

MOCK ORAL ARGUMENTS



Justice Patti Kitching (Ret.)

If you have an oral argument before a Court of Appeal or a Supreme Court, you must diligently prepare for that all-important appearance. The experience may be exhilarating, or it may be disappointing. One authority on the United States Supreme Court has said that an argument before the Supreme Court is a combination of a speech, a conversation and an inquisition.

One way to increase your chances of presenting a successful oral argument is to participate in a mock oral argument beforehand. There you will have the opportunity to practice your argument before one or more persons. They will then critique your presentation and demeanor, discuss the strengths and weaknesses of your case, and provide constructive criticism for improvement.

There are different types of mock oral argument. For example, you may gather together one or more of your colleagues, or you may seek out a panel of retired judges or justices. Whichever model you choose, it is important that the people you choose be prepared and willing to offer suggestions and criticisms to improve your presentation. If you prevailed below, they will help you secure an affirmance, and if you lost below, they will help you improve your chances for a reversal.

In order to prepare the mock panel for your argument, you should provide the panelists with the briefs, any critical portions of the record (such as a dispositive agreement or ruling) and relevant case law. If there are amicus curiae briefs, you may also want to provide some or all of them. The panelists will then read the briefs, study the issues, and prepare questions. They may also decide to meet before the

argument to discuss the case.

At your mock oral argument, the members of the panel should confirm that you understand the appropriate standard of review so that you frame your arguments appropriately. They should test your arguments by asking difficult questions and following up until you have sufficiently answered the questions. Depending on the case, they may ask you to explain the ramifications on other cases if the court decides in your favor. It is important that they ask you to distinguish cases that may be harmful to your position. They should also examine you regarding any procedural issues in your case, like waiver and invited error. Finally, they may ask you to explain how your case fits into the appropriate development of the law.

It is important to remember that the actual Court of Appeal or Supreme Court may view your case differently than you do. This is where the mock oral argument panel can be particularly helpful, because the panel members will be taking a fresh look at the issues in your case. You do not want to be surprised by a question from the actual court, and if there is a new issue or argument you have not considered, you want to learn about it at your mock oral argument—and not at the actual argument. The mock panel may also identify a procedural error you have made. If the panel does identify a problem area with your case, it may be able to help you formulate an argument or strategy that deals with the problem.

The mock panel will also be extremely helpful in advising you how to organize and streamline your argument. For example, if you have five issues you think are important in your case, the panel may rank your arguments from very strong to very weak. It may advise you to omit one or more of your arguments so you have more time to emphasize your potentially winning arguments.

You should decide what main points you want to make in your oral argument and make them early. However, you should always be ready for the panel or the actual court to interrupt your presentation, even if you have decided you must make certain arguments and this interrupts your plan. If someone on the mock panel or the court asks a question, be sure you understand the question and then answer it right away. A question means that the questioner is interested in that issue – and if that person is interested in an issue, you must be interested in it too. You should treat this as an opportunity to have a conversation with the panel or court where you will have an opportunity to satisfy the panel's or the court's concerns. While answering the question, you may be able to incorporate into your answer the other important points you wish to make. After you have answered the question, you can go back to your prepared remarks if you have time. Some courts are more active than others, so it is a good idea to have a presentation that identifies areas that can be omitted if you run out of time.

I have had personal experience on both sides of mock oral arguments. When I was a Deputy Attorney General, the United States Supreme Court heard one of my cases. The case presented many interesting issues, including federal court jurisdiction, ERISA, preemption, and California personal income tax. At that time, the Association of Attorneys General prepared Attorneys General and their deputies for arguments in the United State Supreme Court. The association set up a mock oral argument for me in Washington, D.C., a day or two before my actual argument. The panel for my mock oral argument included former law clerks to the Justices of the Supreme Court. Needless to say, they were immensely helpful, particularly because my case involved esoteric issues. They were able to critique my presentation and suggest ways to craft my arguments so they would appeal to the

members of the Court. Although I had spent many hours trying to anticipate questions from the Court, they raised questions I had not anticipated, and they helped me formulate answers to those questions. Those former law clerks improved my argument and gave me confidence, which led to a favorable result for my client. (A special feature of my case is that it was argued on Justice Ruth Bader Ginsburg's first day on the Court.)

Since I retired, I have served on panels for mock oral arguments. The attorneys have presented their oral arguments, and the panels have treated the arguments as though we were in an actual court proceeding. We have asked difficult questions, interrupted the attorneys, asked the attorneys to distinguish cases, and asked the attorneys to discuss the ramifications of a decision in their favor. After the argument, we have critiqued such things as the strength or weakness of the arguments, the demeanor of the attorney, and the quality of the attorney's responses to our questions. We have given our opinions regarding whether the judges or justices would be satisfied with the answers the attorneys have given to our questions. Our goal was to improve the presentation the attorney ultimately would make to the appellate court.

A stimulating oral argument can be an exhilarating experience. At its best, oral argument helps the court achieve its goal, which is to make the correct decision. Justice William Brennan once said that oral argument was the indispensable ingredient of appellate advocacy and that his whole notion of the case crystallized at oral argument. For these and other reasons, the appellate attorney has the responsibility to present the best possible oral argument to the court. A mock oral argument can be a significant tool in helping the attorney accomplish that task.

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