people use all lower case; it doesn't really matter, so long as you are consistent. The popular trend is toward no initial caps).

14) **Visual Tools.** Use visual devices and tools to make things easier on your reader. In this regard, paragraph breaks are critical; break your paragraphs up, and avoid a paragraph that is more than a half-page long. Additionally, where appropriate, use organizational devices like numbering ("first," "second," "third"); bullet point lists; charts and graphics; and timelines. For example, in a case where the timing of events is critical or convoluted, consider creating a timeline in the fact section.

15) **Typos.** Your brief should not have typographical errors. This also includes formatting nits (e.g., are all your apostrophes "smart" ones, or do you have some "straight" ones peppered in from when you copied and pasted a case cite?

Do you have hanging headings? Did you inadvertently paginate your certificate of service?).

16) **Protect your reputation.** Your brief is part of your reputation. Substantively, that means don't stretch your arguments, play fast and loose with the record or the law, and do other things that undermine your credibility. Aesthetically, you should strive to have a professional-looking brief. Subject to any required rules, you should think about selecting handsome fonts and font sizes, how your cover page looks, and other details that make your brief look professional.

17) **Footnotes.** Try to avoid or minimize footnotes. If you want to challenge yourself, write a brief with no footnotes.

18) **Grammar.** People have different views on grammar. Your use of grammar should be defensible. For example, some people add one apostrophe to the possessive for "Mr. Jones' car." Other people add an extra "s"—"Mr. Jones's car." I add the s, and can defend it based on the grammar rules of Strunk & White.

19) **Sections of the Brief.** Consider whether your brief needs certain sections. For summary judgment briefs, your brief may not need a section on the standard of review, since all judges are familiar with that standard. Or, for a motion to dismiss, your brief may not need a fact section (or may just warrant a very brief summary of the facts) if the facts are apparent from the complaint and otherwise are raised in the context of your argument section.

20) **Reply Briefs.** Reply briefs are different than principal briefs. A good test for a well-written reply brief is that someone should be able to read your reply brief and understand the critical aspects of the case. A reply should briefly re-state key principal arguments; point out important weaknesses and concessions by your opponent; and respond to important arguments raised by your opponent. It does not have to be exhaustive and does not have to address every single point or case raised by your opponent. If your opponent cites a number of cases, consider finding a few common distinguishing points to deal with them all together.

BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS

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Editor-in-Chief

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of review; and

(e) a certificate of compliance, if required by Rule 32(a)(7).[5]

In addition, amici curiae other than the governmental entities permitted to file as of right must include a statement that indicates whether (a) a party's counsel authored the brief in whole or in part, (b) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief, and (c) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.[6] Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by the rules for a party's principal brief.[7] If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.[8]

An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than seven days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than seven days after the appellant's principal brief is filed.[9] A court, however, may grant leave for later filing.[10] Except by the court's permission, an amicus curiae may not file a reply brief.[11] An amicus curiae may participate in oral argument only with the court's permission.[12]

VI. STRATEGY AND ADVOCACY IN BRIEFING AND ORAL ARGUMENT

§ 69:102 Primacy of briefs

The overriding importance of the written briefs cannot be doubted because they are the principal vehicle for educating the judges about the case and influencing their thinking. Not only does the written format provide a medium that permits detailed concepts to be explained (compared to the "sound bites" that often characterize oral argument), the briefs persist in time—enjoying

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[5]Fed. R. App. P. 29(c).

[6]Fed. R. App. P. 29(c)(5).

[7]Fed. R. App. P. 29(d).

[8]Fed. R. App. P. 29(d).

[9]An amicus brief supporting an appellee thus may be filed on the eve of the time appellant's reply brief is due, see Fed. R. App. P. 29(e), yielding a good reason for appellant to seek leave to file an additional brief.

[10]Fed. R. App. P. 29(e).

[11]Fed. R. App. P. 29(f).

[12]Fed. R. App. P. 29(g).

primacy and recency in the terminology of formal argument. The briefs continue to speak long after oral argument is held, providing the last word as well as the first. These facts do not, however, diminish the often pivotal importance of oral argument in close cases, particularly those where the judges are divided. Nor does the importance of the briefs undermine the usefulness of oral argument in affording counsel a last-chance opportunity either to change the mind of a judge who has an adverse view, or to provide clarity or additional support with respect to a position that was tentatively accepted. From the standpoint of the court, oral argument may allow judges to communicate their views to their colleagues and use their questions to try to persuade the other members of the panel. Oral argument may also help to narrow or frame the issues to be addressed in the court's opinion, even if it does not change the panel's ultimate decision. On the downside, oral argument presents substantial risks to the parties, the most severe of which is making a dispositive concession at the lectern, usually at the pointed end of a sharp question from the bench. Or damage can bubble up less directly while explaining or elaborating a legal or factual point. In doing so, counsel may cause one or more of the judges who are sympathetic to counsel's position to reconsider. Thus, there is considerable truth to the view that cases are most often won on the briefs but sometimes lost in oral argument.

§ 69:103 The standard of review (revisited)

As noted above,[1] the parties should not concede the standard of review and blindly throw in boilerplate at the beginning of the brief. Rather, counsel should consider whether a good faith argument can be made for more (or less) deferential review based upon existing case law and the justifications for applying deferential review.

Once the standard of review desired has been articulated and supported by case law in an opening paragraph, it should not be stranded there. Instead, both appellant and appellee should weave the standard of review into the substance of their arguments, reminding the court at appropriate junctures just how deferentially (or not) the district court's ruling should be viewed. For example, after laying out the "clearly erroneous" standard of review applicable to factual findings, appellee's counsel in argument would emphasize the detailed nature of those findings, and the extensive record evidence supporting each finding, before summing up along the lines: "In light of the extensive record evi-

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[Section 69:103]

[1]See §§ 69:19, 69:36.

dence supporting each of the district court's findings of fact—as laid out in the district court's 52-page Decision After Trial—the findings of fact are amply supported by the record and not clearly erroneous."

§ 69:104 Presentation, techniques, and tactics in briefing

The appellate brief is, of course, the primary vehicle for executing counsel's strategic game plan. Indeed, much of what has already been discussed in Division III,[1] concerning the formulation of the strategy on the appeal is intertwined with and directly concerns methods of presentation, techniques and tactics of briefing. What is said here, concerning the brief-writing sequence required by Rule 28 of the Federal Rules of Appellate Procedure, supplements that earlier discussion.

The appellate game plan should address the interest of the court in reaching a fair outcome in the case (however that is defined); so should the brief. Most often that thematic narrative emerges in the statement of facts. The game plan should also address the court's fidelity to rules of law; so should the brief, most often in the legal argument. A brief that places too much reliance on extra-legal considerations of basic fairness (for example, overly emphasizing the small size and weakness of one's client, and the rapaciousness of the adversary) may be taken as signaling the absence of good legal ground for the position advocated. At the other extreme, a brief devoted to a dry analysis of the applicable precedents may fail to create a sense of what justice requires in a particular case, and thus fail to motivate the judges to reach the desired conclusion. A brief of the latter sort is particularly problematic for an appellant.

More generally, everything—literally everything—in a brief should be included with a purpose. Some of the contents of the brief are mandated; some are necessary to give the court sufficient information about the nature of the case so that the judges can comfortably conclude they have a complete picture; everything else should serve the strategy that was formulated to win the appeal. At the same time, redundancy should be avoided. A number of federal appellate judges voice displeasure that briefs are too long and too repetitive, a shared concern that led to reduced type-volume limits.[2] In light of these stated concerns, appellate counsel should try to keep briefs lean and avoid repetition, which unfortunately tends to creep into briefs through the overlapping mandated sections as well as through an optional

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[Section 69:104]

[1]See §§ 69:24 to 69:42.

[2]See § 69:97.

preliminary statement. An accomplished appellate practitioner knows how to craft an introduction that grabs the reader's attention, in order to set the foundation for the brief, without being duplicated in the summary of argument and argument. A judge who finds a brief to be interesting is not likely to complain about its length.[3]

§ 69:105 Presentation, techniques, and tactics in briefing—Preliminary statements

The mandated requirements of appellants' and appellees' briefs are, as discussed above,[1] specified in Rule 28 of the Federal Rules of Appellate Procedure. No mention is made in that rule concerning a preliminary statement (sometimes called an "introduction"). However, none is prohibited, and many briefs of appellants and appellees begin with one. Before discussing what might go into an optional preliminary statement, it is worth revisiting the required components that might overlap with the preliminary statement. In particular, information that might go into the preliminary statement would likely be found in the statement of facts, summary of argument and argument, and may be treated as well in the jurisdictional statement and the awkwardly phrased and often awkwardly injected "Statement of the Case, Course of Proceedings and Disposition Below" required by Rule 28(a)(6). The brief should be organized so that reader can pick up the brief at the first page, be oriented by the preliminary statement, and move effortlessly to the statement of issues, statement of facts, summary of argument and argument. The reader should not have to get bogged down by the other two required components (statement of jurisdiction and statement of the case, course of proceedings and disposition below) especially through repetition and redundancies. All briefs should adopt structures that seek to persuade the reader from start to finish—from preliminary statement to conclusion—but should streamline the presentation and avoid unnecessary repetition.

The brief writer should understand the limited purpose of the jurisdictional statement and avoid adding unnecessary information about the case when discussing the court's jurisdiction. That typically is not a problem. What can be a problem is the apparent invitation in Rule 28(a)(6) to include a broad array of information

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[3]Judge Dennis Jacobs, U.S. Court of Appeals for the Second Circuit, Update on Practice in the Second Circuit Court of Appeals, Address Before the New York State Bar Association Committee on Courts of Appellate Jurisdiction CLE Program (Oct. 17, 2014).

[Section 69:105]

[1]See §§ 69:99 to 69:100.

that may be better set out in a preliminary statement, statement of facts, and elsewhere. Such duplication of effort has been noted by the Advisory Committee on Rules of Federal Appellate Procedure, which raised the possibility of seeking an amendment to the rule to require only a "Statement" in keeping with the rules and practice in the Supreme Court of the United States.[2] It appears to be an accepted practice to supply a "Statement of the Case, Course of Proceedings and Disposition Below" that is no more than a paragraph, and provides the court with an overview of the case from about 30,000 feet, such as:

> *The appeal is from the grant of summary judgment dismissing a breach of contract claim governed by the New York Uniform Commercial Code.*

Consciously limiting this required section in this way frees the brief writer to craft the preliminary statement, statement of facts, summary of argument and argument without risking overlap with this part.

The preliminary statement should aim at synthesizing the party's position on the appeal in a page or two by profiling the case, providing context for the statement of issues, introducing the brief's essential themes and succinctly explaining why the challenged decision should be reversed or affirmed. It should employ a "hook"—an introduction that grabs the reader's attention. It should not, however, duplicate or closely resemble the required summary of argument that follows the statement of facts and precedes the legal argument section of the brief.

The preliminary statement is usually the hardest segment of the brief to draft and requires the highest form of the brief-writer's art. There is no single right way to draft it. Some lawyers struggle with and draft the preliminary statement before doing anything else. Others wait until a draft of the balance of the brief is completed. In whatever way the preliminary statement is drafted, the balance of the brief is the party's extended proof that on the facts and on the law the position expressed in the preliminary statement for reversal or affirmance is correct.

§ 69:106 Presentation, techniques, and tactics in briefing—Statement of jurisdiction

The first section required by Rule 28 in an appellant's brief is a

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[2]See Advisory Committee on Appellate Rules, Agenda for Fall 2010 Meeting, at 19–20 (Oct. 7–8, 2010), https://www.uscourts.gov/sites/default/files/fr_import/AP2010-10.pdf; Advisory Committee on Appellate Rules, Agenda for Spring 2012 Meeting, at 7, 215–55 (April 12–13, 2012), https://www.uscourts.gov/sites/default/files/fr_import/AP2012-04.pdf (proposed amendment and accompanying comments).

statement of jurisdiction, noted above.[1] In most cases, this will be routine and uncontested, and appellee's brief need not contain such a section if appellee is satisfied with appellant's statement. When jurisdiction is a potential issue, often it will be raised by appellee on a motion to dismiss. When appellee does not do so and there is an arguable jurisdictional issue, appellant must consider whether to establish the basis for jurisdiction in its opening brief, or await appellee's jurisdictional attack in its answering brief before providing a full response.

§ 69:107 Presentation, techniques, and tactics in briefing—Statement of issues

Rule 28 next requires appellant's brief to contain a statement of the issues presented, a subject that was previously discussed in Section 69:99. Although Rule 28 does not require an appellee to include a statement of the issues presented unless it is dissatisfied with appellant's statement, appellee should include one as a matter of course because the framing of the issues is of tremendous importance in every appeal.

Rule 28 requires that the statement of the issues be placed before the statement of facts and argument, no doubt so that the judges can consider those later sections in the context of knowing what exactly they are asked to decide. Statements of issues that are too general or that suggest tautologies—"Did the court below err when it denied appellant due process of law?"—are useless. Such a statement of the issues leaves the judges reading the statement of the case with a much-reduced sense of what is and is not important, and without an analytical framework for assessing what they are being told. They will then be reading the facts and argument in the brief focused on figuring out what the issues really are, rather than on how to resolve them. Greater specificity is thus necessary; for instance, "Did the court below err in applying an arbitrary limit of 50 hours of trial time to each side when this led to plaintiff's inability to cross-examine defendant's key expert witness on the issue of liability?"

The statement of the issues can also introduce and even summarize the arguments that will follow, and can begin the job of persuasion. To do so requires stating the issues with a high degree of specificity. One should not go too far, however, and have a lengthy statement of the issues that, for example, summarizes the key facts that party relies on, summarizes the rule of law that party will invoke to decide those facts, and asks whether the court below erred when it misconceived the facts as being dif-

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[Section 69:106]

[1]See § 69:99.

ferent and so applied some different rule. The statement of the issues is not a summary of argument, and it is a mistake to overestimate the court's ability to comprehend the facts and circumstances of the case from the specifics included in the statement of the issues. That comprehension will come from reading the narrative contained in the statement of facts, aided by the introductory profile of the case included in the preliminary statement.

The issues on appeal should be stated as "yes" or "no" questions, and should be framed so that the party's suggested answer is evident or, if not, the party's suggested yes or no answer should be furnished. When there is more than one issue it will aid comprehension if each issue has the same answer. Also, ordinarily, the number and sequence of the issues will correspond to the number and sequence of points in the brief. It would be odd to frame an issue as "Did the court below err when it failed to dismiss the complaint because of [statement of the reason]" and not have a point or sub-point headed "The complaint should have been dismissed because [statement of the reason.]"

The section on appellate strategy already discussed the need to avoid framing a multiplicity of issues, but it bears repeating that one or two good issues do not get better, but instead may get lost, when accompanied by two or three more.

§ 69:108 Presentation, techniques, and tactics in briefing—Statement of facts contrasted with statement of the nature of the case

As noted above,[1] Rule 28 requires the appellant to include a brief statement of the nature of the case, the course of the proceedings below, and the disposition reached below. This calls for a highly abbreviated treatment of the case, in a paragraph or less. It should not be objectionable to the appellee.

In contrast, Rule 28(a)(7) calls for the appellant to provide a "statement of facts relevant to the issues submitted for review with appropriate citations to the record." While the rule permits an appellee to accept an appellant's statement, appellees almost never do so. The statement of facts is the heart of the brief. As Justice Jackson wrote, "most contentions of law are won or lost on the facts," and "[d]issents are not usually rooted in disagreement as to a rule of law but as to whether the facts warrant its application."[2]

[Section 69:108]

[1]See § 69:99.

[2]Robert H. Jackson, Advocacy Before the United States Supreme Court, 37

§ 69:109 Presentation, techniques, and tactics in briefing—Statement of facts

When possible, the statement of facts should unfold as a story. Stories make it easier for the reader to understand the facts and their significance, and to remember the critical facts. Stories are structures in which matters of sequence, cause and effect, motive, and harm can be addressed in a coherent and understandable way. People are familiar with stories and beginning in childhood have developed the habit of learning through hearing or reading stories. A skillful telling of the story of the transaction or relevant events of a commercial dispute will permit the teller's version of what fairness and justice require to emerge naturally and persuasively.

The statement of the facts should not be written in an explicitly argumentative manner; the argument should be reserved for its own section of the brief. But that is not to say that the statement of facts should not be designed to persuade. Quite the contrary, it should be, in the most artful way. A well-told story should aim to leave the reader with a clear sense that the outcome below was fair or unfair, just or unjust, without the need for any legal argument. In that respect, the best-written briefs will make it plain to their readers by the end of the statement of facts, and before the legal argument, what result is appropriate to the case.

There is no point in omitting the "bad" facts. The court will learn them from the adversary anyway and their absence will make the brief-writer seem less than candid, damaging the advocate's credibility. The factual omission, moreover, will suggest that the arguments in the brief cannot survive the bad facts. While acknowledging the facts exist, the brief-writer must minimize their importance or weight and show why they do not undermine the result that is advocated.

Worse than ignoring the bad facts is misrepresenting them. The opponent will point out material misstatements; the court has the resources to determine which version of the record is accurate; and the party that mischaracterized the record will have lost credibility and created the impression that the party believes it cannot prevail on the record.

The judges may consult the record to resolve conflicts between

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Cornell L.Q. 1, 6 (1951). Justice Jackson's remarks in this and other instances are equally applicable to practice in the courts of appeals. As to the reliability of Justice Jackson's views on how to persuade, he himself noted that John W. Davis had written, "Who would listen to a fisherman's weary discourse on fly-casting . . . if the fish himself could be induced to give his views on the most effective method of approach?" Jackson, 37 Cornell L.Q. at 1 (alteration in original) (quoting John W. Davis, The Argument of an Appeal, 26 A.B.A. J. 895 (1940)).

the briefs, for further detail, and for other reasons. Even so, judges principally learn the facts of the case and the course of proceedings below from the briefs. Far too many briefs, unfortunately, are written with statements of the case that are too demanding on the reader and are overly detailed and too complex. The operative rule is always keep it simple. In that regard, footnotes can conflict with the goal of simplicity if they are used to introduce "background" detail that is not really relevant to resolution of the issues in the case.

Counsel who have been immersed in a case for perhaps years will sometimes be blind to how much explanation of the facts is needed before one really has a grasp of them. It is far more important to take the space needed to make sure the basics are well conveyed, than it is to include in the presentation every detail that is thought to add some color to the picture. As noted by one of the coauthors above,[1] briefs often omit facts about the context of the dispute and in doing so make it difficult, if not impossible, for the court to understand the consequences of the decision it is being asked to make. Good brief-writers know what facts to provide to put the issues, and requested relief, in context. They also know what to leave out, including unnecessary dates. While the sequence of events is often critical, the actual calendar dates may not be. Judges routinely lament wading through detailed chronologies only to find out the dates do not matter to the issues under review.

§ 69:110 Presentation, techniques, and tactics in briefing—Impediments to reading comprehension

Briefs, moreover, should be written with consideration for the mechanics of reading and sympathy for the obstacles to reading with comprehension. The writer should think about the judge's (and law clerk's) experience reading the brief. For example, briefs sometimes introduce too many defined and technical terms in the early pages; this can tax one's memory or, worse, leave the reader focused on recalling the definitions rather than grasping the significance of the facts. In addition, Rule 28(d) provides that references to the parties as "appellant" or "appellee" should be kept to a minimum. This would in any event be good advice; using parties' names is easier for the reader. Names beyond those of the parties can be hard to remember and sometimes readers need help with them. If Jones has been identified only once as the president of Smith Co., and that 10 pages ago, the reader will not

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[Section 69:109]

[1]See § 69:45.

resent being reminded of Jones' position when encountering the name a second time. Also, converting recognizable corporate names to acronyms is counter-productive.[1]

The number and placement of footnotes can interfere with comprehension. A footnote placed in the middle of a sentence, or sometimes in the middle of a paragraph, can interrupt the flow. Will the reader still have in mind the beginning of the sentence or paragraph when picking up in the middle? Some readers will reread the beginning and perhaps feel imposed upon by being forced to read something twice; others will simply continue, and not adequately grasp the end of the sentence or paragraph.

§ 69:111 Presentation, techniques, and tactics in briefing—Typeface and layout considerations

The typeface requirements in Rule 32, including the specification that proportionally spaced fonts be 14-pt or larger,[1] are intended to make briefs easier to read. Other techniques for reducing reader strain include keeping paragraphs short and using frequent headings to guide the reader. In this way, information can be "chunked" into bite-sized sections and easily digested by the reader.[2]

The growing use of computer tablets is introducing new challenges to brief writers as readers adapt to the small screen size and limited contrast of the text. Readers typically scan the screen across the top, down the left margin and then probe the middle of

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[Section 69:110]

[1]Excessive use of acronyms may not only interfere with reading comprehension; it may also upset the reader, as made abundantly clear by Judge Laurence Silberman of the D.C. Circuit. In several opinions he has publicly upbraided counsel for using dense acronyms. See, e.g., Delaware Riverkeeper Network v. F.E.R.C., 753 F.3d 1304, 1320–21, 78 Env't. Rep. Cas. (BNA) 2016, 183 O.G.R. 870 (D.C. Cir. 2014) (criticizing brief as "being laden with obscure acronyms notwithstanding the admonitions in our handbook (and on our website) to avoid uncommon acronyms" and lamenting that "[e]ven with a glossary, a judge finds himself or herself constantly looking back to recall what an acronym means"). Judge Silberman further noted that "we never see that in a brief filed by well-skilled appellate specialists. It has been almost a marker, dividing the better lawyers from the rest." Delaware Riverkeeper Network, 753 F.3d at 1321. Even outside the D.C. Circuit, good brief writers will avoid unfamiliar acronyms that tax, vex and annoy law clerks and judges.

[Section 69:111]

[1]Fed. R. App. P. 32(5)(A).

[2]For a discussion of "chunking" and other typographic and layout considerations in legal brief-writing, see Ruth Anne Robbins, Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents, 2 J. Ass'n Legal Writing Dirs. 108 (2004), http://www.ca7.uscourts.gov/rules/painting_with_print.pdf.

the page, following an "F" pattern.[3] This reading pattern means brief writers must enhance the visible structure of their legal briefs including by using short paragraphs and frequent headings, and also by employing bullet points and lists.[4] Another useful technique is to provide an ultra-clear table of contents and then link the TOC headings to the headings in the brief.[5] This allows the reader to jump directly from the TOC to the pertinent part of the brief.

§ 69:112 Presentation, techniques, and tactics in briefing—Argument

As already noted,[1] by the time the judges reach the summary of argument and the argument, they should have a clear idea of the essential reasons why the case should be decided in favor of that party. The arguments will then supply the legal analysis that should serve several functions: it will further support the sense of what fairness requires, as already developed in the statement of facts; it will show that legal analysis and logic point in the same direction as a sense of fairness, or better yet, mandate that direction; and it will provide what is needed to write a conventional opinion. The summary of argument should be quite brief, ordinarily a page or two. Each major point in the summary of argument may be framed as a syllogism of legal principle and factual application leading to the conclusions being advocated. However it is done, the goal is to provide a short, snappy, summary of each argument.[2]

In the argument section of the brief, which follows the summary, it is important not to hide from the opponent's ammunition.[3] There is nearly always a more than colorable argument that can be made for the other side and the judges will hear

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[3]See Robert Dubose, Writing Appellate Briefs for Tablet Readers, Appellate Issues, Spring 2012, at 9, 11.

[4]Dubose, Writing Appellate Briefs for Tablet Readers, at 9, 14.

[5]Dubose, Writing Appellate Briefs for Tablet Readers at 9, 14 (describing "bookmarking" process by which links can be formed).

[Section 69:112]

[1]See § 69:99.

[2]More than one law clerk and judge have skipped over the summary of argument in favor of reading the argument. As Justice Scalia explained to Bryan Garner, "Why would I read the summary if I'm going to read the brief?" Interview with Justice Antonin Scalia, 13 Scribes J. Legal Writing 51, 74 (2010). Even so, many judges and law clerks appreciate them.

[3]In fact, Third Circuit Local Rule 28.3(b) imposes upon each party the obligation to cite to authority that is binding on the court, whether that authority supports or opposes the party's propositions. That local circuit rule is an extension of the attorney's duty of candor to a tribunal, long recognized in Rule

it. The argument section of a brief must deal with that opposing argument, and most often quite explicitly. You should make your affirmative arguments first and then follow with a response to your opponent's (or lower court's) position.

When arguing against the outcome below, it is important to be respectful to the judge who reached it. An appellant's argument is unlikely to be strengthened by suggesting that one who disagreed with it lacks competence and understanding or is biased. Indeed, a personal attack on the judge below may invoke judicial feelings of solidarity and collegiality. It is not helpful for an appellant if the appellate judges are made to feel that a reversal implies not merely error below, but something far worse. A related point is that an attack on the integrity or tactics of opposing counsel most often will be a distraction at best, and perhaps a suggestion that the party making the attack has nothing better to advance in support of that party's position. In some instances, the errors of opposing counsel in misstating or omitting portions of the record, in misrepresenting authorities, or in attempting to take unfair advantage in some other way will speak for themselves loudly and not require epithet. On the other hand, if the opposing party's brief misstates the record or the law in a way which is material to the issues on appeal, counsel should not hesitate in calling the misstatement directly to the attention of the appellate court in a professional manner in its answering brief.

Legal argument's effectiveness comes from its clarity, coherence and effective use of precedent. Clarity does not need elaboration. Coherence requires that all that is stated in the brief, and all that is necessarily implied, form a consistent whole. Failures of coherence, thus defined, are more common than one might predict, as advocates will sometimes not see how two good arguments are somehow fundamentally at war with each other, or depend on inconsistent premises. Judges, coming to the case without an advocate's predisposition to favor the client, will see these conflicts.

As for use of precedent, a case or two in the right circuit, not too old, clearly making the point advanced, is a wonderful thing to have. There is no reason to dilute the impact of those most powerful cases by citing cases that support the point only

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3.3(a)(2) of the Model Rules of Professional Conduct, that requires an attorney to cite directly contrary binding authority. Even so, most cases can be distinguished and labeled in such a way that counsel will not violate Rule 28.3(b) or the analogous ethics rule. The critical question, however, remains whether disclosure will help or hurt the party's interests on appeal. If opposing counsel (or the court) is likely to find the case, disclosure almost always make sense. But counsel might decide not to bring to the court's attention negative authority that is not binding on the court and was hard to find, figuring disclosure will only muddy the waters.

indirectly or by inference. A brief, moreover, is rarely aided by making it seem that there are 20, rather than two, cases that show why that party should win.

It is difficult to say how many cases the judges will read, or have their clerks read, before deciding a case. It surely will not be a hundred and it is unlikely to number in the dozens. Brief-writers should consider which cases they want the judges to read.[4] Counsel should ask themselves a question that might get asked of them at oral argument: "What case or cases best supports your position?" These cases will, of course, bear most directly on what is actually in contest, as opposed to cases establishing basic principles not really in dispute, or cases sufficiently distinguishable so as to not be persuasive. The key cases should be featured in the argument section of the brief; it should not be a challenge for the reader to figure out which ones they are. Sending the judges to read cases of little relevance will not help, and will quickly discourage further reading.

Total candor is required when discussing the important cases, just as it is when discussing the record. Candor is required to maintain credibility; candor is required to achieve persuasiveness. The additional factor present and relied on in the precedent, but absent in the case at bar, will not be overlooked by the adversary or the court. The brief that ignores this distinction will fail to persuade. The better brief will argue directly why the missing factor is unnecessary.

Effective use of precedent ordinarily requires discussing the facts of the important cases. The legal principle set forth in a precedent, unmoored from the facts that led to its invocation, is ordinarily not very persuasive. It is, on the other hand, very persuasive to the courts of appeals that factually indistinguishable cases previously have set forth legal principles in favor of the very position being asserted on appeal. Demonstrating that requires discussion of the facts of the cases. Even when dealing with cases important to the argument but not directly on point, it is most helpful to synthesize the facts.

As a general rule, both appellant and appellee should aim to include a complete statement of their respective positions in their principal briefs. For the appellant, it is unwise to lay back from advancing an important argument until the reply brief.[5]

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[4]The District of Columbia Circuit requires that in the table of authorities of their briefs, the parties identify the authorities on which they chiefly rely. D.C. Cir. R. 28(a)(2).

[5]See § 69:113.

§ 69:113 Presentation, techniques, and tactics in briefing—Reply brief

The reply brief is critical. Some judges and law clerks start their analysis with the reply, treating it as the point where issues are joined by the parties and the real dispute emerges. Even when the reply is read last, it has tremendous importance. The reader is likely to view the dispute as being framed by the reply—what the parties are disputing factually and legally in the final analysis. The reply should be crafted so that it answers every material challenge raised by the appellee (including correcting the misapplication of standards of review, misstatements or mischaracterizations of the facts or evidence, and distinguishing cases on which appellee relies) but does so within the framework of the issues and arguments articulated in appellant's opening brief. This means the reply brief should not be organized as a sequential point by point refutation of particular arguments advanced by appellee. Rather, the reply should be structured by subject matter to resonate with the organization of the main brief, and to permit the detailed refutations of appellee's arguments to be integrated into the restatement of appellant's themes. In this way, the brief-writer can minimize the chances that the court will adopt appellee's phrasing of the issues and arguments.

As with the principal brief, appellate counsel should strive to avoid unnecessary repetition. The reply brief must not simply repeat the arguments laid out in the principal brief. Where appropriate, the reply can be shortened by cross-referencing the main brief's discussion of key factual and legal contentions. But it is difficult, if not impossible, to craft a comprehensive and snappy refutation of the arguments in appellee's brief—and to do so within the argument framework set out in the appellant's opening brief—without repeating some aspects of the main brief. The trick is to have a reply brief that *can* be read first and be persuasive, without unduly repeating parts of the main brief. It is a balancing act. Most practitioners consider the appellant's reply brief the most challenging to write and likely the most important brief in each case.

§ 69:114 Presentation, techniques, and tactics in briefing—Omitted arguments

Also as a general rule, neither appellant nor appellee should withhold any point of material importance from its principal brief in anticipation of advancing that point during oral argument. This is an obvious caution. The briefs are fully studied in advance of oral argument. Oral argument is not held in a number of cases. In many instances, when writing the brief, counsel will not know if oral argument will be held. Moreover, a rebuttal point made in

oral argument may be too late, may not be fully understood, and may not be remembered.

Of course, any time a party chooses to leave out (or forgets to include) a particular ground or contention in briefing, the specter of waiver exists. The rule is clear that the appellant's failure to assert on appeal arguments raised in the district court effects a waiver.[1] But what if the *appellee* does not advance on appeal all arguments asserted in the district court? The omission of the argument from appellee's brief may be intentional and tactical, or an oversight. In either case, the appellant may try to seize on the absent argument and assert that the appellee has conceded the point. But the duties to preserve arguments on appeal are not parallel for appellants and appellees. While an appellant must advance every ground and argument on appeal that is raised in the district court—or be found to have waived that contention—the same rule does not apply to an appellee. Rather, the circuit court remains free to affirm the district court on any ground disclosed in the record, including grounds abandoned or overlooked in appellee's brief.[2] Even so, circuit courts will not often reach down to such "orphaned" issues to decide the case.

[Section 69:114]

[1]See Ridgeway v. Walmart Inc, 946 F.3d 1066, 1076, 2020 Wage & Hour Cas. 2d (BNA) 2937, 170 Lab. Cas. (CCH) P 62017 (9th Cir. 2020) ("When an appellant fails to clearly and distinctly raise an argument in its opening brief, this court considers the argument abandoned."); Odums v. Greenpoint Mortgage Funding, Inc., 831 Fed. Appx. 32 (2d Cir. 2020) (holding that when the appellant raises an issue before the district court but does not raise it on appeal, the issue is deemed abandoned); Rittinger v. Healthy Alliance Life Insurance Company, 914 F.3d 952, 955, 2019 Employee Benefits Cas. (BNA) 32116 (5th Cir. 2019) (finding that plaintiff-appellant "forfeited" an argument by failing to raise it before the district court); In re Anderson, 884 F.3d 382, 388–89, 65 Bankr. Ct. Dec. (CRR) 101, Bankr. L. Rep. (CCH) P 83222 (2d Cir. 2018) ("It is well settled that arguments not presented to the district court are considered waived and generally will not be considered for the first time on appeal." (quoting Anderson Group, LLC v. City of Saratoga Springs, 805 F.3d 34, 50 (2d Cir. 2015))); Havens v. Colorado Department of Corrections, 897 F.3d 1250, 1259–60 (10th Cir. 2018) (same); Blasi v. New York City Bd. of Educ., 544 Fed. Appx. 10, 11, 301 Ed. Law Rep. 578 (2d Cir. 2013) ("[M]erely incorporating by reference an argument presented to the district court or stating an issue without advancing an argument is insufficient to raise an issue for appellate review." (internal quotation marks omitted) (quoting Norton v. Sam's Club, 145 F.3d 114, 117, 77 Fair Empl. Prac. Cas. (BNA) 221, 76 Empl. Prac. Dec. (CCH) P 45376, 40 Fed. R. Serv. 3d 1185 (2d Cir. 1998))).

[2]Kennedy v. City of Villa Hills, Ky., 635 F.3d 210, 214 n.2 (6th Cir. 2011) ("[A]ppellees do not waive claims by failing to respond to appellants' arguments on appeal."); Leary v. Daeschner, 228 F.3d 729, 741 n.7, 147 Ed. Law Rep. 824, 16 I.E.R. Cas. (BNA) 1249, 142 Lab. Cas. (CCH) P 59062, 2000 FED App. 0331P (6th Cir. 2000) ("This court cannot be forced to reverse the district court due merely to the cross-appellees' failure to respond to the cross-appellant's arguments."). Rather, a circuit court can "affirm [the district court] on any

Where the appellee has not bothered to advance on appeal an argument made below, it signals the appellee's lack of confidence in the contention, and the omission will likely be viewed by the circuit court as a de facto waiver. Accordingly, appellee should include in its brief each ground for affirmance it wishes the court to consider.

VII. STRATEGY AND ADVOCACY IN ORAL ARGUMENT

§ 69:115 Oral argument

Briefing having been completed, the case is ready for oral argument in those cases in which it is allowed.

Before turning to oral argument strategy, techniques and logistics, it is important to recognize that oral argument is on the decline in the federal circuit courts, both in terms of the percentage of cases being orally argued and the amount of time allotted for such argument.[1] The circuit court practices in holding oral argument vary greatly, but all circuit courts grant oral argument more frequently in counseled (i.e., non-pro se) cases. Appeals involving business disputes almost always are counseled cases and very often present issues that circuit courts find worthy of further development through oral argument. Even where oral argument is available, the time allotted may be limited to ten minutes or less. Accordingly, the primary responsibility of appellant counsel must be to prepare the more persuasive briefs, with

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grounds for which there is a record sufficient to permit conclusions of law, including grounds not relied upon by the district court." CBF Industria de Gusa S/A v. AMCI Holdings, Inc., 850 F.3d 58, 78–79 (2d Cir. 2017) (quoting In re Arab Bank, PLC Alien Tort Statute Litigation, 808 F.3d 144, 157 (2d Cir. 2015), as amended, (Dec. 17, 2015) and aff'd, 138 S. Ct. 1386, 200 L. Ed. 2d 612 (2018)); Bikram's Yoga College of India, L.P. v. Evolation Yoga, LLC, 803 F.3d 1032, 1036, 116 U.S.P.Q.2d 1357 (9th Cir. 2015). The Sixth Circuit further observed that the appellant had cited cases standing only for "the proposition that appellants who do not raise an argument on appeal waive that argument," and had cited "no such cases suggesting the same is true for appellees." Kennedy, 653 F.3d at 214; Leary, 228 F.3d at 741 n.7.

[Section 69:115]

[1]David R. Cleveland & Steven Wisotsky, The Decline of Oral Argument in the Federal Courts of Appeal: A Modest Proposal for Reform, 13 J. App. Prac. & Process 119 (2012); American Academy of Appellate Lawyers, Oral Argument Task Force Report ("AAAL Oral Argument Task Force Report"), https://www.appellateacademy.org/publications/Oral_Argument_Task_Force_Report.pdf (surveying circuit statistics and practices and noting "a marked decline in both the percentage of argued cases and the time allotted for each argument"); Matthew Stiegler, Guess Which Circuit Holds the Fewest Oral Arguments, CA3blog (Jan. 28, 2016), http://thirdcircuitblog.com/judges/guess-which-circuit-holds-the-fewest-oral-arguments-hint-its-the-same-one-that-issues-the-fewest-published-opinions/ (noting that in 12 months before September 30, 2014, the Third Circuit decided 90.1% of its cases without oral argument).

those written filings eclipsing the persuasion that can be accomplished in oral argument, with rare exception.

Even so, both personally and professionally for appellate counsel, it is the most visible and most exciting event in the appellate proceedings, no matter how short. Even at ten minutes per side, the challenges can be great and the demands of performance exacting.

In this modern era of the "hot bench," when oral argument takes place, the judges and their staffs have studied the briefs, the record and relevant authorities, and have at least formed tentative opinions about the outcome of the case.

For the federal appellate judiciary in the present-day environment, certainly the most important aspect of oral argument is the questioning process with counsel in which the judges individually may seek to sharpen the issues; get answers to the hard questions; clarify uncertain points relating to the law, the facts, or the evidence; resolve doubts; test their preliminary thoughts; strengthen the basis for a particular position or expose the weakness of an adverse one; build support for a position with their colleagues on the panel; introduce considerations that have not been dealt with in counsels' written submissions; explore the precedential and other effects of possible outcomes; deal with policy issues; or, in other ways, become better prepared to make a fully-informed final decision. If the judges instead are inactive during the parties' arguments, it often means they have a clear view both as to the outcome and as to how to write the opinion.

Appellate counsel in oral argument is afforded the opportunity to improve the chances of success by making a cogent albeit brief presentation of the central points of the case, lending further support to a favorable argument with which (although unknown to counsel) one or more of the judges may already agree, or by confronting and rebutting an important adverse argument that may have gained acceptance in the minds of one or more of the judges before the argument. Often oral argument is of pivotal importance in those cases in which (although unknown to counsel) the three judges come to the hearing with divided views, since what is said by counsel in responding to hostile or friendly questions may have a much greater influence on the judges than in those cases where they come to the argument with a unanimity of view. Oral argument is counsel's crucial final chance either to win the case by changing a judicial mind which is already made up, or to lose the case with a blundering response to a key question or other misstep.

The rules governing whether oral argument will be held, scheduling, panel composition, and procedure are contained primarily in Rule 34 of the Federal Rules of Appellate Procedure

and local circuit court rules. Their most important features are reviewed in Sections 69:115 to 69:120. Thereafter, Sections 69:121 to 69:128 present a comprehensive discussion of the process, strategy, tactics and techniques of oral argument in the context of commercial cases. In addition to what has already been said about the functions of oral argument in present-day conditions, subjects discussed include the divergent goals and strategies of appellant and appellee; the decision whether to seek or oppose oral argument; important considerations concerning preparation by counsel; essential elements in the content of oral argument; techniques of oral argument; and rebuttal.

§ 69:116 Rules governing oral argument

The discussion in Sections 69:117 to 69:120 of the general and more significant local circuit court rules addresses when a court of appeals may dispense with oral argument,[1] scheduling of oral argument,[2] composition of the appellate panel,[3] and procedure at oral argument.[4]

§ 69:117 Rules governing oral argument—The opportunity for oral argument

Based on the text of Rule 34 of the Federal Rules of Appellate Procedure, one might be forgiven for thinking that oral argument is a "given" in the circuit courts. Indeed, Rule 34 provides that oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons: (a) the appeal is frivolous; (b) the dispositive issue or issues have been authoritatively decided; or (c) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.[1] But as is true of many rules, Fed. R. App. P. 34 has numerous exceptions. Non-argument calendars exist in some circuits (although not applicable to commercial and business cases), and many circuit courts by culture and management of their argument calendar make oral argument the exception

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[Section 69:116]

[1]See Fed. R. App. P. 34; § 69:117.

[2]See § 69:118.

[3]See § 69:119.

[4]See § 69:120.

[Section 69:117]

[1]Fed. R. App. P. 34(a)(2).

rather than the rule.[2] The modern trend is toward permitting less argument as evidenced by the Second Circuit's abandonment of a long-held practice of permitting argument in every case including those brought by pro se litigants. The Second Circuit adopted a rule that requires counsel to affirmatively request oral argument or be found to have waived the right.[3] In imposing this obligation on the parties, the Second Circuit joins the Fifth, Sixth, Eighth, Tenth and Eleventh Circuits, each of which may find a waiver if a party fails to request oral argument.[4] Even in circuits where parties are not required to ask for oral argument, the court may be very restrictive in permitting argument. For example, the Third Circuit allows (but does not require) parties to file a statement regarding oral argument, but the court's practice is to deny oral argument in 90% of all cases.[5] Even when pro se cases are taken out of the equation in the Third Circuit,

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[2]See § 69:115.

[3]2d Cir. R. 34.1. The Second Circuit also established a non-argument calendar for certain immigration cases. See 2d Cir. R. 34.2.

[4]See, e.g., 2d Cir. R. 34.1 (requiring that parties file an Oral Argument Statement Form within 14 days after the filing of the last appellee's brief); 5th Cir. R. 28.2.3 (requiring parties to include in their briefs a short statement of the reasons why oral argument would be helpful or a statement that appellant waives oral argument); 6th Cir. R. 34(a) ("A party desiring oral argument must include a statement in the brief, not to exceed one page in length, setting forth the reason(s) why oral argument should be heard. A party's failure to include such a statement may be deemed by this Court a waiver of oral argument."); 8th Cir. L.R. 28A(i) ("[A]ppellant must file a statement not to exceed 1 page providing a summary of the case, the reasons why oral argument should or should not be heard, and the amount of time (15, 20, or 30 minutes, or in an extraordinary case, more than 30 minutes) necessary to present the argument."); 10th Cir. R. 28.2(C)(4) (mandating that a brief's front cover include a statement as to whether or not oral argument is desired and, if oral argument is desired, requiring the brief to include a statement of the reason oral argument is necessary); 11th Cir. R. 28-1(c) (requiring that appellate briefs include statement of whether or not oral argument is desired). In contrast, the First, Third, Seventh and Ninth Circuits make optional any filing with respect to requesting oral argument. See 1st Cir. R. 34.0(a) ("Any party who desires to do so may include, either in the opening or answering brief as the case may be, a statement limited to one-half page setting forth the reasons why oral argument should, or need not, be heard."); 3d Cir. R. 34.1 (permitting parties to file a statement with the court setting forth the reasons why oral argument should be heard within seven days after the filing of appellee's or respondent's brief); 7th Cir. R. 34(f) ("A party may include, as part of a principal brief, a short statement explaining why oral argument is or is not appropriate under the criteria of Fed. R. App. P. 34(a)."); see also Seventh Circuit's Practitioner's Handbook for Appeals 193 (stating that oral argument is to be allowed unless all three judges on the panel conclude it would not be helpful applying the factors under Rule 34(a)), http://www.ca7.uscourts.gov/forms/Handbook.pdf; see 9th Cir. R. 34-4(a) (allowing parties to stipulate to submission without argument).

[5]See ABA Appellate Practice Compendium (2012) at 76.

oral argument is held in only 25% of counseled cases.[6] The federal courts of appeals vary widely in allowing oral argument in counseled cases. At the low end, joining the Third Circuit, are the Fourth (25%), Sixth (31%), and Eleventh (25%) Circuits.[7] The highest percentages of argued counseled cases are found in the D.C (77%) and Seventh (86%) Circuits.[8] The Federal Circuit has a policy of generally allowing oral argument but also maintains a "No Hearing" calendar.[9] If a panel informs the parties that oral argument will not be allowed, the parties may be able to move for reconsideration.[10] Finally, oral argument may not occur if the parties agree and file a stipulation waiving it.[11] Although such a stipulation does not bind the court of appeals, it ordinarily will be approved.

§ 69:118 Rules governing oral argument—The scheduling of oral argument

The clerk of each court of appeals is responsible for preparing, under direction of the court, a calendar of cases awaiting oral argument.[1] In placing cases on the calendar for argument, each clerk must give preference to appeals in criminal cases except routine and basic sentencing appeals.[2] Arguments generally are scheduled in the order in which appeals are docketed, although some circuits will attempt to accommodate the parties' schedules and prior commitments when determining dates for oral argument.[3] Also, in deserving cases, oral argument for an appeal may be expedited upon the request of one or more of the parties

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[6]AAAL Oral Argument Task Force Report add. at 17 tbl. III.

[7]AAAL Oral Argument Task Force Report add. at 17.

[8]AAAL Oral Argument Task Force Report add. at 17.

[9]See ABA Appellate Practice Compendium (2012) at 313 (citing Fed. Cir. I.O.P § 7.2).

[10]See, e.g., D.C. Cir. 34(j)(2) ("Motions for reconsideration of a decision to dispose of a case without oral argument may be made within 10 calendar days of the date of the order advising counsel of th[e] court's determination that the case is to be decided without oral argument."); see ABA Appellate Practice Compendium at 313 (citing 1-5 CAFC, Practice & Procedure § 5.01) (granting counsel the opportunity to challenge placement on "No Hearing" calendar).

[11]See Fed. R. App. P. 34(f) ("[T]he parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.").

[Section 69:118]

[1]Fed. R. App. P. 45(b)(2); see also Fed. R. App. P. 34(b) ("The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side.").

[2]Fed. R. App. P. 45(b)(2).

[3]See, e.g., 1st Cir. R. I.O.P. VII ("Before the hearing list is finally established, the Clerk notifies the parties by letter of the proposed date for

to the appeal.[4]

An expedited date for oral argument usually will be granted upon a showing of good cause which, in the context of commercial appeals, may arise in an appeal from a preliminary or permanent injunction, in which delay would cause manifest injury.[5]

Once the date for oral argument has been set, any motion for postponement of the argument date "must be filed reasonably in advance of the hearing date."[6] The circuits require different showings in order for any such motion to be granted.[7] As a general rule, any motion for a postponement of the argument date should be made as soon as possible.

§ 69:119 Rules governing oral argument—Composition of the appellate panel

With the exception of cases heard en banc, oral arguments are

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hearing the case so that counsel may contact the Clerk if it appears that a scheduling conflict exists."); 7th Cir. R. 34(b)(3) ("Requests by counsel, made in advance of the scheduling of an appeal for oral argument, that the court avoid scheduling the oral argument for a particular day or week will be respected, if possible."); 11th Cir. R. I.O.P 34-3(e) (noting the schedule is set by the expected volume of cases and availability of the judges and that "[c]ounsel are expected to make all reasonable efforts to adjust conflicts in their schedule").

[4]See § 69:87 for discussion of motions to expedite appeal and motions to expedite oral argument.

[5]Many circuits have local rules specifically providing for expediting an appeal and oral argument. See, e.g., 5th Cir. R. 34.5 (allowing court of appeals to expedite consideration of an appeal for good cause); 6th Cir. R. 34(b) (same); 11th Cir. R. 34-4(e) (same). In the absence of a pertinent local rule, a court of appeals nonetheless may grant a request for expedited hearing under Fed. R. App. P. 2.

[6]Fed. R. App. P. 34(b).

[7]See, e.g., 1st Cir. R. 34.1(d) ("Once a case is scheduled for argument, continuances may be allowed only for grave cause."); 2d Cir. R. 34.1 (requiring showing of "extraordinary circumstances" to postpone argument"); 3d Cir. R. 34.2 (requiring "good cause" to postpone oral argument); see also 4th Cir. R. 28(c) ("The Court will interpret the listing of an attorney on a brief as a representation that he or she is capable of arguing the appeal if lead counsel is unavailable."); 5th Cir. R. 34.6 ("After a case has been set for hearing, the parties or counsel may not stipulate to delay the hearing. Only the court may delay argument for good cause shown."); 6th Cir. R. 34(c) ("good cause"); 7th Cir. R. 34(e) ("extraordinary circumstances"); 9th Cir. R. 34-2 ("No change of the day or place assigned for hearing will be made except by order of the Court for good cause. Only under exceptional circumstances will the Court grant a request to vacate a sitting within 14 days of the date set."); 10th Cir. R. 34.1(A)(3) (requiring "extraordinary circumstances" for postponement); 11th Cir. R. 34-4(f) requiring "good cause" which generally is not satisfied by the engagement of counsel in other courts); D.C. Cir. R. 34(g) ("extraordinary cause").

heard by panels of three judges.[1] Two of them generally must be circuit judges of that court, and the third either of the same status, or a district court judge from that circuit, or circuit court judge from another circuit sitting by designation.[2] The judges are assigned to each panel by mechanical and random assignment, which, in most cases, results in each active circuit judge sitting with every other active judge in the circuit an equal number of times. The circuits vary with respect to the amount of advance notice appellate counsel will receive as to the names of the judges selected to sit on a given panel.[3]

[Section 69:119]

[1]Upon the request of a party, a majority of the circuit judges who are in regular active service may order that an appeal initially be heard by the court of appeals en banc. Fed. R. App. P. 35(a), (b). Such requests rarely are made and even less often granted in the context of commercial appeals and, therefore, are not discussed in this section. See § 69:134 for a discussion of en banc rehearings.

[2]28 U.S.C.A. § 46(b). A court's senior circuit judges are "judges of that court" for purposes of the rule requiring that two of the panel members be judges of that court. See Cone Corp. v. Hillsborough County, 995 F.2d 185, 63 Empl. Prac. Dec. (CCH) P 42644 (11th Cir. 1993); In re Bongiorno, 694 F.2d 917 (2d Cir. 1982). If the panel lacks the requisite number of judges from that court, it is a jurisdictional defect that renders the court without jurisdiction to hear or decide the appeal. Nguyen v. U.S., 539 U.S. 69, 82–83, 123 S. Ct. 2130, 156 L. Ed. 2d 64 (2003) (vacating affirmance of criminal conviction holding that the Ninth Circuit panel, consisting of two judges from that court (both Article III judges) and the Chief Judge of the District Court for the Northern Mariana Islands (an Article IV territorial-court judge appointed by the President and confirmed by the Senate for a 10-year term, violated 28 U.S.C.A. § 46(b) and was without jurisdiction). In addition, the Chief Justice of the United States may designate and assign temporarily a district judge of one circuit for service in another circuit's court of appeals, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises. 28 U.S.C.A. § 292(d). A similar process permits district court judges to be designated to adjudicate matters in another district. 28 U.S.C.A. § 297(d). All such certificates of necessity are time-limited; they do not automatically renew. A designated district judge, who acts after the authorization has expired, is acting without jurisdiction and any decision made by that judge will be null and void. See Wrenn v. District of Columbia, 808 F.3d 81, 83–84 (D.C. Cir. 2015) (finding that an N.D.N.Y. senior district judge, who was initially authorized to hear one case in the District of Columbia pursuant to a certificate of necessity under 28 U.S.C.A. § 294(d), acted without jurisdiction in adjudicating a related case that was assigned to him after the authorization expired).

[3]For example, First Circuit (appellate counsel generally is notified of the panel assignment 1 week prior to oral argument); Second Circuit (Thursday before argument); Third Circuit (10 days); Fourth Circuit (appellate counsel learn the panel assignment on the morning of oral argument); Fifth Circuit (1 week); Sixth Circuit (2 weeks); Seventh Circuit (morning of argument); Eighth Circuit (30 days); Ninth Circuit (1 week); Tenth Circuit (1 week); Eleventh Circuit (1 week); Federal Circuit (morning of argument). In the District of Columbia Circuit, unlike all other circuits, appellate counsel learns the composition of the panel through a scheduling order issued prior to briefing.

§ 69:120 Rules governing oral argument—Procedure at oral argument

Court rules can require arriving well before the scheduled argument, and it is good practice in all events because the schedule may be accelerated or changed due to a variety of reasons. Counsel typically signs in with a clerk. If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument.[1] If neither party appears, the case will be decided on the briefs unless the court orders otherwise.[2]

Prior to the time a case is called for argument, the clerk of the court will have advised all parties of the argument time to be allowed each side.[3] Most circuits have a local rule in place setting limits on the time allotted for each side's argument, predominantly 15 minutes per side although with some variations among the circuits.[4] Requests for enlargements of argument time, which should be made by motion to the court prior to the date of oral argument, are disfavored.[5] Arguments beyond 30 minutes a side are extraordinary. In enforcing the assigned time limits for argument, presiding judges can be particularly strict. Lights typically are affixed upon the lectern from which the advocate argues, e.g., one amber light which, when lit, signifies that the lawyer has only a few minutes of argument left, and the second red, which signals that time has expired. Appellate counsel should learn

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[Section 69:120]

[1]Fed. R. App. P. 34(e).

[2]Fed. R. App. P. 34(e).

[3]Fed. R. App. P. 34(b).

[4]See, e.g., 1st Cir. R. 34.0(c)(1) (usually permitting no more than 15 minutes per side for oral argument); 2d Cir. R. 34.1(d) (offering no presumptive time allotments, though in practice it is often ten minutes or less per side); 3d Cir. R. I.O.P. 2.1 (usually 15 minutes per side; requests for oral argument beyond 20 minutes are determined by a majority of the panel); 4th Cir. (usually 20 minutes per side); 5th Cir. R. 34.11 (usually 20 minutes per side); 6th Cir. 34(f) (15 minutes unless otherwise indicated); 7th Cir. R. 34(b)(1) (specifying that amount of time allotted for oral argument will be set based on the nature of the case); 8th Cir. R. 34A(b) (20 minutes per side); Fed Cir. R. Practice Note 34 (15 minutes per side).

[5]See, e.g., 3d Cir. R. I.O.P. 2.1 (stating that the majority of the three-judge panel determines whether a party will receive additional time); see also 3d Cir. R. I.O.P. 2.1 ("If counsel believes that more time is needed for oral argument, a written motion setting forth the reasons for additional time . . . must be submitted well in advance of the hearing date." Such motions are discouraged by the court and are seldom granted."); 5th Cir. R. 34.12 (requiring a party to request additional time through motion or a letter to the clerk well in advance of the hearing date); 11th Cir. R.34 I.O.P. 11 (requiring parties to request additional time through a written motion well in advance of hearing).

how this system works prior to argument.[6] Once the red light is illuminated, attempts by zealous advocates to stray beyond the allotted time, unless answering a panel member's question, may be met with a stern admonition to sit down. Similarly, with the exception of a panel member's invitation to an appellee to answer a question following rebuttal by the appellant, sur-rebuttals are disallowed.

Sometimes, however, it is apparent that the court plans for the possibility of argument beyond the allotted time. The Second Circuit, for example, often seems to place difficult cases last on the calendar in anticipation that the argument will go beyond the stated maximum per side. Experience in other circuits confirms that extended oral arguments occur whenever the court is deeply engaged in the argument. If the case raises interesting issues, and the argument calendar permits sustained argument, counsel should anticipate going past the allotted time. Arguments that last 45 minutes or an hour are not unheard of. In one commercial case, the Third Circuit heard 45 minutes of argument on the interpretation and application of UCC 2-609, after which the panel thanked counsel for bringing such an interesting case to their court. Appellant's counsel should welcome that kind of interest from the court. Even if the appellee would prefer a less searching and involved argument, extended argument presents an important opportunity to answer the court's questions about the decision below.

Appellant's counsel has the right to open and close the argument,[7] and should indicate at registration before oral argument the amount of rebuttal time that is desired.[8] Time reserved for rebuttal will be deducted from counsel's initial time for argument. Moreover, arguments presented by more than one attorney on behalf of a single party or multiple parties with the same interests generally are disfavored by the court and, in some in-

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[6]See, e.g., 5th Cir. R. 34 I.O.P. ("A green light signals the beginning of the opening argument of appellant. Two minutes before expiration of the time allowed for opening argument, the green light goes off and a yellow light comes on. When the time reserved for opening argument expires, the yellow light goes off and a red light comes on. If counsel proceeds after the red light, time will be deducted from the rebuttal period. The same procedure as outlined above [for appellant] is used [for appellee's argument. For appellant's rebuttal, a] green light signals commencement of time; a red light comes on when the time expires. No yellow light is used [for rebuttal argument].").

[7]Fed. R. App. P. 34(c).

[8]But see 1st Cir. R. 34.0(c)(2) ("Although FRAP 34(c) permits an appellant both to open and conclude the argument, the court holds the view that seldom is counsel well served by an advance reservation of time for rebuttal . . . [as rebuttal time] is likely merely to allow repetitious argument.").

stances, may not be permitted.[9] When such a division of arguments is permitted or when more than one counsel argues on the same side for parties with differing interests, the time allowed shall be apportioned between such counsel at their own discretion. If counsel are unable to agree, the court will allocate the time.

With regard to the argument itself, appellate counsel should have a complete mastery of the record, the briefs and pertinent authority, and must be prepared to answer any questions raised by the court. Nearly all circuits, however, caution in their local rules that appellate counsel be mindful of the fact that the court already has read the parties' briefs, and oral argument should not be used merely to repeat what already has been written.[10]

Rule 34 of the Federal Rules of Appellate Procedure also imposes two additional rules relating to the manner in which oral argument is to be presented. First, under Rule 34(c), appellate counsel is not permitted at oral argument to read at length from briefs, records, or authorities. Second, Rule 34(g) states that "if physical exhibits other than documents are to be used at the argument, counsel must arrange to have them placed in the court room before the court convenes on the date of the argument."[11] Local rules should be consulted for additional rules and restric-

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[9]See, e.g., 2d Cir. R. 34(c) ("Only one counsel will be heard for each party on the argument of a case, except by leave of court."); 6th Cir. R. 34(h)(2) ("Without leave of Court and absent exceptional circumstances, this Court will not permit divided arguments."); 7th Cir. R. 34(c) (divided arguments permitted but disfavored). But see 11th Cir. R. 34-4(d) ("Only two counsel will be heard for each party whose appeal is scheduled to be argued, and the time allowed may be apportioned between counsel at their discretion.").

[10]See, e.g., 4th Cir. R. 34(d) ("[M]embers of the Court hearing oral argument will have read the briefs . . .. Counsel should emphasize the dispositive issues."); 6th Cir. R. 34(h)(1) ("Oral argument should undertake to emphasize and clarify the written argument appearing in the briefs."); 9th Cir. Rules 34-1 to 34-3 Advisory Note ("The Court thoroughly reviews the briefs before oral argument . . .. Counsel therefore should not unnecessarily repeat information and arguments already sufficiently covered in their briefs.").

[11]At least two circuits have unique rules in place governing visual aids at oral argument and local rules should, therefore, be consulted prior to their use. In the Federal Circuit, counsel may not use a visual aid at oral argument unless the other side was given at least 21 days advance notice and an opportunity to object. Fed Cir. R. 34(c)(2) ("If counsel intends to use at oral argument a visual aid that was not used at a trial, or administrative hearing, counsel must give written notice to opposing counsel no later than 21 days before the oral argument.") The District of Columbia Circuit requires that "[i]f counsel intends to use exhibits during argument or to hand out prepared materials, notice of th[at] intent must be provided to the court and all other counsel presenting argument by letter received not less than 5 days before the date of the argument." D.C. Cir. R. 34(i).

tions on the content of oral argument.[12]

§ 69:121 The process, strategy, tactics, and techniques of oral argument

The strategy, tactics, and techniques of oral argument for each of appellant and appellee are shaped by the strategic game plan, the briefs, procedure, and process. Oral argument is simply the last step in the implementation of the game plan, as that plan may have undergone adjustment as a result of the briefing. Procedure plays a role initially in the determination of whether oral argument will be held and, if so, the restraints of time that are imposed on counsel. Process, as discussed in Section 69:118, is crucial since oral argument to a "hot bench," most importantly in the back-and-forth of questioning, comes after the judges have studied the case and have ordinarily reached at least a tentative conclusion about its outcome. Taking into account all these interrelated factors, the subjects of the succeeding subsections are whether oral argument should be requested or opposed;[1] the functions of oral argument for the appellant and the appellee;[2] preparation;[3] structure and content;[4] techniques;[5] and rebuttal.[6]

§ 69:122 The process, strategy, tactics, and techniques of oral argument—Requesting or opposing oral argument

In most circuits, there will be real questions of whether oral argument is needed and will be permitted. As is apparent from the earlier discussion of the rules and procedure relating to the court's determination of whether to hold oral argument,[1] in commercial cases the standard of most immediate importance is whether "the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." The appellant who has

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[12]See, e.g., 7th Cir. R. 34(g) ("Counsel may not cite or discuss a case at oral argument unless the case has been cited in one of the briefs or drawn to the attention of the court and opposing counsel [in advance of the argument].").

[Section 69:121]

[1]See § 69:122.

[2]See § 69:123.

[3]See § 69:124.

[4]See § 69:125.

[5]See § 69:126.

[6]See § 69:127.

[Section 69:122]

[1]See § 69:117.

submitted a main brief and a reply brief will be in no position to argue that there is any inadequacy in those briefs. Instead, appellant must concentrate its argument in support of a request for oral argument on the value of oral argument to the court due to, for example, the complexity, difficulty or importance of the issues. An appellee seeking oral argument ordinarily would not want to emphasize the difficulty or importance of the case but would assert that oral argument would aid the court. In appropriate circumstances, an appellee would also rely on a need to deal orally with matters raised in appellant's reply brief as to which there was no opportunity to respond in writing. An appellee opposing oral argument would emphasize the adequacy of the briefs, the superfluousness of oral argument, and, often, the routine character of the case.

As a matter of strategy in a commercial case, it is difficult to imagine any good reason why an appellant would not seek oral argument. Few cases, if any, involve such clear reversible error that oral argument would not afford appellant some opportunity for improving the chances of success. As the losing party, appellant needs to stimulate the court's attention and arouse its interest in the legal issues and the considerations of fairness or justice. Appellant's counsel wants the judges to become engaged and ask questions, to verbalize difficulties so that they can be answered, to bolster support with those judges who may be inclined to appellant's position and to dissuade those judges who may be inclined to the appellee's position. In short, appellant's counsel wants to make the most of this last chance to influence the outcome of the case. Another related reason for appellant to seek oral argument is that in-chambers study of the case by the judges and their staffs may not be as intense and may not receive as much of the judges' attention as cases which are heard at oral argument. Indeed, the failure of appellant's counsel to request oral argument may be viewed by some judges as an indication of weakness or lack of importance of the appeal.

The possible strategies of appellees concerning whether to seek or oppose oral argument are more complicated. Generally, it might be considered that appellee, as the winning party, ought to be content to have the case decided on the decision rendered below and the briefs. For these reasons, appellee would often oppose a request for oral argument, so that appellant is not given an opportunity to arouse interest and another chance to persuade the court to reverse the challenged decision. There are, however, cases where, despite victory below, oral argument is in appellee's interest, for example, in a close case or where the district court adopted and applied a novel principle of law. It is, moreover, as valuable for the appellee as it is for the appellant to hear what is on the minds of the judges and have the opportunity to bolster its

position by dealing with their concerns before they confer to decide the case. Oral argument may also be in appellee's interests when appellant's reply brief raises new matter that needs response or is sufficiently strong to require a rebuttal that is not merely a repetition of what was said in appellee's answering brief. For whatever particular reasons, appellees commonly ask for oral argument, and so an appellee need not be concerned that such a request will be taken by the court as conceding weakness or difficulty in the case.

§ 69:123 The process, strategy, tactics, and techniques of oral argument—The functions of oral argument for appellant and appellee

Oral argument permits appellant to try to arouse the court's interest and stimulate dialogue as a vehicle for convincing the court that justice was not done below and that the court of appeals may properly remedy the matter. For the reasons discussed above in Section 69:115, answering questions—whether hardballs, curveballs, or softballs—is the most important element of appellate advocacy in the federal courts of appeals. For appellant, the second most important element is making an affirmative presentation that prompts the judges to ask questions, and thereby gives counsel the opportunity to confront and respond to difficulties and lend further support to the case when friendly questions are asked.

For appellee, the function of oral argument is not as simple. In some instances it may be to avoid exciting interest (by making as brief a presentation as possible), where it is apparent during the argument of appellant's counsel that the court has little or no interest in the case. In some instances, it may be a limited one: giving appellee's counsel's answers to questions asked of appellant's counsel; satisfying an uncertainty or dealing with a weakness that may have emerged during the course of opposing counsel's argument; strengthening or confirming a particular position; or providing comfort for the fairness or justice of the result. In other instances, where the case is a close one or where the challenged decision is in obvious jeopardy, the function of oral argument for appellee is full-blown. In that situation appellee's counsel must deal with the case in its entirety no differently from appellant's counsel. Counsel can take nothing for granted in making a final effort to convince the court of the fairness or justice of appellee's position and in seeking to persuade the court that no reversible error was committed.

Oral argument is not a time to make a presentation that is aimed at sounding good to the client but glosses over the real difficulties in the case. Counsel must single-mindedly shape the

argument for the only audience that counts: the judges. In advance of the argument this is a point particularly worth making to corporate executives or other business clients in commercial cases who nevertheless may be unsophisticated or inexperienced in the appellate process and who, in significant cases, may attend the argument. Although few if any modern appellate lawyers in commercial cases would advise their clients not to attend the oral argument (and many welcome such attendance), this aspect of appellate advocacy was so important that in an earlier day, leading judges and appellate lawyers strongly advised against the very presence of clients at the oral argument:

> "I doubt whether it is wise to have clients or parties in interest attend the argument if it can be avoided. Clients unfortunately desire, and their presence is apt to encourage, qualities in an argument that are least admired by judges. When I hear counsel launch into personal attacks on the opposition or praise of a client, I instinctively look about to see if I can identify the client in the room-and often succeed . . . The case that is argued to please a client, impress a following in the audience, or attract notice from the press, will not often make a favorable impression on the bench. An argument is not a spectacle."[1]

§ 69:124 The process, strategy, tactics, and techniques of oral argument—Preparation for oral argument

Mastery of the record and law is the first essential element of preparation for oral argument so that any question from the judges about any subject can be answered with assurance and in a way that helps advance the party's position. For arguing counsel, it means achieving fingertip control of the facts, the evidence, the decision which is the subject of the appeal, and the relevant authorities. It requires only one discipline: diligent study and restudy of the record and the authorities in the context of the challenged decision, the issues on appeal, and the arguments of the parties advanced in their briefs. There are really no shortcuts, particularly in complex commercial cases. Indeed, many hours have to be spent in getting ready for a 15-minute oral argument, even for the appellate lawyer who has tried the case or who handled the proceedings in the court below.

Preparing for oral argument is primarily the task of arguing counsel, not subordinates or associates. From time to time, one hears stories of a distinguished but too-busy arguing counsel berating an assistant after the oral argument for failing, during

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[Section 69:123]

[1]Robert H. Jackson, Advocacy Before the United States Supreme Court, 37 Cornell L.Q. 1, 10 (1951); see also Frederick Bernays Wiener, Briefing and Arguing Federal Appeals 345 (1961).

preparatory sessions, to call attention to particular facts or evidence in the record, or even legal authority, that became the subject of questioning during that argument. The failure, however, can be seen as arguing counsel's. If the salutary objective of complete mastery is to be achieved, relatively little of the hard work can be delegated to others.

Preparation also means thinking through the oral argument and all its possibilities. This goes to the structure and content of the argument,[1] including, most importantly, the issues and matters which will likely be of greatest concern to the judges and that will be the likely subjects of questioning from the bench. In this latter respect, the most important goal of preparation is that no question asked at oral argument should be unanticipated, and no answer unprepared. That is easier said than done, but it does mark the rigor with which the analytical aspects of preparation must be addressed.

When preparing, appellate counsel will recognize that although the questions from the court will be the principal determinant of the matters covered in the argument, they will be able to exercise some control as well. Counsel should identify the two or three points that they are determined to make no matter what questions are asked and prepare to integrate those points into the answers to a variety of different questions that can be anticipated.

There is no single best method for preparing the oral delivery of the argument. Accomplished appellate counsel prepare in different ways, depending on their personal preferences and experience. Some like the discipline and formality of a moot court, using a panel of colleagues to simulate the forthcoming argument. Others prefer private and sometimes repetitive rehearsals. Many prepare more informally around a conference table with colleagues, analyzing difficult issues, visualizing questioning from the bench, developing answers and approaches, trying out different types of organization, and anticipating the argument of the adversary for the purpose of developing counter-strategy. The key point is that some form of intense preparation is essential, however it is done.

The mechanics of preparing for oral argument also may vary depending on personal preferences and experience. Most lawyers will want some prepared materials before them during argument as an aid to memory. Some lawyers prefer handwritten notes on legal pads, others on index cards or sticky-notes, and still others with tabbed notebooks by subject matter containing typewritten outlines and points. Whatever method or combination of methods

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[Section 69:124]

[1]Separately discussed in § 69:125.

may be used, too much detail should be avoided since the effectiveness of oral argument is enhanced by eye-to-eye contact with the judges and is greatly diminished when counsel's nose is buried in notes. By the time of the argument counsel should know the case so well that a sheaf of notes is unnecessary.

One practice that should always be followed in advance of the argument is tabbing the significant portions of the record and briefs for quick and easy reference during the argument without fumbling or delay. However, if a record reference requested by a judge during oral argument is not quickly at hand, rather than delaying and interrupting the argument in search for the reference, permission should be requested to leave the record reference with the clerk after the conclusion of the argument or to provide it in a letter to the court.

Preparation for oral argument also means having as much knowledge as possible concerning the judges who will be hearing the case. In contrast to counsel's lack of knowledge of panel assignments prior to briefing (except in the District of Columbia Circuit), eight of the circuits give counsel notice of the panel assignments from one to four weeks in advance of the scheduled date for oral argument.[2] This provides plenty of time to identify the panel members who participated in writing, concurring in or dissenting from any of the decisions cited in the parties' briefs to identify any other possibly relevant decision not cited by either of the parties in which a panel member participated. Study of those decisions is obviously helpful in preparing to argue the questions involved on the appeal, but also may be helpful in discerning the attitudes, approaches and styles of the different panel members.

In the Fourth, Seventh and Federal circuits, panel assignments are not announced until the morning of the argument and therefore the same kind of study is not possible. However, well in advance of the announcement of the panel assignment, an index can be prepared identifying each judge in the circuit who participated in any of the decisions cited in the briefs, so that once the panel is announced a quick review may be possible of those decisions in which panel members participated. It is important to have this information before the argument, and not learn it for the first time during or after the argument.

§ 69:125 The process, strategy, tactics, and techniques of oral argument—Structure and content of the oral argument

An essential element of preparation in advance of oral argument, for both appellant and appellee, is organizing the structure

[2]See § 69:119.

and content of the intended or potential argument. This involves outlining which points should be made (including the answers to anticipated questions), the ideal manner in which they should be made and their ideal sequence. As frequently occurs, however, appellant's argument is not delivered as organized. Rather counsel must be flexible and nimble in reacting to questions and interruptions from the bench, and if possible, integrating answers to such questions into the intended argument. The same is true for appellee's counsel, who must also have the dexterity to alter the planned argument in light of any evidence of any lack of interest by the judges or anything else that may have been said or not said during the course of the opening argument. With these caveats, the outlines prepared by opposing counsel serve as the substantive foundations for their respective oral arguments. They are also useful as reminders to counsel of what major points to get across in answering questions or in presenting affirmative oral argumentation in the gaps of time between questions.

The outline, which is appellant's plan and appellee's tentative plan for the oral argument, should articulate the issue or issues on the appeal and proceed, as John W. Davis has said, to go "for the jugular vein": the single point or few points around which the appeal revolves.[1] Robert H. Jackson expressed essentially the same wisdom a little bit differently in saying that the impact of oral presentation will be greatly enhanced "if it is concentrated on a few points that can be simply and convincingly stated and easily grasped and retained."[2]

Counsel must anticipate that however much time is allowed for argument, most of it will be devoted to answering the questions posed by the judges. Counsel will not have all the time allotted to make the points counsel chooses. But it is also important to recognize that counsel will always have some opportunity to address points of counsel's choosing. A large part of preparation is determining what few things are on the list of what must be said. A large part of delivery is managing to say them even in the face of active questioning by the court, not by disregarding the court's questions, but by answering them in a way that includes the necessary material, or by not stopping upon concluding an answer but instead seamlessly moving from the direct answer to the critical point of counsel's choosing.

For appellant's counsel, an attempt to open the argument with

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[Section 69:125]

[1]John W. Davis, The Argument of an Appeal, 26 A.B.A. J. 895, 897 n.1 (1940).

[2]Robert H. Jackson, Advocacy Before the United States Supreme Court, 37 Cornell. L.Q. 1, 5 n.1 (1951).

a summary of the facts is not merely a waste of valuable time. Usually it will be met with either a polite or irritable reminder that the judges are familiar with the facts from their study of the briefs and record. It will be starting the argument off exactly on the wrong foot, a mistake from which counsel may never recover if immediately interrupted and confronted with hostile questioning. Likewise, a bad way to begin oral argument, which occurs all too often, is to correct mistakes in the brief. This should be handled with the submission of an errata sheet that can be mentioned at a later point in the argument.

Instead, counsel should begin with a "roadmap"—essentially, a statement of the issue on the appeal and an identification of the one of two points counsel expects to make during the argument. Primary emphasis should immediately be given in the simplest possible terms to the strengths of appellant's position that reversible error occurred. Often this will involve a blend of the key facts and the applicable principles of law (in many instances without the necessity of citing specific case authority), interwoven with the themes of fairness or justice that were introduced in the briefs. Ordinarily this would be done by stating the relevant legal principle, applying that principle to the facts of the case and then explaining why that is the right result. It is a structure that anticipates and invites interruption from the bench to which counsel can return each time questioning ceases.

Not only the strengths but also the weaknesses of appellant's position (the strengths of the decision below or of the adversary's arguments or both), must be confronted and dealt with. Indeed, since it is the appellant's burden to show reversible error, appellant cannot ignore what appear to be good reasons supporting the result reached in the court below. Instead, those reasons must be confronted to show why they are either wrong or insufficient. As the late Chief Judge Breitel (of the New York Court of Appeals) often remarked, the most successful appellate lawyers are those who acknowledge the weak spots in their argument and then minimize their importance or weight. It was another expression of the maxim: "Run to trouble and not away from it!"

Preferably, the structure of argument would be first to address strengths and second to address apparent weaknesses. It frequently occurs, however, that one or more of the judges interrupt appellant's counsel early in the argument with questioning on the weaknesses of appellant's position. In that case, counsel must answer the questions directly and candidly. The outcome of the appeal is immediately at stake because likely this is counsel's last chance to persuade the court that reversible error occurred.

In the universe of civil appeals the odds strongly favor affirmance. That, however, is irrelevant to the demands of perfor-

mance by appellee's counsel. In any particular case, the tactics of appellee's counsel will hinge largely, but not entirely, on the extent and content of the judges' questioning during the argument of appellant's counsel, the impact of that argument and the answers to such questioning. At one extreme, evident lack of interest by the judges in the appeal, reflected by the absence of questioning or dialogue between the judges and appellant's counsel, may prompt appellee's counsel to be very brief, to hit the high points quickly and sit down, simply giving the judges enough time to interrupt and ask questions they choose on any points of concern or clarification. However, appellee's counsel should follow up and answer any questions of possible significance that were asked during the argument of appellant's counsel where appellee's answer would be different from that given by appellant's counsel or where appellant's counsel failed to answer.

At the other extreme, the dialogue during appellant's argument may reveal a keen interest by one or more of the judges in issues raised on the appeal or in the outcome of the case. In those circumstances, nothing can be taken for granted. Appellee's counsel must assume that the result of the appeal hinges on the oral argument, and act accordingly in defending the decision rendered by the court below.

This means, no differently from appellant, that appellee should rely on the plan for a full oral argument, and address the important issues around which the appeal revolves. It means confronting and allaying any concerns that are expressed by any of the judges during the argument. It means providing additional support or comfort for the result below in those cases where the judges seem to want it, based on the questioning during appellant's argument. There is, however, an important difference. When appellant's counsel stands up, it is at the beginning of the argument and the judges usually allow at least introductory comments before they begin the questioning. When appellee's counsel stands up, the judges are fully focused on the issues of interest to them. Thus coming into the argument midstream, appellee's counsel is frequently greeted with a barrage of questions. It then becomes counsel's often difficult task not only to provide answers to those questions and deal effectively with the issues bothering the judges, but to integrate that as much as possible into a structured argument that emphasizes the strengths of appellee's position, minimizes its perceived weaknesses and rebuts appellant's key arguments—all in the all-too brief allotted time. To do this successfully requires swiftly bringing the court back to the major points supporting the correctness and justice of the challenged decision. Appellant's best issues were at the center of the table of the judges' minds during its counsel's argument. Appellee's counsel in a close case must push those issues off the table

and put appellee's issues back to its center.

Sometimes an appellee will be prepared to rebut an appellant's point that, when made during appellant's argument, seemed to receive little interest or attention from the judges. Ordinarily that should lead to dropping the point from appellee's argument. To do otherwise may be a waste of time, or worse: reopening a subject may awaken interest when interest would not otherwise have been aroused.

In cases where appellant, in its reply brief, has made new contentions or advanced new authorities with respect to which appellee has not had the opportunity to respond, appellee's counsel is compelled, in advance of the oral argument, to evaluate their relative strength and importance and decide preliminarily whether to include a response in the oral argument. That decision then has to be reconsidered in light of what occurs during the argument of appellant's counsel. If a response is called for, it should deal with the merits of the new contentions or new authorities. Opposition to them should not rest on a claim concerning the improper manner in which they were raised in the expectation that the court will ignore them. The court might consider them as a fair extension of an earlier argument that at least arguably was a proper reply to arguments in appellee's brief, and in any event may place a higher premium on getting to the right result than on disciplining a lawyer for the nature of a reply brief. What can be said is that "although appellant has improperly raised a new argument in its reply brief that the court should not consider, any consideration would show that it lacks basis because . . ."

§ 69:126 The process, strategy, tactics, and techniques of oral argument—Techniques of oral argument

The art of oral advocacy in the federal courts of appeals is not, as some say, a lost art. It is, however, a much different art from that practiced before the advent of the "hot bench" and congested appellate dockets. Although some of the techniques are the same, many are different due to the reduced amount of time allotted for oral argument, the high degree of preparedness by the judges, current judicial perceptions of the purposes of oral argument and the fact that it is taking place during the concluding phase of the appellate process shortly before the judges get together to decide the case. Some of the consequences of these factors have already been discussed.

Oral argument today is above all else, and at its best, a sophisticated exchange between bench and counsel. There is no longer any place for oratory, and none, if there ever was any, for speechifying, pontification, or reading a prepared statement. Clar-

ity and brevity of verbal expression are consummate virtues. Good diction and a clear voice are crucial. Pace of speech is important since words must be spoken slowly enough to be heard and understood, yet fast enough, with tempo and tone, to capture and retain interest. Eye contact is also important, as it would be in any effort to make a sale or other personal effort of persuasion.

There is no substitute for an appellate lawyer who not only argues the case in a reasoned and credible manner but also manifests a genuine and even passionate conviction in the position being advocated. Although oral argument is a serious event, indeed a formal and dignified one, cheerfulness and good humor are in good order at appropriate moments. Sarcasm and jokes are not. Nor are any interruptions, facial expressions or other theatrics during the adversary's presentation. Personal attack on the motivations, personality or competence of adversary counsel or the district judge whose ruling is being appealed is usually badly received and reflects adversely on the credibility and persuasiveness of counsel who engage in such tactics. In a similar vein, purple prose and rhetoric usually add nothing to the argument, and often will detract from it, since it is only counsel's characterization of an argument, not a reason that supports or undermines an argument.

Since the primary function of oral argument for the judges is to question counsel concerning issues in the case that need clarification or explanation, the most important techniques for counsel concern the manner in which questions should be answered. Understanding the question is crucial, of course, and if a question is not clearly understood, it is essential to seek clarification or to state what question counsel believes is being answered before offering an answer. Failure to do so can lead to confusion and misunderstanding that will undermine the effectiveness of the argument.

Questions should be answered as directly as possible, with the explanation following rather than preceding the answer. For example, if a question inquires whether something is a fact, it would be best to concede that it is before explaining why the fact is irrelevant. Counsel would also be well advised to move from the direct answer to the explanation without pausing for breath, else a new question may intervene. Moreover, answers must be responsive to the inquiry and aimed at satisfying the judge's concerns while at the same time advancing counsel's overall argument. There is, of course, nothing better than making one's best points in answering either friendly or hostile questions from the bench, but whether such welcome opportunities arise may depend on how quickly the judges begin the questioning.

Questions from the panel should be viewed not as obstacles to

be dealt with before returning to the familiar road of a prepared argument, but as windows into the thinking of the judges. Appellate judges rarely see any reason to keep their concerns about a party's argument to themselves. To the contrary, they will reveal their concerns in their questions, and their sincere interest in the answers reflects the importance of the answers to their ability to decide with confidence. Questions are the opportunities to discuss the facts and the law not in terms conceived of by counsel, but in the terms framed by the judges' own thinking.

Candor and forthrightness are prime requisites in dealing with weaknesses or difficulties. As previously discussed, it is a serious error to run away from the strengths of the other side rather than confronting them and attempting to minimize their importance or weight. Agreements or concessions on particular points may be sought during the argument. If given (hopefully they have been thought out in advance in preparing for the argument), counsel should do so in a positive rather than begrudging manner. "Yes" or even "certainly" are better than a truculent "I can't argue with that." Equally important to the words is tone and manner. Concessions made defensively will be assumed to be damaging. Those made with an assured sense that they detract not at all from the force of the presentation convey a different message.

If counsel is unfamiliar with an authority cited in a question from the bench, it is better to acknowledge that than to attempt to bluff an answer. If the inquiry concerns facts or evidence in the record, and counsel does not know the answer, that too should be acknowledged. If important enough, permission to file a supplemental submission on the point should be requested.

Sometimes the judges will pose hypothetical questions counsel has not anticipated. Those quick enough to develop reasoned responses consistent with their full approach should certainly do so; others, including very capable appellate counsel, will sometimes admit that the question is too difficult to permit a seat-of-the-pants response while, of course, emphasizing why the very different facts at issue yield the result counsel is advocating.

To defer answering ("I'll answer that question later") is often a mistake. Whether or not that may be personally offensive to the judge who asked the question, as it may be, that judge is in the midst of a thinking process in asking the question, wants the answer now, not later, and may turn off from the rest of the argument because counsel did not answer the question when asked.

All the emphasis given in the discussion so far to the importance of direct and helpful answers to the questioning from the bench needs at least one qualification. Sometimes (but rarely) a

hostile member of a panel will seek to dominate the argument with questions aimed at emphasizing what are, from arguing counsel's perspective, all the wrong points. Sometimes in that circumstance, another member of the panel will come to the rescue with a "softball" question enabling counsel to argue from more comfortable ground. But if not, counsel may have no choice but to answer the antagonistic questions abruptly and take some time to make the critical points that might persuade the other panel members.

Judges are frequently turned off by counsel's attempts, often interrupted, to read lengthy extracts from cases or testimony or documentary exhibits, a practice now forbidden by Rule 34(c) of the Federal Rules of Appellate Procedure. In most cases, there should be little or no reading. It is usually a waste of precious argument time. It is also difficult to listen to and assimilate the dead words of others, particularly when they concern complex factual or legal matter. Thus, it is usually a bad forensic technique to read the words of others. Nevertheless, there are situations in which quoting one or two sentences in the words of a key witness, or from a crucial document or a controlling decision, is precisely the right way to answer a question or to provide important emphasis and credibility to a key point.

Counsel are frequently asked for record references that support or refute a particular argument. As previously discussed, such questions should have been anticipated, and the record tabbed in advance so that requested references can be provided quickly and easily, together with any appropriate comment. Arguing counsel frequently may rely upon a colleague sitting at the counsel table to locate the record reference, although it is arguing counsel who should provide the reference to the judge who asked for it. From an affirmative standpoint, a technique that often can prove successful in a case in which some brief testimony or one or two documents are of central importance to its outcome, is for counsel to ask the court to open the appendix to a particular page where the evidence is located, to wait while the judges comply with the request (which they invariably do), and then point out the significance of the particular evidentiary matter. This engages both the visual and auditory senses of the judges, and enables arguing counsel to maintain control over the content and direction of the argument. Those are salutary forensic goals.

Sometimes in commercial cases both the visual and auditory senses of the judges can be engaged through the use of a visual aid (whether in the form of a free-standing chart on an easel or an 8 1/2 by 11 handout), such as a graph or table that reduces complex data in the record to a simple and very important point

on the appeal.[1] This can be very tricky, however, and counsel should exercise great care in deciding to use a visual aid, and if so, the manner in which it is used.[2] On the one hand, for example, if the visual aid is already an exhibit in the appendix, the judges may deem it presumptuous, or at least unnecessary, for counsel to do anything but refer to the record (calling the judges' attention to the page of the record, as suggested above, may be much the better technique). On the other hand, if the visual aid is new, it may require justification even if, as is required, it consists only of data that is already in the record. In the end, the use of a visual aid comes down to a judgment whether it will serve an important role in emphasizing a major point on the appeal or clarifying complex data of great significance to the case and whether it will be well-received by a busy court otherwise lacking any interest in jury-type techniques.[3]

There is no single right approach to dealing with legal authorities during oral argument. In many cases no references or citations need be made to particular case authority or statutes since discussion of general principles may be sufficient. Ordinarily, therefore, reference and citation to authority should be left to the briefs. If, however, the case turns on the meaning of a statute or the application to the facts at hand of legal principles expressed in a particular authoritative decision or two, and grounds for different interpretations exist, then that statute or those prior deci-

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[Section 69:126]

[1]See Rule 34(g) for rules pertaining to the use of physical evidence and visual aids; see also earlier discussion in this section. Fed. R. App. P. 34(g).

[2]Tennessee Valley Authority v. Hill, 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed. 2d 117, 11 Env't. Rep. Cas. (BNA) 1705, 8 Envtl. L. Rep. 20513 (1978) provided the backdrop for the oft repeated story in which Griffin Bell, Attorney General during the Carter administration, attempted to make dramatic use of a visual aid when arguing before the Supreme Court. As recounted in Charles C. Mann & Mark L. Plummer, Noah's Choice: The Future of Endangered Species 147–48 (1995):

> A big man with a raspy, deeply southern voice, Bell interrupted his oral argument to withdraw a test tube from his jacket pocket. "I have in my hand a darter," he proclaimed, "a snail darter." The snail darter, a freshwater fish no bigger than a human thumb, had been placed on the endangered species list three years before; the case involved a dam that would destroy its only known habitat. Bell handed the fish to the bench. The test tube made its way along the line of nine justices, each of whom solemnly peered at its contents before passing it to a neighbor. "Stopping a dam that would provide thousands of jobs for the sake of this insignificant fish? Ridiculous!;" The attorney general stood back, satisfied, as laughter filled the court. The laughter was halted by the quiet voice of Justice John Paul Stevens. "Mr. Attorney General," he said, "your exhibit makes me wonder. Does the Government take the position that some endangered species are entitled to more protection than others?" Bell's smile disappeared . . . [he] had no answer.

[3]See Chapter 49, "Graphics and Other Demonstrative Evidence" in Haig, Commercial Litigation in New York State Courts (§§ 49:1 et seq.) (5th ed.).

sions and their similarities, their differences and the extent to which they are controlling, may be at the center of the oral argument. In no case, however, should counsel cite or discuss a prior decision or statute that was not cited in the briefs or drawn to the attention of the court and adversary counsel in advance of the argument. If appellee's counsel intends during oral argument to refer to authorities not previously cited for the purpose of responding to new matter in appellant's reply brief (see the discussion of this subject in the prior subsection), leave should be requested in writing in advance of the argument.[4]

§ 69:127 The process, strategy, tactics, and techniques of oral argument—Rebuttal

Appellant's counsel has sat through appellee's counsel's argument, often with quiet but frustrating impatience or chagrin. Usually the moment appellee's counsel sits down, appellant's counsel is "ready for bear" and rarely willing to call it a day and forego rebuttal argument. In fact, since rebuttal is the last time in most cases appellant's counsel will be heard, it may be critical in a particular case that a pivotal contention be refuted or a significant misstatement of the record be called to the court's attention. Virtually every appellant's counsel reserves time for rebuttal, and wisely so.[1]

Appellant's counsel can be advised, without difficulty, to keep rebuttal brief and limit it to crucial points. Whatever points are raised should be organized into the structure of appellant's affirmative argument, rather than delivered as a scattered recitation of answers to appellee's contentions. This requires good note-taking during the argument of appellee's counsel, an instantaneous decision as to what *not* to raise in rebuttal, and the ability to organize a handful of points into a coherent presentation. Sometimes rebuttal may serve the very important purpose of giving appellant's counsel an opportunity to give a quite different answer to a critical question that was first asked of appellee's counsel.

It is often said that using rebuttal time is risky, because it may adversely reopen an issue that already has been settled in appel-

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[4]A party also may file with the court of appeals a letter citing additional pertinent and significant authorities that come to that party's attention after its briefs have been filed under the authority of Rule 28(j) of the Federal Rules of Appellate Procedure. See § 69:95.

[Section 69:127]

[1]Outside of the First Circuit, the authors respectfully disagree with the admonition in First Circuit Rule 34(c)(2) that seldom is counsel well served by an advance reservation of time for rebuttal because such rebuttal is likely to be merely repetitious.

lant's favor or may result in an adverse question or answer that would never have otherwise occurred. This criticism of the use of rebuttal time is not well-taken. In most cases, appellant is already in a position of great risk since the case was lost in the lower court and the odds are against reversal. Although usually appellee charts a course that is risk adverse, appellant usually charts a course that embraces the opportunities to take risks to achieve reversal. Rebuttal is appellant's last chance. If it involves risk, so be it.

§ 69:128 Changing oral argument practices during the COVID-19 pandemic

The COVID-19 pandemic has forced federal circuit courts to adapt and modernize, particularly through the use of teleconferencing and/or videoconferencing technologies to hold oral argument remotely. Although the situation remains fluid with evolving practices across the country, it is hard to imagine appellate courts going back to pre-pandemic practices that largely avoided remote arguments. The Ninth Circuit, which has long embraced remote argument for the benefit of judges and counsel, produced a helpful on-line tutorial on how to argue remotely by videoconference, including practical tips.[1] The ABA likewise conducted a useful webinar entitled, "Appellate Advocacy in the Age of COVID-19" [On-Demand CLE] free to its members, which provides practical tips for remote argument, including what equipment practitioners should use; how to set up their office (or dining room) for best effects; and best practices in presenting argument by phone or video. The benefits of holding arguments by remote technology are many, including avoiding the expense of counsel traveling to appear in person for oral argument. When courts allocate only a few minutes of argument time, the calculus may strongly favor appellate counsel not traveling to the courthouse and instead participating by videoconference. Time will tell whether post-pandemic practices in the circuit courts will look like the Ninth Circuit's, with liberal reliance on remote technology to shrink distances.

Significant differences exist between videoconferenced and teleconferenced oral argument. The visual component enables not just a more personal connection between the judges and lawyers during argument but also enables substantially greater information sharing (especially related to demeanor) that is beneficial at

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[Section 69:128]

[1]May It Please the Court: 9th Circuit Oral Arguments in COVID-19 Times, YouTube (Apr. 21, 2020), https://www.youtube.com/watch?v=fcYmj8aNbEc&feature=youtu.be.

least to arguing counsel. From the perspective of a lawyer at the podium, video participation allows appellate counsel to observe visual cues—such as facial expressions, head shakes, and hand movements—to gauge the panel members' receptivity to the arguments being advanced, and to see when a judge is about to ask a question. A lawyer arguing on the telephone is blind to all of those visual cues. Counsel lose the ability to put the judges' words into the context of those non-verbal communications, which can materially alter their import. It is particularly hard to determine whether a response to a difficult question has answered it to the satisfaction of the inquiring judge. In the author's oral argument experience during the ongoing pandemic, teleconferencing leaves much to be desired compared to videoconferencing.

Appellate counsel should visit the court's website and call the clerk's office for information on how a particular circuit court is hearing argument during the ongoing pandemic.

At the time of publication, the Second Circuit has been conducting all oral arguments over the telephone since mid-March 2020. The Court does not expect to resume in-person oral argument until the Fall 2020, at the earliest. Members of the Court report favorably on their experience hearing oral argument remotely by phone. The protocol and mechanics of telephonic argument in the Second Circuit are discussed below by way of example. Appellate counsel should visit the website and call the clerk's office for information on how a particular circuit court is hearing argument during the ongoing pandemic.

Thirty minutes before the start of the calendar, arguing counsel are directed to call the court at a dedicated number so that the clerk can ensure all counsel are ready. At this juncture, counsel for appellants advise the clerk as to their requested rebuttal time. All arguing counsel remain on the line, on mute, until their case is called. The court live-streams audio for everyone else.

Procedures vary greatly between panels of the Second Circuit. The presiding judge will describe the protocol to be followed in each argument. Some panels use a formal protocol much like that used by the Supreme Court of the United States on May 4, 2020, for its first-ever teleconferenced oral argument—in which the court avoids interruptions for a set period, after which each member of the court is given a turn to ask questions, moving from the most senior to the most junior member. The presiding judge manages the questioning and identifies which judge is speaking. By taking turns in this way the court strives to avoid having lawyers and judges "step on each other's lines." This highly structured approach alters the natural pattern of questioning, with some judges asking more questions given a distinct turn, while others ask fewer questions because they are reluctant

to interrupt. A judge who puts off a question may find it becomes moot, or may even forget it.

Other Second Circuit panels treat the telephonic oral argument as a regular in-person argument and do not give any dedicated argument time free of interruption, and do not take set turns questioning. This unstructured approach can be challenging because participants in the argument invariably speak at the same time, and it may be difficult for the practitioner to identify who is speaking. Yet other panels employ a hybrid protocol whereby counsel are given two or three minutes of uninterrupted argument time before questions are asked, but without dedicated turns for each judge.

No matter what telephonic argument protocol is followed, appellate counsel are well advised to speak without rushing and to pause every so often to enable panel members to ask questions. Breaking up the argument by issue may make sense, pausing at the changeover, and counsel may even want to ask if the panel has any questions before moving on to the next argument. Counsel should welcome questions since they provide an opportunity to address concerns that the court may have about the arguments being advancing.

It is likely that appellate arguments by phone will go substantially longer than if conducted in person, as illustrated by a recent afternoon calendar at the Second Circuit. The panel used the formal approach and allowed counsel to argue without interruption for as long as their allotted time permitted. Court started promptly at 2 p.m., with three cases on the calendar. Each side had ten minutes. Court ended at 4:40 p.m. This more than doubled the argument time for each case.

Regardless of the telephonic protocols followed, appellate judges and lawyers should be mindful in adapting to sightless oral arguments. Counsel should make certain to have good telephone equipment and a clear connection, and participate from a quiet space. Moving papers on a desk near a microphone can create noise for listeners; one of the "best practices" for telephonic argument is to place papers on a towel.

From the practitioner's standpoint, the ability to see the judges and their reactions makes for a substantially better and more meaningful argument experience. To the extent videoconferencing can be feasibly employed, the bar strongly supports its employment.

VIII. DECISION AND POST-DECISION PROCEEDINGS

§ 69:129 The decision, judgment, mandate, and rehearings

Sections 69:130 to 69:135 focus on the rules and other consider-

BY GERALD LEBOVITS

Writing Bad Briefs: How to Lose a Case in 100 Pages or More

Writing a really bad brief — a brief so bad you're sure to lose your case — is a skill few attorneys acquire. Only a select few can do that more than once or twice in a lifetime.

You might wonder why you'd ever want to lose a case. Perhaps you hate your client. Let's face it: Some clients are scam artists, especially those who don't pay you. Perhaps you hate your client's case. On an ethical level, the world will be better off, frankly, if some of your clients lose. Or perhaps you like your client, but you realize that your client will lose sooner or later. You might want to throw your client's case before your legal fees grow too high. Or perhaps you're in league with your adversary. The job market is tough, after all; maybe you're trying to get a job at your adversary's law firm. Or perhaps you want to ingratiate yourself with a judge who'll probably rule against your client anyway. Lawyers need to think about their next case, don't they? Or perhaps you've learned that your client has shallow pockets, and you need to cut your losses and move on before your firm downsizes you. That can happen a lot these days.

The reasons you might want to lose are many, and writing a bad brief is a key to losing. For those lawyers who want to lose — and lose big — this column's for you.[1]

Rule #1: Ugly's in the Eye of the Beholder.

Stimulate readers visually. Make sure you have a bad cover. Because first impressions count when it comes to briefs, judges will notice a bad cover. They'll assume that if you don't care about presentation, you probably won't care about getting the law right. Include a border, preferably with a seasonal motif. Flowers and snowflakes add a great touch. If the court has specific requirements about how the cover should look, ignore those rules. Judges have little sense of style anyway.

Then reverse the caption. If, at the trial level, the People of the State of New York had prosecuted the defendant, make it look on appeal as if the defendant-appellant is suing the People. If you include a caption, use a typeface like Old English Text or any other font that looks like hieroglyphics. Omit your firm's name and your name if you want to disassociate yourself from your loser client.

It'll be easier for your client to go down in defeat if you leave little white space on a page. The white space is the space in the margins and between words, sentences, and paragraphs. The more words you put on a page, the greater your chances of losing. Judges will know right away that they're reading a losing brief. No need for margins. Margins were created for legal-writing teachers to critique your work in law school. Judges, too, need margins because their eyesight has dimmed over the years, so don't give them any. Your goal is to make sure the judge won't read your brief.

The more typefaces in your brief, the more you'll distract the judge from finding any good arguments your client might have. You're closer to losing than you think if your brief looks like a ransom note. Challenge yourself to write each paragraph in a different typeface. If you really want to signal that you and your brief are losers, write each sentence in a different typeface: one in Times New Roman, another in Courier, and a third in Garamond. When neon lights fail, bold, underline, and italicize, preferably all at once, and all in quotation marks. How else are you going to emphasize your lack of forthcoming content, show sarcasm, and prove your paranoia? Then uppercase as many words as you can. Capitalizing excessively makes your writing memorable, albeit unreadable.

Black ink signals professionalism. Don't use it, unless you want to win. Make your brief ugly by using baby pink or sky blue ink. The judge will notice the cute feminine or masculine charm.

If you want to irritate a judge, don't include page numbers at the bottom of each page. Judges should know how to count.

Include lots of footnotes, all in a small typeface. That'll cause the judge to dwell on the irrelevant red herrings in your case. Burying substantive arguments in footnotes is how you'll get judges and their law clerks to make law, even if the law they'll make favors your adversary. Great law started in the footnotes. Ask any Supreme Court clerk.

To lose, don't bind your brief. If you must bind it, use a rubber band or string. That'll help the judges lose some or all the pages. Or bind the brief with a metal clip with razor-sharp edges. You spilled blood writing the brief. Why shouldn't the judge

Continued on Page 56

and law clerk? They'll reward your thoughtlessness when they write their decision. If you decide to bind your brief, make sure the binding prevents the judge from reading the brief. Every time the judge turns the page, the brief should snap shut. When submitting the brief, include a paperweight to hold the brief open. The judge might think it's an exhibit.

Non-gender-neutral writing is like a bump on the road that focuses travelers on the trip rather than the destination. Make the judge dwell not on your content but on why you used "he" or "she." If you're not sure whether to use "she," "he," or "it," use all three, like so: "s/he/it." There's nothing like a few "s/he/its" to make your brief look exactly like that.

Boilerplate doesn't work, and that's why you should use it. Your brief should look like a cut-and-paste job.

> The longer your brief, the less the judge will understand your case.

Reuse large portions of your brief from another brief you've written. Another tactic is to regurgitate a brief an intern wrote 10 years ago, and neither update nor check the old citations. Go green: Recycle your arguments. Diligent judges know that clients and cases are unique. You need to disabuse them of the notion that your client's case is unique.

Get an intern to photocopy your brief. Make sure the text on the photocopies is crooked and distorted. Have the intern photocopy half of each page. You'll leave the judge wondering what's missing.

Rule #2: Maintain Order With Disorder.

Winners pick and choose their issues and arrange them in order of strength. Loser wannabes include as many issues as they can think of and arrange them in alphabetical order. Like a law school exam, a brief is all about issue spotting, no? Besides, if you don't include all the atmospherics, you won't preserve issues for your appeal. Having many issues means you've thought about your case in depth. Put substantive issues first. Leave dispositive issues for the end. Save jurisdictional issues for the last page. Doing so will catch the judge's attention. Not.

Don't organize your arguments. Let the judge figure out what's important. That's not your job. If you're dealing with a conscientious judge, raise facts and issues not in the record.

When it comes to standards of review, who needs standards? Don't tell the judge what standard to use. Judges know what standards apply. If they don't, so much the better. If someone at your firm forces you to discuss legal standards, mix them up. Judges appreciate an enlightened discussion about why they have the discretion in the interests of justice to disregard a constitutional statute whose plain language is not subject to reasonable debate.

A brief is mystery writing in disguise. Leave the main point for the last line of the last page. You want to stun the judge.

Divert the judge's attention from real arguments and focus instead on bogus ones. Instead of making legal arguments, make only policy arguments, regardless of any binding authority that rejects the policy you suggest. Or avoid policy arguments altogether. Policy is for politicians.

Include at least one argument that doesn't pass the laugh test. It's helpful if the argument is outrageous. Putting a smile on the judge's face: Priceless.

Judges need much structure. That's why your brief shouldn't have any. Don't include headings or subheadings. No need to tell the court in what direction you're headed. Forget IRAC or any other organizational tool you've learned. Your law professors made you learn that stuff to make their job easier when they graded exams — and to help you win cases. If losing is your goal, forget what the experts told you.

Never weave a theme or theory of the case into the brief. Themes and theories tell the judge what your case stands for — something about which your judge should remain clueless. A confused judge means a happy client. And happy clients want you to write about why your adversary is a jerk, not about pretentious and arcane themes and theories.

Invert the parties' names. Write "appellee" when you mean to write "appellant." Never use your client's name or your adversary's name. But if you must, use acronyms. If your client's name is "Olivia Knight," use "OK" throughout your brief. If the appellant's name is "Bob Smith," write "BS."

Because good writing is planned, formal speech, avoid outlining and editing, and use contractions and abbreviations.

Include many facts. Leave nothing out. Be sure to mention a witness's eye color, social security number, and family history. Including every irrelevant fact, person, place, and date will guarantee that the court won't know whether the case involves a tort, a contract, or a constitutional wrong. Arrange the facts in reverse chronological order. Don't even think about techniques of storytelling, making your client come alive, and offering a succinct, concise procedural history from your client's perspective.

Misstate the law. Make it up if the court's holding favors your client. Logic tells you that the law can be so wrong. Don't explain how the law applies to your client's facts. The law is what it is. You can't change anything about it. Avoid common sense. If you pretend that you want to win and you decide to integrate law and fact, start the sentence as follows, "In my humble opinion . . . ." Every judge will know that true enlightenment will come at the end of the sentence. That's why you're guaranteed to lose in the end.

When you've lost all hope, and things seem to be going your way

despite all your efforts, or lack thereof, throw all the pages to the brief down a flight of stairs, collect them, and submit them in the order the pages fell on the floor. Every case is a puzzle waiting to be solved.

Rule #3: Quote Other Judges and Lawyers Because Your Ideas Don't Matter.

No one wants to hear what you have to say. Someone smart said it before. Just repeat it. Using lots of long quotations means you didn't do independent research and analysis. Make your lack of effort obvious. Block quotations are essential in a loser brief. They waste tons of space. And no one reads them. The less the judge reads, the likelier you'll lose. When you quote, misquote. How else will you know whether the judge read your brief? Make sure you quote dicta, not holdings. Also, quote language that sounds good, even if the case goes against your client's position — and even if the case facts are different from your case. If you've read it before, it must be true. Don't bother checking other authorities. Quote all the language from the source. Include everything. Regurgitate the holdings of the case, paragraph by paragraph. Take the holdings from the headnotes. Better yet, quote from the headnotes.

Rule #4: Citations Are for the Lame and the Weak.

Miscite your authorities. Get the volume of the reporter right, but forget page numbers. Close enough is good enough, unless your goal is to lose by winning. If a decision is longer than one page, never give the pinpoint citation. Your goal is to make it so difficult for the judge to find any morsel of accuracy that the judge will turn to your adversary's brief.

String cite whenever possible. If you have 20 cases for the same proposition, add them all. To show that you're smarter than the judge — a losing and therefore effective strategy — cite after every proposition in your brief, even for obvious statements. But don't cite the record below. Pointless.

Nor should you cite much legal authority. Judges are busy skeptics. It's fun to make them and their law clerks research from scratch. If they don't, and they probably won't, you're halfway to your losing goal line.

Never write the name of the case correctly. Pick one party and leave the other one out of the citation. Annoying the court will help you lose.

Don't cite the official reporters. Make the judge and law clerk find the correct citation. You just know they won't.

If you cite, don't explain why your citations are relevant. Mention that the cases are on point, but don't say why. If you try to explain the case, make the case more complicated than it is. If you want to be analytical and fancy, start every paragraph with "My adversary's argument is mendacious and ridiculous." And never use parenthetical explanations after citations. Parentheticals just throw judges a curve.

Don't cite binding cases from your jurisdiction. Cite oral decisions. Cite and quote only from dissenting and concurring opinions. Don't cite constitutions, statutes, or other laws.

Never attach the hard-to-find cases or the law you've cited.

Rule #5: Being a Lawyer Means Knowing How to Break the Rules.

The more rules you break, the greater your chances of losing. If the judge presiding over your case limits your brief to 15 pages, ignore the page limit. Rules are made to be broken. The judge obviously doesn't know that more is better. Exceed the limit. Make it 25, 50, 100, or more pages. The longer your brief, the less the judge will understand your case. Hauling heavy briefs will give the judge the excuse not to read your brief. Besides, most judges can't concentrate for more than 10 minutes at a stretch. And judges will usually fall asleep — they call it "deliberating" — by the mid-afternoon from all the hard work they've done digesting their two-hour lunches. The longer and more boring the brief, the faster you'll get the judge to deliberate over your brief.

If you're a stickler for the rules, condense your 100-page brief to fit a 15-page limit. It doesn't matter whether the text is too small to read. It'll give the judge an opportunity to take out a magnifying glass and see your case for what it really is: a loser.

Deadlines are for deadbeats. The more important it is to the court or your adversary for you to file a brief on time, the more you should be late. That's why, when you get a project, you shouldn't start early.

Don't include a table of contents or a table of authorities. Including either one of them, or including both of them, means you're a showoff.

Rule #6: Make It Personal.

If you've tried all the above rules, and you still haven't lost, go for the jugular. Attack the court, opposing counsel, and your adversary with insults, condescending language, snide remarks, irony, and humor. Destroy them: Denigrate their intelligence, motives, and integrity. Tell them how you really feel. Assail the court's earlier decisions. Pour it on like salt on a wound. Critique your adversary's writing skills. It's obvious you went to the better law school. Don't be deferential to the court. We all know that the judge isn't the sharpest tool in the shed, just the more politically connected. If you choose to be deferential, make it sound phony: Use "respectfully" a lot. If you do that, the court might not sanction you for frivolous litigation.

Losing briefs are those that demonstrate how the court is conspiring with your adversary against your client and you personally. Use the phrase "in cahoots" often.

Tell the court that your adversary is a "liar" who likes to tell "fanciful fairytales." From then on, call your adversary "My opponent's 'esteemed' attorney." If your adversary responds in kind, keep fighting back. Hit below the belt. Judges love it when both parties take off the gloves. You'll entertain your judge, who'll place bets with court personnel on which lawyer will end up the bigger loser.

Rule #7: Bury the Bad Stuff.

Losers concede nothing. Fight to the end, especially on the little things that don't matter. How else will the judge know that you're passionate about the case?

Include only the facts favorable to your client. Hide unfavorable facts. A judge who thinks you're sleazy will reward you with the loss you seek.

Bury the bad cases — the ones that go against your client's position. If you've found a case that goes against your argument, don't mention it. Let your adversary find it. No point in talking about one meaningless case when you have 20 other cases on your side. Let the law clerks do some research. They get paid to do your research. And they get unlimited access to Westlaw and LEXIS. You don't. Count yourself fortunate if you never get a chance to address unfavorable cases later.

Don't cite the record. The past is the past.

Rule #8: You're a Lawyer, Not an Editor.

Lawyers don't have time to spellcheck, proofread, or cite check. Time is money for lawyers. But for judges, seeing typos in a brief is like having a cellular phone go off in a quiet courtroom to the doleful Ramones' "I Wanna be Sedated" ballad. Don't sweat the details. It's the big stuff that counts in a brief. Use typos to signal that you're a busy and successful lawyer — albeit a loser — with a great practice.

Repeat your arguments every chance you get. That will guarantee that the judge won't care even if you're right on the law. Belabor the obvious.

No need for clarity or brevity: Hapless virtues.

Don't begin paragraphs with topic sentences or draft transitions to connect paragraphs.

Punctuation is important, but not in a losing brief. You've never learned the difference between a comma, period, semicolon, and colon. No reason to start now. To make your brief stand out, challenge yourself to write a sentence that covers an entire paragraph. Stream of consciousness means you've thought about the case.

Handwritten edits will do. Put arrows and stars for the judge to follow your argument. You want your work to stand out; show the judge that you didn't put the effort to proofread. If you want to look like you care, handwrite the page numbers in black ink in the bottom left-hand corner, right near the brief's binding. Finding the page numbers is half the fun in reading a brief.

Misspell your client's name. Misspell the judge's name. If you can't remember the judge's name, call the judge "Mr.," especially if the judge is a woman.

Rule #9: Be Superficial: It's Not the Substance That Counts.

Write emotionally: Show the judge what matters. Because understatement is persuasive, be sure to exaggerate. Details are what convince, so be conclusory.

Don't tell the court what relief you seek. If by some mishap you win, you'll at least get the relief you neither need nor want.

In a losing brief, the question presented should be several paragraphs long. You've got lots of questions, and judges always think they have lots of answers. Write the question in a way that the judge will respond with a definite "maybe."

In your facts section, include facts that aren't in your argument section. Include facts that aren't in the record. If you must cite the record, direct the judge to the wrong page. A quicker way to lose: Don't cite facts at all. Argue law but never fact. Don't explain how the case reached the appellate court. Don't explain what happened at trial.

In your summary of the argument, write only one or two sentences detailing what your case is about. If you must summarize, make sure your summary is longer than your entire argument section.

The heading and subheadings, if you include any, should be objective and neutral. You want the judge to think you're honest and fair — and wrong. Label your headings "Introduction," "Middle," and "Conclusion."

> If you choose to be deferential, make it sound phony: Use "respectfully" a lot. Obfuscate with jargon.

Start every argument in your opening by predicting what your adversaries might say. Then don't say why they're wrong.

In your reply briefs, don't respond to your adversaries' arguments. Restate everything you've already mentioned in your brief. Or, even better, raise new arguments.

Rule #10. When All Else Fails, Confuse Them With Words.

Write like a real lawyer. Confound with legalese: "aforementioned," "hereinafter," "said," "same," and "such." Obfuscate with jargon: "the case at bar" or "in the instant case." Bore with clichés: "wheels of justice"; "exercise in futility"; and "leave no stone unturned."

Treasure nominalizations: Turn powerful verbs into weak nouns. Although nominalizations are wordy and abstract, relying on them is good for losing. *Examples:* Use "allegation" instead of "allege," "violation of" instead of "violating," and "motioned for" instead of "moved."

Metadiscourse is verbal throat clearing. That's why you need to know about this device. Every chance you

get, use "it is important to remember," "it is significant to note," "it should be emphasized that," and "it goes without saying that." Use "it is well settled" and "it is hornbook law" to describe what the less-educated might call a split in authority.

Use the passive voice everywhere: Be obtuse about who's doing what to whom. Write "The victim was murdered by the defendant" instead of "The defendant murdered the victim." When the issue is who murdered the victim, obscure the actor altogether: "The victim was murdered" should suffice.

Grammar — adverbs, adjectives, nouns, pronouns, agreement, parallelism, sentence fragments, verb tenses, fused participles, and gerunds — is a big blur for some lawyers. Keep it that way. Who knew about modifiers? Don't learn the difference between "who" and "whom" and "that" and "which." Mixed metaphors will set you apart from your adversary: Your brief will cause the judge to close the barn door after a horse shut it.

Throw in adjectives and even some adverbial excesses. Use "clearly" and "obviously," especially when your point isn't at all clear or obvious.

Use plenty of acronyms, especially those you never define.

Be cowardly. Include doubtful, timid, and slippery equivocations, phrases, and words: "at least as far as I'm concerned," "generally," "probably," "more or less," and "seemingly." That's how you show what a lousy case you have.

Instead of writing in the positive, write in the negative. Appellate judges, who themselves love expressions like "This case is remanded for proceedings not inconsistent with this opinion," will identify with expressions like "This case is not unlike . . . ."

Have fun and play with language. Create run-on sentences. Combine complicated, multisyllabic words. Construct long sentences — learned lawyers do that all the time.

Employ foreign words. It behooves you to replace English words with French, Italian, and Spanish. If you're educated, use Latin. The judge will think you're sui generis.

Redundancy is necessary in a losing brief. Two or more words are better than one. Use the following: "advance planning," "few in number," and "true facts."

Reach for a thesaurus every chance you get. Use different words to mean the same thing. Forcing the judge to expend energy reaching for a dictionary leaves little time for the judge to read your brief.

Talk about freedom, justice, equity, and the American dream. Bring up the U.S. Constitution even if your case has nothing to do with a constitutional issue.

Include at least one rhetorical question in each paragraph. Isn't that a good way to tell the judge you're a LOSER?

Conclusion

Writing a bad brief takes preparation and practice. The preparation begins during law school. Few things academic apply to practicing in the real world. Lawyers must know the real rules to writing a bad brief — the things you never learned in law school and, likely, the things no one will teach you when you practice law.

If a winning brief makes it easy for the judge to rule for you and want to rule for you, the loser's goal is to make it hard for the judge to rule for you and to make the judge want to rule against you.

If you're unlucky enough to have smart, honest colleagues edit your brief, ignore their suggestions. Accuse them of being egotistical to deflect any notion that they're offering helpful comments. And disregard all comments offered by your partner or supervisor. Their comments might be subversive — and actually favor your client.

Sometimes judges will feel so sorry for you that they'll wade through your brief to find a nugget of merit. You might have a chance to win — er, lose — after all. But if losing is your goal, just read your brief, typos and all, at oral argument. ■

1. In case you win despite following the foolproof advice in this column, the Legal Writer suggests some more articles. They'll help you lose your next case: Sarah B. Duncan, *Pursuing Quality: Writing a Helpful Brief*, 30 St. Mary's L.J. 1093, 1132–35 (1999); James W. McElhaney, *Twelve Ways to a Bad Brief*, 82 ABA J., Dec. 1996, at 74; Jane L. Istvan & Sarah Ricks, *Top 10 Ways to Write a Bad Brief*, N.J. Law. 85 (Dec. 2006); Eugene Gressman, *The Shalls and Shall Nots of Effective Criminal Advocacy*, Crim. Just., Winter 1987, at 10; Peter J. Keane, *Legalese in Bankruptcy: How to Lose Cases and Alienate Judges*, 28 Am. Bankr. Inst. J. 38 (2010); Alex Kozinki, *The Wrong Stuff: How You Too Can . . . Lose Your Appeal*, 1992 BYU L. Rev. 325, 325–29 (1992); Paul R. Michel, *Effective Appellate Advocacy*, 24 Litig. 19, 22–23 (Summer 1998); William Pannill, *Appeals: The Classic Guide*, 2 Litig. 6 (Winter 1999); Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. Rev. 431, 433–37 (1986); Harry S. Silverstein & Edwin C. Ruland: *How to Lose an Appeal Without Really Trying*, 4 Colo. Law. 831 (1975); Harry Steinberg, *The 10 Most Common Mistakes in Writing an Appellate Brief*, N.Y.L.J., Aug. 31, 2009, at S4; Susan S. Wagner, *Making Your Appeals More Appealing: Appellate Judges Talk About Appellate Practice*, 59 Ala. Law. 321 (Sept. 1998); Joseph F. Weis, Jr., *The Art of Writing a Really Bad Brief*, 43 Fed. Law. 39 (Oct. 1996).

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BEST OF ABA SECTION

GOVERNMENT AND PUBLIC SECTOR LAW

ORAL ARGUMENT: FIVE TIPS TO IMPROVE YOUR DELIVERY

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Author: By Susan Kidd

Susan Kidd, Esq., is director of the ABA Government and Public Sector Lawyers Division.

Text

[*69] Not all lawyers engage in oral argument, but all of us benefit when we articulate our viewpoints well. The advice below is provided in the context of an oral argument, but the tips are relevant to any spoken expression meant to persuade. These guidelines are valid for explaining legal strategies to your client, speaking to your boss about a case, or serving as a panelist for a CLE program. Replace the term "judges" with "client," "boss," or "audience" to illustrate the full scope of these guidelines.

Tip 1: Engage the judges. Capture their attention at the beginning. Start your argument with a sentence or two that will cause the judges to sit up and listen. Even if you are dealing with a very dry topic, articulate why this is important to your client. Judges are more apt to listen and understand your points if you give them a reason to listen. Your job is to tell the client's story effectively. "Be creative. Consider that every presentation is made on a stage and you are the actor, producer, and director," said Sharon E. Pandak, partner at Greehan, Taves & Pandak PLLC in Woodbridge, Virginia. Pandak also is a strong proponent of visual aids that can help illustrate your point, especially when the material is dry. "Have a boring case such as erroneous tax assessment litigation? Need to explain the large

differences in fair market value claims and your locality's assessment? Use a simple line chart in different colors," said Pandak.

Demonstrate confidence in yourself and your message. If you don't believe in your argument, you will never convince someone else to believe in it. This means citing the law and emphasizing the facts that have the best chance of convincing the judges to rule in your client's favor. It also means that you must prepare thoroughly--know the facts and the law inside and out. Confidence also means playing the part of advocate, especially when things are not going your way. Even if you are taking a beating from opposing counsel or pointed questioning from the judges, maintain eye contact, speak with a forthright demeanor, stand tall, and keep the expression on your face as pleasant as you can.

Do not read to the judges. Reading a document automatically diminishes your effectiveness. You know your argument. A listener's engagement will improve if the information is transmitted in a conversational format. Tell the judges your argument in your own words. Create a guideline by reducing your written document to bulleted highlights. If you lose your train of thought, this can serve as a backup.

Eye contact with the judges is essential. Judges will follow your argument and understand it better if they feel a connection with you. Their listening and comprehension will improve if they are looking at you while you speak.

Tip 2: Help the judges understand the content. Make it easy to understand. Give your listeners a road map and refer back to it. Don't make the judges work to comprehend what you are saying--they won't. They will simply gloss over your words, and you'll lose a valuable opportunity to help them understand your client's position.

Use examples to help the judges understand the situation. Examples are very useful when used correctly. "Examples that are tied to the specific facts of a [*70] case or a similar appellate case which you want the judge to find persuasive can be particularly effective during oral argument," said Timothy L. Nemechek, a Colorado Administrative Law Judge. Examples are especially effective if the facts or legal theories are confusing.

Don't use jargon. Judges will probably not ask the meaning of a specialized word. That means they will not understand the point you are trying to make, resulting in a waste of precious time. Explain yourself in clear, simple English.

Don't assume that the judges know the facts or record by heart. Reiterate background information succinctly to ensure that they comprehend the context. If the judges have forgotten or failed to pick up on a crucial fact, they may not follow your argument.

Frame your case. To help judges understand, successful litigators shape the interpretation and meaning of the facts. "Telling your client's story with context and particularization fosters comprehension," said Edward Monahan, former Kentucky Public Advocate.

Tip 3: Adopt an effective speaking style. A relaxed, down-to-earth speaking style will most effectively engage the judges. Seem approachable, smile as appropriate, and look earnest. Modify your pitch so you don't sound robotic. View your argument as a conversation.

Inject passion when warranted. Judges will hear the emotion in your voice, and it will emphasize your point better than your words. Eliminate "uh," "um," and "right." When you practice, consider using your phone to record your argument and listen to hear how many times you use these "fluency disrupters." These distractions sound unprofessional, hurt your credibility, and interrupt your argument's flow.

Body language speaks volumes. Listeners use your body language to evaluate your competence. Take a video of your argument and examine your movements. Watch TED Talks to determine the type of body language that is the least distracting and the most engaging. Remember that the substance of your argument, your voice, and your body language are all part of a package that the judges are evaluating.

Tip 4: Close your argument with impact. Reiterate your strongest argument using different words. The judges' understanding may improve if you use alternative language. Do not simply repeat words that you have already spoken.

Emphasize the impact of the decision. Judges are human beings, too. Sometimes, explaining how the decision will affect your client or others in the community can be your strongest argument.

State a call to action. Just as in advertising, you need to clarify what you want the listener to do. Your job is to make it easy for the judges--articulate the ruling you are seeking.

Tip 5: Practice, practice, practice. Like any other skill, the only way to truly improve speaking skills is to practice. If you experience anxiety when speaking in public, conquer your fear by exposing yourself to the activity that makes you uncomfortable. Join Toastmasters or some

other group that provides an opportunity to practice public speaking skills.

Be prepared for the hardest questions. Find all the holes in your argument. Compile a list of the questions about those problem areas and any other questions that you most hope will *not* be asked by the judge. Then prepare responses to those specific questions and practice delivering them.

Following these tips will help you present your case effectively to anyone you are trying to convince. You'll be on your way to becoming an expert oral advocate.

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