

Preparing for oral argument (Raffi Melkonian)

Oral argument is perhaps the most fun part of being an appellate advocate. And it's a remarkable privilege. During an appellate oral argument, the constitutional decision-makers in important matters come in person to hear you speak. Imagine if normal citizens could explain their thoughts to Congress directly! Still, oral argument can be stressful for even very experienced lawyers. One way to address that problem is with consistent preparation technique.

My method for preparing for oral argument is plagiarized almost entirely from that of Chief Justice John Roberts, as he has explained it in articles and speeches. There are worse people to copy from: as a lawyer, the Chief was one of the best oral advocates of his generation. And while each person surely has their own way of preparing, I have found that most lawyers can benefit from adopting at least part of his method.

Harvesting questions. My process begins with writing down as many possible questions I could be asked as possible. I start by carefully reading the briefs, with particular emphasis on the opponent's reply brief (if I am representing the appellee) or the answering brief (if I represent the appellant). What questions jump off the page? What important issue have been left open? What is the most likely way I could lose? The questions do not all have to be complex ones. At the harvesting stage, the goal is to create as many questions as possible, and so they might range from the central disagreement between the parties to granular questions about record citations for the most important allegations of the complaint. The next step is to prepare precise and crisp answers to each question, with citations if necessary. The goal is to address each question with the best answer you can think of. Don't hesitate to change your answers if they're not working!

Practice! I spend a considerable amount of time practicing my argument in front of a video camera. This shouldn't be like practicing a speech, however. You might begin at different points in the argument, to replicate the back-and-forth of oral argument. Or just pretend you are facing an extremely hot panel that gives you almost no time to argue. This is when the index cards come into their own. You can either practice entirely from the cards or begin a presentation and interrupt yourself with questions from the cards. If an answer doesn't flow smoothly, consider stopping and refining the answer right away rather than leaving the work for later.

Moot: Moots are expensive, both in time and resources. But a good moot is often the only way to find the most difficult questions in a case and to refine your themes and strongest points. Ask your "judges" to be tough on you. Make them interrupt and challenge you. And on the flip side, you should be ready to present a contested oral argument. I recommend only doing the moot when you have made serious progress on preparing the case. Conducting a moot when you are not ready to argue wastes

both your time and that of your colleagues. If you're not ready yet, spend more time with your notecards.

The “daggers”: By the end of your argument preparation, you may have prepared outlines, dozens of note cards, and spent hours reading briefs. But ultimately, there are really only a few issues and points that really matter. There is no worse feeling than going to oral argument and forgetting, in the rough and tumble of the debate, to make one of those points. That is why I prepare a last index card that has the five points that I must make “come hell or high water.” I then practice incorporating those crucial points in my arguments no matter what. And ultimately, that is all I take up with me to the argument podium.

Good luck! Oral argument, at its best, is a conversation with the judges of the Court. Having thought hard about what might trouble a judge trying to write an opinion is the best way to be prepared, and make argument fruitful for you, your client, and the Court.