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ARTICLES

MAY IT PLEASE THE COURT – OR NOT: APPELLATE JUDGES’ PREFERENCES AND PET PEEVES ABOUT ORAL ARGUMENT

Margaret D. McGaughey*

There was a time when the only way to plead a case was orally. King Solomon decided between two women claiming to be the mother of the same baby based only on their oral representations, made without briefs (and, for that matter, without lawyers).¹ In the early 1800s, cases in the United States Supreme Court required no briefs, and oral arguments occasionally lasted as long as ten days.² By the twenty-first century, only one fifth of cases in the federal courts of appeals are decided on the basis of both briefs and oral argument.³ The rest are resolved on the pleadings alone. Even those appeals that are heard orally are given only thirty minutes per side in the

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1. 1 Kings 3:16–28 (Revised Standard).

2. John W. Davis, *The Argument of an Appeal*, 26 ABA J. 895, 895 (1940).

3. Jay Tidmarsh, *The Future of Oral Argument*, 48 Loy. U. Chi. L.J. 475, 478 n.16 (2016).

Supreme Court⁴ and fifteen per side, or even less, in the federal courts of appeals and state supreme courts.⁵

With so little time to make their case, but so much at stake, what should lawyers do during oral argument to capture the judges' attention?

Lawyers have frequently written on this topic. Helpful to fellow advocates as such works may be, what matters is less what lawyers think about oral argument than what resonates with judges.

This article is the product of in-person interviews with nineteen state and federal appellate judges to ascertain what they find to be effective at oral argument and what they deem counter-productive or even annoying.⁶ Ten of the interviewed jurists are active or senior members of the United States Court of Appeals for the First Circuit.⁷ Eight are current or former justices of the highest courts of Maine,⁸ Massachusetts,⁹ New Hampshire,¹⁰ and Rhode Island.¹¹ One jurist was formerly Chief

4. Sup. Ct. R. 28.3 (July 1, 2019) (providing that “[u]nless the Court directs otherwise, each side is allowed one-half hour for argument”).

5. *See, e.g.*, 1st Cir. Loc. R. 34(c) (providing that “[n]ormally the court will permit no more than 15 minutes per side for oral argument”); Me. R. App. P. 11(b) (providing that “[e]ach side will be allowed up to 15 minutes for argument” in the Supreme Judicial Court).

6. Former First Circuit Chief Judge Frank M. Coffin’s classic guide to oral advocacy prompted many of the questions posed during the interviews and added much to the discussion in each. *See* FRANK M. COFFIN, A LEXICON OF ORAL ADVOCACY (Nat’l Inst. for Trial Advocacy (1984)). In the interest of disclosure: this author served as Judge Coffin’s law clerk.

7. Sincere thanks go to Chief Judge Jeffrey R. Howard and Judges David J. Barron, Michael Boudin (Chief Judge from 2001 to 2008), Kermit V. Lipez, Sandra L. Lynch (Chief Judge from 2008 to 2015), William J. Kayatta, Jr., Bruce M. Selya, Norman H. Stahl, O. Rogeriee Thompson, and Juan R. Torruella.

8. The author is grateful to three former members of the Supreme Judicial Court of Maine: Chief Justice Leigh I. Saufley, Associate Justice Donald G. Alexander, and Chief Justice Daniel E. Wathen.

9. Chief Justice Ralph D. Gants, Associate Justice David A. Lowy, and Associate Justice Scott L. Kafker, who previously sat on the Massachusetts Appeals Court, graciously consented to interviews. Andrea Breier, the law clerk to Justices Kafker and Lowy, was also helpful in explaining that court’s practices.

10. Recently retired Chief Justice Robert J. Lynn of the New Hampshire Supreme Court made significant contributions to this dialogue.

11. Chief Justice Paul Suttell kindly agreed to add his thoughts.

Judge of the First Circuit and now is an Associate Justice of the Supreme Court.¹²

With respect to some aspects of oral argument, the judges were in complete accord. Regarding others, there were significant differences of opinion. The objective of this article is to identify the points of agreement and disagreement so that oral advocates can avoid what judges see as common pitfalls and be aware of differences from court to court and judge to judge that will inform their oral advocacy.

I. PURPOSE AND SIGNIFICANCE OF ORAL ARGUMENT

The judges all agreed that the most important part of the appellate process is not oral argument, but the briefs. On paper, lawyers can carefully shape their legal theories, chose their words precisely, incorporate accurate supporting record references, edit and revise repeatedly, and bring the insights of colleagues to bear on the final product. Oral arguments, by contrast, are one-person shows, more spontaneous, occasionally unpredictable, and often lacking the careful scripting that attends the briefs.

There was no unanimity among the judges, however, regarding the significance, or even the utility of oral argument. The cost to litigants can be significant, for oral argument often entails travel, not to mention the legal fees associated with preparing for and appearing in the appellate court. There is also a cost to judges, who must spend their own and their law clerks' time getting ready for and hearing argument when they could be writing opinions instead.

Whether oral argument should be ordered less frequently was the subject of much debate among the judges. First Circuit Judge Torruella suggests that oral argument is a carryover from the English legal system, where briefs are literally brief, but oral

12. Having sat on both the First Circuit and the Supreme Court, Justice Stephen G. Breyer contributed a unique perspective.

The reader should note that this article refers to each judge or justice by the title appropriate to his or her highest judicial office. Thus, although some of Justice Breyer's comments refer to his experience on the First Circuit, he appears throughout as "Justice Breyer," Dean Saufley of the University of Maine School of Law appears throughout as "Chief Justice Saufley," and so on.

argument can last hours or even days. Many judges share his view that too many cases are set for argument, and the few truly complex appeals where oral argument will assist in the decisionmaking process are given too little time. Other judges, however, favor granting oral argument liberally because even if the outcome of a case appears clear, it can be difficult to predict what will arise during argument.

First Circuit Chief Judge Howard has come to believe that because his is a “paper court” and its members are very well prepared, “the federal circuit courts could get by without oral argument, but I think we would make a lot of mistakes.” He finds educational value in having judges face the lawyers who have thought about the cases longer than the judges have and are willing to probe the limits of a possible ruling and what its impact would be. Whereas when he came to the First Circuit in 2002, forty percent of cases were set for argument, after a short-term increase in criminal filings, the number has settled at thirty-five percent. One concern Chief Judge Howard has about the declining number of oral arguments is institutional: that there are fewer opportunities for lawyers to appear before appellate courts and gain the experience needed to improve their advocacy. He favors adding a case or two to each argument list simply to allow lawyers—particularly young lawyers—to develop their skills.

The consensus of the judges was that although oral argument changes the outcome of an appeal only between ten and twenty percent of the time, it alters the reasoning more frequently. For Justice Breyer, for example, oral argument at the Supreme Court changes the result five percent of the time, but can refocus the reasoning in thirty percent of cases. Oral argument can shed light on issues that have been inadequately addressed in the briefing, for example procedural bars or mootness. Maine Chief Justice Saufley’s view is that a good advocate whose brief has not quite captured the court’s attention can bring the case to life at oral argument. First Circuit Judge Lipez tells students—and by extension lawyers—that they should always assume that oral argument will make a difference because “often enough, it does.”

Even the non-believers conceded that oral argument serves a public function. Judging is a relatively solitary pursuit, and

what judges do can appear to the general public to be largely a mystery. Courts issue opinions that have significant impact not only on individuals, but on the nation as a whole, yet how they arrive at those opinions seems almost clandestine. In addition, the media does not always accurately portray the courts. In all but the most sensitive cases, however, oral argument is open to the public and this allows citizens a window into the appellate process and the judges' thinking. It also gives the litigants and their lawyers the sense that their arguments have been considered and they have literally had their day in court.

Judges offered varying insights into what, apart from winning, an advocate's purpose at oral argument should be. Everyone agreed that a principal function is to answer questions and thereby educate the court. First Circuit Judge Lynch summarizes the view of a number of jurists that an exceptional advocate will deliver an oral argument that amounts to an outline of how an opinion in that lawyer's favor would read. According to First Circuit Judge Boudin, lawyers should never present the extreme version of their position, but should guide judges to a result that will appear to both the court and the general public to be reasonable and legitimate. New Hampshire's Chief Justice Lynn describes an advocate's objective as persuading the court not only that a given position is correct, but also that it will lead to a proper development of the law and will not produce an outlier that the court will have to deal with in the future. Many appellate judges, five of the seven justices of the Massachusetts Supreme Judicial Court (SJC) among them, have previously sat on the trial bench, which makes them especially attentive to giving trial judges clear guidance. Those judges' trial experience makes them want to explore at oral argument the breadth of an opinion and any caveats that should be attached.

For some judges, oral argument is an opportunity to learn their colleagues' perspectives on a case. As a matter of court culture, many judges do not confer with their colleagues in advance of oral argument. A thorough discussion among the judges comes only in the *semble*, the conference of judges, which in most courts is held immediately after a day's argument

session is completed.¹³ Questions to the lawyer during oral argument may thus be for the purpose of teasing out another judge's leanings or using the lawyer's answers as the basis for the *semble* discussion. Communicating with other jurists through questions to the lawyers is especially common at the Supreme Court, where, by virtue of having voted to grant or deny certiorari, the Justices are already aware of their colleagues' tentative views. The same is true of *en banc* hearings in the federal courts of appeals, where a majority of judges in active service who are not otherwise disqualified will have voted to hear the case.¹⁴

Although different jurists put it different ways, they all agreed that there are three basic ingredients of an effective oral argument:

- preparing;
- listening; and
- answering the question when it is asked.

II. PREPARATION

There was no dispute among the judges that the best oral advocates know their cases better than anyone else in the world. That includes opposing counsel and the judges themselves. In the state courts, it is typical for judges to hear twenty to twenty-four appeals in a one-month term. Panels of the First Circuit generally hear twenty-four cases per month, or more when there is a two-week session. In the Supreme Court, up to twenty-four cases can be heard in each of the two-week terms held between October and June. The sheer number of cases means that a well-prepared advocate can be of considerable assistance to any appellate court.

13. During *semble*, the judges cast tentative votes to affirm, reverse, or order some other relief. Except for jurisdictions where the author of an opinion is selected in advance, writing assignments are generally given at *semble*.

14. Fed. R. App. P. 35(a).

A. Judges' Preparation

Because judges have differing methods of preparing for argument, a lawyer expecting to appear in an unfamiliar court may want to research the backgrounds and opinions of the jurists who will decide their case. It may also be useful to contact experienced advocates in that jurisdiction or former law clerks to gain insight into how the judges ready themselves for argument.¹⁵ Although the composition of a bench should not matter to the outcome of an appeal, the reality is that it often does. The more a lawyer knows about judges' predilections and how they prepare, the better equipped the lawyer will be to answer questions or correct misunderstandings.

1. The First Circuit

The First Circuit sits in three-member panels, with two panels occasionally sitting on the same day. Because the composition of panels generally changes, not all members of the First Circuit hear all cases that are scheduled for that session. Each panel typically hears six cases a day over four days, sitting for one or two weeks each month.¹⁶

Briefing can be complete a month to six weeks before oral argument is scheduled. The members of the panels generally have time to read the briefs and lower court opinion, examine critical parts of the record, order exhibits from the trial court if necessary, and, for those who use law clerks before argument, direct the preparation of bench memos. Many federal appellate judges discuss the cases they will hear not only with the clerk who writes the bench memo, but with all of their clerks as a group. The clerks debate the merits of the cases and often develop questions for the judge to put to counsel at argument. This reliance on law clerks should serve as a warning to the unwary. It is law clerks' unarticulated job description to find facts in the record that the advocates have overlooked, relevant cases that have not been cited, or precedent that has been mischaracterized, contorted, or discredited.

15. While an active practitioner in the First Circuit, this author fielded such inquiries.

16. UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, RULEBOOK 118 (Jan. 13, 2020) (outlining schedule for sessions and their locations in I.O.P. VII(C)).

Justice Breyer reports that when he sat on the First Circuit, the issues could generally be resolved by established precedents, which enabled him to “skate” through the briefs. He contrasted his experience on the First Circuit, where the focus is on the case, with the Supreme Court, where the emphasis is on the issue. A major function of intermediate appellate courts is error correction, which makes procedural bars important. At the Supreme Court, however, the certiorari process seeks to eliminate any case in which such an obstacle will prevent the Justices from deciding an issue cleanly.

2. The Supreme Court

Justice Breyer’s means of preparing for argument in the Supreme Court is more akin to his former colleagues’ approaches in the First Circuit. He receives the briefs several weeks in advance of an argument session. In any given case there can be eight to fifteen briefs—for the parties, the Solicitor General, and any amici, plus reply briefs—and sometimes as many as eighty (which he remembers in a right-to-die case) or a hundred (in an affirmative action case).

Whereas his clerks read the certiorari petitions and write memoranda, Justice Breyer reads all the briefs personally. He starts with the opinion below because if there is a claim of error in the legal reasoning, he feels “at sea” unless he knows what that reasoning is. Among the briefs, he may begin with the Solicitor General’s, if there is one. He tends to read a petitioner’s reply brief before the principal brief because the reply “makes the same argument and it’s in twenty-five pages,” not the forty to sixty pages of a principal brief. He puts the amicus briefs in order of who he thinks are the better lawyers, and reads those briefs according to his ranking. When the amicus briefs begin to be repetitive, he may skim the tables of contents to see if they raise any new points. He can become interested in a particular set of amicus briefs if those representing the same types of clients take opposite positions—for example, one nursing association favoring a constitutional right to die and another opposing it. It takes him an entire day to read two sets of briefs. Justice Breyer then talks to his four law clerks, dividing that session’s cases among them. After reading

the assigned clerk's bench memo, he discusses the cases with the clerks as a group once, or sometimes twice, before argument.

3. *State Supreme Courts*

State court appellate judges have different ways of preparing. They generally have less time to grapple with a greater number of cases, and also fewer law clerks. This means that advocates should be alert to any possible misapprehensions regarding the facts or the record. Indeed, some justices use their law clerks only to research discrete issues.

a. Maine

In the Maine SJC, the initial assignment for drafting an opinion is made in advance of oral argument. The assigned justice's law clerk prepares a bench memo that is circulated among the other members of the court. Because the entire record is now available to all seven justices through a Google drive, analysis by the law clerk writing the bench memo focuses on the legal arguments. Although lawyers think they are able to tell at a Law Court¹⁷ argument who will be the author of an opinion because of the number and detail of the questions that justice asks, this perception can be deceiving. As Justice Alexander points out, the assigned justice's law-clerk bench memo and well written briefs often spark the other justices' interest in an issue.

b. Massachusetts

The seven justices of the Massachusetts SJC receive briefs one month before oral argument.¹⁸ Because of the press of producing opinions on the previous month's cases, however, many justices are able to turn to the new set of briefs only at the end of the week in which they have conferenced about opinions.

17. When sitting as an appellate court, Maine's Supreme Judicial Court is known as the Law Court. *Supreme Court*, ST. OF ME. JUDICIAL BRANCH, https://www.courts.maine.gov/maine_courts/supreme/index.shtml ("The Supreme Judicial Court is the governing body of the Judicial Branch. Sitting as the Law Court, it is the court of final appeal.")

18. Massachusetts is the only northern New England state to have a two-tiered system of appellate review.

This may mean having only two or three working days to prepare for the next set of arguments.

The justices read the briefs themselves, and occasionally also read parts of the record and salient cases. The writer of an SJC opinion is not assigned in advance. One justice, however, is chosen to be the “reciting judge” and can be expected to go into greater depth with respect to the record and the caselaw, and tends to lead the discussion at *semble*.

c. New Hampshire

In New Hampshire’s five-member Supreme Court, the writer of an opinion is assigned randomly, generally a month in advance of argument. Some, but not all, justices tend to focus more extensively on the cases they are assigned to write. The justices generally prepare cases alone; only one of them uses bench memos frequently. Before argument, law clerks may perform spot research. It is after argument, at the opinion-writing stage, that the law clerks become more involved.

d. Rhode Island

Rhode Island’s five Supreme Court justices hear appeals that fall into two categories. Show-cause cases, which have been filtered for review, must be heard by at least three justices, although in practice, the full court hears them unless one justice is recused.¹⁹ The lawyers in show-cause cases are entitled to ten minutes per side at oral argument with two minutes for rebuttal.²⁰ In contrast, the lawyers in full cases can expect to be allotted thirty minutes per side with ten minutes for rebuttal.²¹ Briefs are filed approximately thirty days before argument. As soon as one set of oral arguments finishes, the justices begin work on the next month’s cases. Law clerks in Rhode Island write bench memos only for their own justice.

19. Criminal cases must be heard by the full court. R.I. SUP. CT. R. 12A.

20. R.I. SUP. CT. R. 24.

21. *Id.*

B. Lawyers' Preparation

1. Who Should Argue

One issue that sparked considerable discussion among the jurists is who should handle the appeal: the trial lawyer or an appellate specialist. A trial attorney has lived with the case from beginning to end. First Circuit Judge Kayatta points out that, especially as pertains to error correction, the trial lawyer may be able to make the appellate court “feel the hit” in a way new counsel cannot. However, trial lawyers may be less sensitive to procedural bars or less well-versed in the standards of review that often determine the outcome of an appeal. Trial counsel may also be tempted to treat the appellate court like a jury and make the mistake of giving impassioned pleas about the equities rather than measured answers to questions about the law or record. This was a common complaint among the judges. When the trial lawyer’s own conduct is in question—for example, when the lawyer failed to object at trial—there can also be awkwardness for that lawyer at oral argument.

Some judges, Rhode Island’s Chief Justice Suttell among them, see value simply in having a new pair of eyes view the record and precedents. However, a lawyer who did not handle the trial may be tempted to dodge a difficult question by saying “I was not trial counsel.” This response was one of the highest on the judges’ list of pet peeves. First Circuit Judge Stahl and Chief Justice Gants of the Massachusetts SJC warn that there is also a danger associated with senior partners stepping in at the last minute to argue orally. Even though the client may want the named partner to argue, an associate who has read the record, written the brief, and perhaps even tried the case may be better equipped to answer questions from the bench.

In the Supreme Court, the increasing trend is for a small cadre of specialists—most of them in Washington, D.C.—to handle the cases. An advantage of these specialists is that they have become accustomed to what in the federal courts of appeals would amount to an *en banc* hearing every day. In the Supreme Court, there are nine individualistic personalities who, as Justice Breyer puts it, cannot even agree where to go to lunch. Supreme Court specialists also are mindful that the emphasis in the Court is not on the case, but on the issue. A difficulty for the bar in

general is that the increasing specialization at the Supreme Court level means that fewer lawyers acquire the experience needed to maximize their effectiveness in that court. Not every client whose case reaches the Supreme Court, however, wants to abandon counsel who has represented them ably up to that point. Moreover, in cases that are extremely technical in nature—tax or bankruptcy cases, for example—the best advocate may be a lawyer who is familiar with that specialty.

The consensus of the judges was that lawyers who regularly appear in appellate courts generally make better oral advocates. Lawyers who work for institutions—the United States or a public defender agency—tend to be effective, in part because those organizations have internal training, review, and moot court processes. In Judge Lynch’s view, lawyers for institutional clients may also have a better eye for balancing the long-range impact of a decision against the outcome of the individual case. The principal concern judges have with choosing between trial counsel or an appellate specialist is that the advocate be able, as First Circuit Judge Barron puts it, to “speak the language of appellate law.” By that they mean, for example, that lawyers understand and apply established standards of review instead of ignoring them or wasting time urging the judges to change them.

2. *What to Prepare*

A common theme of the judges was that good preparation means knowing the case better than the judges do. Preparation requires mastery of the record²²—having read it personally from cover to cover—and the ability to answer any question about, for example, whether there was an objection at trial and what its basis was. Questions of law may be readily handled in the briefs, but at oral argument, the record—and a lawyer’s grasp of it—are critical. An oral advocate must be able to correct any misunderstanding about a record fact, whether by opposing

22. Parties do not always agree on the contents of the record appendix. In jurisdictions that have electronic filing, experienced counsel for the appellee will review the docket and supplement the appendix with any documents or transcripts the appellant may not have included that the appellee deems necessary.

counsel or one of the judges. Ideally, this is done by being able to cite a record reference.

Preparation also means understanding the standards of review and being fully familiar with the significant authorities—including the authors of those opinions, whom counsel may be addressing at oral argument. It is important to know which cited cases have been discredited, questioned, or targeted for Supreme Court review. Case research should thus be updated to and including the day of argument. Judge Stahl warns that lawyers should never allow themselves to become flummoxed by being asked about a dispositive case that was decided after the briefs were filed.

According to Chief Judge Howard, in criminal cases especially, it is important to be fully conversant with the facts. They can make the difference between a search and seizure that is reasonable and one that is not. Judge Barron's view is that where a statute, regulation or case precedent is in issue, the advocate should be able to quote the operative language during oral argument and direct the judges in how to read it.

Whether the bench that will hear argument has had weeks to prepare or only days, the judges uniformly agreed that oral argument should never be simply a second presentation of the briefs. Instead, the advocate should view the case through the different prism of how the judges or any other objective observer would see it. Some judges believe that oral advocates should lead with their strongest argument. The same is true of an argument that is difficult, but could be dispositive. Massachusetts Justice Lowy points out that, especially when faced with a "hot bench," if a lawyer does not begin with a winning or potentially dispositive argument, the time constraints of oral argument and questions from the judges may make it impossible ever to reach that claim. Maine's Chief Justice Wathen notes that in multiple-issue cases, there is generally a "jugular, make-or-break argument" and good lawyers will focus initially on that argument.

According to Justice Breyer, however, because "you are no stronger than your weakest point," experienced advocates will be able to segue quickly to their weaknesses. One means of achieving this result is by presenting the affirmative case, acknowledging that some aspect of it may be problematic, and

then addressing the problem. The judges made clear they appreciate lawyers who candidly recognize the flaws in their cases and avoid even the appearance of trying to hide anything. Whether handled from the outset, or in response to questions from the bench, having ready answers to weaknesses in a case is one of the most important aspects of preparation. Justice Breyer pointed out that Chief Justice Roberts was known as a practitioner to make a written list of all the difficult questions he anticipated, rank the answers, and then all but memorize the list.

Good preparation often means being able to offer multiple reasons for reaching the result the advocate wants. Chief Justice Wathen deems this the “belt and suspenders” approach. As Judge Coffin explains, the “even if” technique runs along the lines of “Even if there is appellate jurisdiction and even if the objection was preserved below and even if the trial judge erred in his ruling, nevertheless the error was harmless because _____, _____, and _____.”²³ Although perhaps best laid out in detail in the briefs, this technique can protect a lawyer from becoming cornered during oral argument. If, for example, the judges appear unpersuaded by a procedural challenge, the advocate can quickly shift to the merits or from there to a claim of harmless error.

Most of the judges favored a lawyer—whether for the appellant or the appellee—whose remarks begin by identifying what issues have been raised and then explaining which one or two issues will be the focus of the presentation. Because argument time is short, this approach signals to the judges that the lawyer is not ignoring any of the issues, but is concentrating on what appears likely to be of greatest interest to the bench or most significant to the outcome. Identifying from the outset a lawyer’s view of what is central helps to orient the judges. It also gives, in effect, a roadmap to the argument that allows the judges to redirect the advocate to another issue that the judges may consider more important. Oral advocates given this hint should seize it and pivot immediately to the issue the court has identified. An introduction that identifies what issues will be covered also encourages the court to remind the advocate as

23. COFFIN, *supra* note 6, at 79.

time is expiring that the moment has come for addressing any other issues listed at the start.

As an aside, several judges complained that lawyers tend to raise too many issues on appeal in the idle hope that one of them will be meritorious. Judge Boudin holds law schools partly responsible for this penchant. In law school, students are graded on their ability to identify every possible argument, including the most extreme ones. Good advocates, however, know to focus only on a few meaty issues. Justice Alexander's view is that raising too many issues diverts the court's attention and can suggest a lack of credibility or judgment on the lawyer's part. A case with a large number of issues can also be frustrating for courts, such as the Massachusetts SJC, that publish all of their opinions. This is because even though some issues may be clearly frivolous, the judges must still spend time and effort addressing them. Especially at oral argument, lawyers should emphasize only the arguments that are critical to a successful outcome.

The judges also consistently advised against preparing an argument that begins with a lengthy summary of the facts or procedural history of the case. The judges found this to be a surprisingly common mistake, especially on the part of young lawyers. A lengthy introduction can irritate judges by suggesting that they are not prepared and it is almost always a waste of precious argument time. What experienced lawyers do instead is plunge immediately into the issues. Of course, if a judge seems confused or asks about the facts or procedure, the lawyer should explain. Otherwise, however, the judges agreed that counsel should presume that the court is conversant with the case. If a lawyer is unsure, one approach First Circuit Judge Thompson recommends is to begin with something along the lines of "I assume the court is familiar with the facts."

3. Procedural Bars

One frequently overlooked issue that counsel should always anticipate is possible procedural bars that will heighten the standard of review. These include a failure to object at trial; offering the trial court one theory, but advancing another theory on appeal; advertent to an issue on appeal, but not developing it adequately; or raising an issue for the first time in a reply brief

or at oral argument. The judges had different reactions to how strictly procedural bars should be enforced.

Some judges believe that appellate courts invoke procedural bars too frequently and may use them to duck thorny issues. Other judges see the failure to preserve an objection at trial as a sign of sloppy lawyering or occasionally an effort on the part of a cagey lawyer to sandbag a trial judge by failing to object, all the while hoping that the plain error rule will save the day.²⁴ What may present the greatest difficulty for Judge Barron is when a novel or complex argument is raised in a brief, but just barely—in a sentence or two. The concern is in part fairness to the trial judge, who may view it as unreasonable to be reversed on a ground that the judge was never asked to consider. There is also the question of fairness to the opposing party, who may not grasp the import of a claim that is buried in the briefs. Perhaps most significant to Judge Barron is that the appellate court needs the benefit of full advocacy before deciding important issues.

Most appellate courts have a discretionary right to overlook forfeitures and waivers to avoid a miscarriage of justice. Judges may thus choose to entertain issues for the first time during oral argument or even raise *sua sponte* issues that have not been briefed or argued at all. Because some courts—and some judges on those courts—are especially unforgiving with respect to forfeitures and waivers, however, lawyers should research in advance the proclivities of that court. Even more important, lawyers should not wait for the court to raise a procedural bar, but should address any such issue directly, both in the briefs and at argument.

4. Crutches

In an ideal world, lawyers would be well enough prepared to be able to argue with no notes. After all, actors can speak from memory sometimes for hours. For most lawyers, however, preparing for oral argument means taking some form of crutch to the podium to enable the advocate, for example, to quote the

24. *United States v. Olano*, 507 US. 725 (1993) allows courts to consider an unpreserved claim when there is (1) error; (2) that is plain or obvious; and (3) affects substantial rights; and (4) if, absent reversal, a miscarriage of justice would result or the integrity of the judicial system would be undermined. *Id.* at 732–36

precise language of a complex statute or regulation. The judges appear not to care especially—or in some cases even notice—whether lawyers bring to the podium black notebooks (as is advised in the Supreme Court),²⁵ legal pads, iPads, notecards, or scraps of paper.²⁶ As First Circuit Judge Selya joked, a lawyer “could bring six generations of his family to the podium.”

The universal concern is that whatever material the lawyer takes to the lectern should not be so voluminous as to interfere with the presentation and should be well-enough organized that the lawyer can refer to it easily, quickly, and without wasting time. A lawyer who thumbs through briefs and appendices in the middle of an argument can appear to be fumbling or to have become sidetracked. The sound of paper rustling against the microphone can also be distracting to the judges.

In the Supreme Court, reliance on a legal pad is actively discouraged.²⁷ One problem with iPads, which Massachusetts Justice Kafker identified, is that the advocate may be tempted to focus on the tablet, lose eye contact with the judges, and even stop listening. If a lawyer anticipates needing computer access to the record or cases during argument, Justice Kafker suggests having an associate at counsel table who has a tablet, can find the necessary information, and can pass a note to the arguing lawyer without interrupting the flow of the dialogue.

Even experienced lawyers tend to take a few notes to the lectern, although in practice they rarely even glance at them. Notes at the podium can provide a measure of comfort against nerves. Having something small in hand can also guard against excessive gesticulating.

Many judges notice when lawyers bring nothing to the podium, although some find that practice to be purely a matter

25. CLERK OF THE COURT, GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES 6 (Oct. 3, 2019), *available at* https://www.supremecourt.gov/casehand/Guide%20for%20Counsel%202019_rev10_3_19.pdf.

26. This appellate advocate’s crutch of choice was five-inch by seven-inch notecards—one or two cards per issue—which could be re-ordered while the argument was taking place to accommodate the direction of the discussion. The name of a judge who made a helpful point with opposing counsel could be noted on the cards so that point could be reinforced during the appellee’s arguments. The judges say they generally are not averse to an argument that refers to a judge’s remarks to either counsel.

27. “Please note that a legal sized pad does not fit on the lectern properly. Turning pages in a notebook appears more professional than flipping pages of a legal pad.” GUIDE FOR COUNSEL, *supra* note 25, at 6.

of the lawyer's personal pride. Arguing without notes can be impressive because, as Judge Kayatta points out, it creates a professional appearance and suggests that the advocate has total command of the law, facts, and record. Arguing without notes does not impress the judges, however, if the argument is not buttressed by adequate knowledge of the case. Judges would prefer to hear a good argument delivered with notes than a bad argument presented note-free. The takeaway is that lawyers should bring to the podium as little as possible, while being sure that they have what they need.

Of greater importance to the jurists than what type of crutch a lawyer uses is that the advocate not be tied to it. In courts that exempt the first few minutes of argument from questions,²⁸ it may be more acceptable to adhere closely to a prepared script at first. Even then, however, the remarks should be well-enough rehearsed that the advocate does not read them.²⁹ Although some judges are prepared to accept following a written text as the product of nerves, it causes the lawyer to lose eye contact with the bench and severely limits the ability to engage in dialogue. Reading an argument can also cause judges to lose interest because they generally have read the briefs and do not need them to be reiterated aloud. The judges agreed that excessive reading by counsel for the appellee is especially ineffective because what that lawyer should do instead is seize on what the court has said to the appellant. In sum, although crutches may be helpful, or even necessary, they should not become a ball and chain.

28. In New Hampshire and Maine, court custom dictates that appellate judges will not interrupt lawyers for the first three minutes of argument. That practice was also recently adopted in the Supreme Court of the United States. GUIDE FOR COUNSEL, *supra* note 25, at 7 ("The Court generally will not question lead counsel for petitioners (or appellants) and respondents (or appellees) during the first two minutes of argument. The white light on the lectern will illuminate briefly at the end of this period to signal the start of questioning.")

29. Excessive reading is indeed discouraged by both the Federal Rules of Appellate Procedure and the Supreme Court Rules. Fed. R. App. P 34(c) ("Counsel must not read at length from briefs, records, or authorities."); Sup. Ct. R. 28.1 ("Oral argument read from a prepared text is not favored.").

5. *Moot Courts*

One way of ferreting out the strengths and weaknesses of an advocate's position is by holding moot courts. Department of Justice policy requires moot courts in any appeal in which the United States is the appellant and strongly encourages them in any case involving the United States that presents a novel or complex issue. Holding moot courts is also a frequent practice in the offices of many state attorneys general and public defenders. For younger lawyers, a mock oral argument at which more experienced lawyers act as judges is good practice because it gives the novice a chance to receive constructive criticism about reacting under fire. More experienced advocates tend to prepare not by holding dress rehearsals, but by discussing with their colleagues the questions they are likely to be asked and answers they might give. Justice Breyer offers this suggestion: "Know your case and explain it to your spouse, teenaged daughter, somebody prepared to listen. When they understand it, you've got it."

III. LISTENING

Perhaps the most common complaint the judges have about under-performing lawyers is that they become so engrossed in their prepared remarks that they fail to listen: they do not listen to the questions put to opposing counsel; they do not listen to opposing counsel's answers; and they sometimes do not even listen to the questions put to them while they are at the podium. Listening to what the judges ask opposing counsel is critical because those questions may spark the interest of other judges or provide information that can be used in response or rebuttal to stress key points. Listening to opposing counsel's answers is equally important because those answers may raise significant issues or amount to concessions that can also be emphasized in response or rebuttal. Listening to judges when being questioned at the podium is essential because lawyers who do not listen can wind up answering questions the judges never asked.

Justice Breyer warns against this bad habit of failing to listen. "You're not there to prove to some person how clever you are," he says. "You're there to win the case. So listen to what the

other side is saying.” He recalled having been given similar advice when preparing for his Supreme Court confirmation hearings: “You’re not in a confirmation hearing to show you’re clever. You’re in a confirmation to get confirmed. The way you will get confirmed is to listen to the question. Think about it. Then take your time and answer—fully.”

The judges agreed that counsel for the appellee has a tremendous advantage at oral argument. First, the burden is on the appellant, not the appellee. A second advantage is that the appellee argues after the appellant and thus has the opportunity to hear the judges’ questions to opposing counsel and that lawyer’s responses. Counsel who listens to that exchange can adapt the appellee’s argument on the spot to correct mistakes, seize upon concessions, and hammer home whatever points the bench has made that the opponent left unanswered. The judges noted that experienced counsel for appellees will generally put aside their prepared remarks, focus initially on the issues that have dominated the discussion with the appellant, and then turn to the issues they believe should be addressed. Judge Barron’s view is that unless the dialogue between the judges and opposing counsel is completely off track, picking up where the court left off is generally effective, among other reasons because it demonstrates to the court that the lawyer has been paying attention.

Listening is also key because it tells the advocate when to stop talking. Inexperienced lawyers sometimes think that because they have been given fifteen minutes to argue, they should use every second of that time. In the judges’ estimation, however, a good lawyer will take the court’s pulse, assess when all of the necessary ground has been covered, and end before the red light begins to flash. If the judges have additional questions, they will not be shy about asking them. Judges may even encourage a lawyer to end before time has run by thanking the lawyer, as was Chief Justice Saufley’s practice. Good lawyers take the hint. Occasionally, counsel for an appellee will recognize that the best course is to waive argument altogether. Chief Justice Wathen quotes his predecessor Vincent McKusick’s saying: “God bless the man who has nothing to say and knows enough to say it.”

Judge Boudin reinforces the point with a story about his colleague Judge Selya as a practitioner. Representing the appellee, Judge Selya appeared before a panel of the First Circuit that included Judge Bailey Aldrich. In person, Judge Aldrich could be “so sweet and charming,” but on the bench, he was “noticeably stern with lawyers.” During the argument, Judge Aldrich looked at then-advocate Selya, who was seated at counsel table, and barked, “Wipe that smirk off your face. You’re next.” Counsel for the appellant promptly ended his argument. Judge Selya then “rose from his chair, walked to the podium . . . put his arms on the edge and said, ‘Judge Aldrich, I think that everything that needs to have been said in this case has been said’ and sat down.” In Judge Boudin’s view, this was “true genius.”

Justice Breyer tells a similar story about Justice Clarence Thomas. After one lawyer argued, his opponent rose, said, “I don’t think I have anything to add, Your Honor,” and returned to his seat. Justice Thomas reportedly commented, “I have heard many arguments, but I think that’s the only time I’ve heard the perfect argument.”

IV. ANSWERING QUESTIONS

Framed in various ways, the judges uniformly say that oral argument should not be a speech, but a conversation. Judge Kayatta’s view is that eighty-five percent of lawyers who appear before the First Circuit do not understand that the purpose of oral argument is to engage the court in, as he puts it, the same type of robust discussion one would have around a dinner table. Chief Judge Howard advises that to the extent a lawyer can create the atmosphere of “just sitting in the office talking about these issues, . . . it’s a win.” He urges lawyers to force themselves into a conversational tone that will allow them to discover why the brief may not have convinced the court and address that flaw. Body language should communicate that the lawyer has anticipated the questions and not only is able to answer them, but is eager to do so.³⁰

30. In addition to themselves communicating with body language, lawyers should be alert to the body language of the judges. Judge Coffin comments that “[a] keen observer at

Lawyers should answer questions from the bench immediately after they are asked. Too often, the judges agree, oral advocates say “I’ll get to that later.” When they do, the judges stop listening and become increasingly frustrated as they wait for the answer. A lawyer who refuses to respond to a question at all will have difficulty avoiding the inference that an answer would disadvantage the lawyer’s case. How to handle certain kinds of questions, however, can present a challenge.

*A. Handling a Question That the Lawyer
Does Not Understand*

The judges admitted that they occasionally ask long questions that may be difficult for the lawyer to understand. A question may also have four or five component parts, which leaves the lawyer wondering what the focus of the question is. It is dangerous for a lawyer to answer the wrong question. The judges were unanimous in saying that lawyers should not be embarrassed to acknowledge that they do not understand a question from the bench.

Although one way to handle this situation is by asking that the question be repeated, doing so may use up valuable argument time. It may also give the impression that the judge does not know how to ask a question or, as Chief Justice Saufley points out, produce a reframed question that is even longer and more incomprehensible than the original inquiry. If the lawyer thinks he or she understands the question, but is unsure, the lawyer could reframe the question in a way the lawyer does understand and say, “If I understand you correctly, here is my response.” If the reframing is inaccurate, the court will redirect the lawyer. This approach is also generally better than giving an answer that is not responsive at all because the retort from the bench likely will be “that’s not my question.” Chief Judge Howard suggests that reframing the question may be useful even if the lawyer does understand what was asked because it gives the judge credit for posing a complex or sophisticated question. Some judges, however, find this approach to be dangerous

court would take note of the subtle signs of quickening interest—judges leaning forward, making notes, listening intently, perhaps even glancing at a colleague.” COFFIN, *supra* note 6, at 13.

because it suggests a lack of attention. Even the judges who approve of it agree that it should not be used routinely, in an effort to twist the question into something the lawyer wants to answer, or as a means of dodging the question.

Occasionally, having responded to a judge, a lawyer will follow up by asking, "Does that answer your question?" Although some judges think this inquiry signals the lawyer's sincere effort to understand and respond to the judge, others think it is another waste of time. This, too, should never be a rote practice.

*B. Handling a Question When the Lawyer
Does Not Know the Answer*

Attempting to respond to a question when the lawyer does not know the answer is difficult and can be unpleasant if the advocate should know what to say. Nevertheless, the judges offered ways to handle this situation. If the question concerns an issue that in the lawyer's judgment is insignificant, the lawyer can simply apologize for not knowing the answer, but explain why the matter is not important. If the question pertains to something that is significant, the judges said the best course is to ask permission to file a statement of supplemental authorities.³¹

What the judges agreed that a lawyer caught off guard should never do is bluff. Judges' law clerks can research and expose a fudged answer, and judges themselves are likely to catch lawyers' mistakes in the process of circulating and editing draft opinions. Faking an answer, citing cases for the wrong proposition, exaggerating the holding of a case, or misstating the facts affect a lawyer's credibility. Especially in small jurisdictions, the judges know the regular appellate advocates. As Chief Judge Lynn says, "you don't forget if somebody gets caught with his pants down." A lawyer's dishonesty can also

31. In the federal courts of appeals, filing of the statement is authorized by Rule 28. *See* Fed. R. App. P. 28(j) (referring to the submission of a letter addressing supplemental citations that refers either to a specific page in the brief or to "a point argued orally"). Many state courts have analogous rules. *See, e.g.*, Mass. R. App. P. 16(l) (providing that "[w]hen pertinent and significant authorities come to the attention of a party . . . after oral argument but before decision, a party may promptly advise the clerk of the court, by letter setting forth the citations").

result in a published opinion with the lawyer's name attached to it. Even if it embarrasses the lawyer to admit ignorance, Judge Lipez advises, "Do not dissemble. Do not fake. Do not make it up." In Chief Judge Howard's view, "there isn't a better lesson you can learn than you have to be candid because there are some judges who are never going to forget. Unfortunately, I'm one of them."

C. Correcting a Judge

As Chief Justice Suttell acknowledges, it can feel awkward—even presumptuous—for an advocate to point out that a judge labors under a misunderstanding. Nevertheless, all of the jurists agreed that when it is done politely, an advocate not only can correct a judge, but should do so. Allowed to stand, a mistake can steer oral argument in the wrong direction. It may be more difficult to correct a judge's seeming confusion about the holding or import of an opinion, especially when the opinion was written by one of the jurists hearing oral argument. When it comes to misapprehensions about the record or the facts, however, the judges are generally grateful for a lawyer's polite efforts at clarification. A lawyer can say, for example, "if I thought the record showed that, I would agree, but the record shows. . . ." A caveat is that lawyers should not begin to correct a judge by saying, "with all due respect." According to Judge Thompson, although that preface takes the lawyer's remarks "out of the spectrum of rudeness," it may signal that the lawyer is "getting ready to punch you in the eye." Judge Barron points out that the key to correcting a judge is to be confident and direct, but polite.

D. Handling a Judge Who Appears to Filibuster

In the matter of dealing with judges who will not allow advocates to make their case, the judges offered little comfort. Judge Lipez summarized the consensus:

I think you're really pretty defenseless in that situation. . . . In many ways, it's not really a fair fight between judges and the lawyer. Judges have all the advantage. I think you just have to suffer the indignity of hearing a judge going on

and on. After all, the only other option is to interrupt and say, "Listen, Judge, you're not giving me a chance to make my case." I think that would probably not be well received. . . . [P]articularly if you're talking about a visiting judge, the home judges may sense what's going on and as long as it's done politely, they would be sympathetic to that kind of response on the part of the advocate.

But he notes that "[i]f it's one of our own judges who's doing that, I think it makes it a little more difficult."

Judge Barron comments that if the judge who prevents the lawyer from talking is on the right track, argument time is not being wasted because the judge is simply making the case for the lawyer. If the judge is not focusing on the right issue, however, and the lawyer is not given the chance to respond, Judge Barron recognizes that it can be quite frustrating, especially when the lawyer has a good answer. Filibustering by one judge can also be challenging for the other judges, who may have different perspectives they are prevented from exploring.

One option is for the lawyer to try to make eye contact with the other judges to encourage them to enter the fray. However, this strategy carries risks, for it may produce resentment on the part of the filibustering judge. An advocate can also try saying courteously, "If I could just respond . . .," although there may not be any opportunity to say even that much. Chief Justice Saufley admits that a lawyer's only option may be to endure the soliloquy, think up a quick, direct answer, and give it at the slightest opening.

Occasionally, other members of the bench may sense that one of their colleagues has commandeered the argument or has focused on the wrong issue. They may interject to suggest that the lawyer answer the dominating judge's question or themselves redirect the argument. In Judge Selya's view, waiting for another judge to come to the lawyer's rescue is the best solution to filibustering. Presiding judges say they may acknowledge that the court has used up the lawyer's time and give the lawyer an extra minute or two to reply.³²

32. The practice in the Massachusetts SJC is to allow lawyers to continue to argue so long as there are questions from the bench. Before Chief Justice Gants's time, this was not the case. As he describes it, after a question was posed, if an advocate "hesitated a moment, it was like *Jeopardy*. . . . It would be somebody else asking the question and the tendency became to need to interrupt because if you waited for the end of the answer, somebody else

If the court does not offer additional time, the lawyer can ask permission to finish a thought. Like other techniques, however, this one has drawbacks. Judge Lynch occasionally suspects that advocates ask permission to continue after the red light has come on simply because the client is in the courtroom and the lawyer feels compelled to put on a show.

*E. When One Judge Appears Adverse
and the Others Remain Silent*

A “hot bench” can sometimes consist of one judge who, although allowing the lawyer to argue, gives the appearance of being unpersuaded while the rest of the judges remain silent. It can be hard for an advocate to read the other judges in this situation because there may be many reasons they choose to participate or not.

Some judges may be more vocal than others simply because they know more about the case. In the Massachusetts SJC, for example, it is common for the “reciting judge” to ask more questions than others. A judge may assume control of the discussion in order to communicate with another judge, set up the argument of opposing counsel, or test the arguing advocate. Judges are also aware that oral argument can be a rare opportunity for lawyers and some, like Judge Lipez, may be active simply in order to make the argument a meaningful experience. Judge Lipez realizes that it can be depressing for a lawyer to work hard preparing an argument, present it in front of colleagues, the client, or both, but meet with noticeable disinterest from the bench. As Justice Alexander points out, a vocal judge may also ask what seem to be damning questions even though that judge is actually inclined in the advocate’s favor. An elementary rule of appellate advocacy is that lawyers should never assume that a question is hostile. An especially active judge may simply enjoy playing the devil’s advocate.

Some judges tend by nature to be quieter at oral argument than others.³³ Judge Stahl, for example, says he often prefers to

would be asking a question and you wouldn’t get your question in. [The lawyer’s] time would be up and you’d have an unanswered question.”

33. Justice Thomas, for example, rarely asks questions during oral arguments in the Supreme Court. See, e.g., Laura Wagner, *Clarence Thomas Asks 1st Question from*

concentrate on what the lawyers have to say. In especially active courts, it may be unnecessary for every judge to ask questions because someone else likely will do so. Silent judges also may or may not share the outspoken judge's view. Eye contact may help the advocate sense whether quiet judges understand the issue. Even if the outspoken judge is off target, lawyers should never gamble that the silent judges will not make the same mistake. Judge Thompson advises lawyers never to give up on a judge or think that judges' silence suggests their leanings. In Judge Coffin's view, "a lawyer who is a gifted listener will have a sense as to whether he should concentrate his remaining fire on the difficult judge or on his more silent and possibly more open colleagues."³⁴

A final reason to persevere even when faced with resistance by one judge is that most appellate courts consist of an odd number of judges. Even if one jurist appears hostile—or, in larger courts, if more than one appears hostile—it is still possible for the advocate to win a majority. Regardless of how hard any single judge presses, an advocate should welcome difficult questions because absent an opportunity to address them, the advocate likely would lose. Judges expect lawyers to push back against aggressive questioning, and indeed say they respect lawyers who stand their ground, as long as it is done politely.

F. Reminding a Judge About Authorship of an Opinion

One subject of disagreement among the judges was whether an oral advocate should identify who was the author of a principal opinion. Judge Howard says this practice "makes my

Supreme Court Bench in 10 Years, NPR.ORG (Feb. 29, 2016), <https://www.npr.org/sections/thetwo-way/2016/02/29/468576931/clarence-thomas-asks-1st-question-from-supreme-court-bench-in-10-years>. As Justice Breyer explains Justice Thomas's view, it is this:

The point of a good question is

- A. The judge doesn't know the answer,
- B. It's likely to make a difference—or it could, and
- C. The lawyer knows more about it.

That Justice Thomas believes the result is "the null set" may explain his characteristic silence at oral argument.

34. COFFIN, *supra* note 6, at 78.

skin crawl” because it conjures up images of Eddie Haskell, the two-faced flatterer in the 1950’s television show *Leave It to Beaver*.³⁵ Some judges view the technique as distasteful, pandering, or even somewhat insulting because, as Judge Lynch points out, it suggests that the author has not prepared adequately for argument or does not know their own opinions. According to Chief Justice Saufley, attaching excessive weight to authorship of an opinion also reflects a lack of understanding of how a collegial court operates. No matter who writes an opinion, it likely has benefitted from comment by the writing judge’s colleagues.

Other judges are not bothered by being reminded that they wrote a principal opinion so long as there is no appearance of apple-polishing. Occasionally, if it appears at argument that a judge is deviating from a position that judge has taken in a written opinion, it may even be helpful to point out who was its author. What is generally best, Chief Justice Gants suggests, is to focus not on authorship of an opinion, but instead on its reasoning.

G. Concessions

One purpose of oral argument is to identify which matters are contested and which are not. Concessions can help judges because they narrow the issues that must be decided. Some matters should be conceded without prompting because they are so easy to verify—whether there was an objection at trial, for example. Concessions about the policy implications of a position can be trickier. Although well-considered concessions can be a sign of the lawyer’s integrity, concessions not thought out in advance can be dangerous because the lawyer may not appreciate the consequences. Oral advocates should thus be reticent about making concessions at oral argument that they have not anticipated. Occasionally, however, lawyers refuse to

35. A little background for readers too young to remember Eddie Haskell: His character was, as Wikipedia puts it, “an archetype for insincere sycophants.” *Eddie Haskell*, WIKIPEDIA (Jan. 30, 2020 19:36 UTC), https://en.wikipedia.org/wiki/Eddie_Haskell; see also, e.g., *Leave It to Beaver: Eddie’s Girl* (ABC television broadcast Oct. 9, 1958), available at <https://www.dailymotion.com/video/x4pvd47> (advance scrubber bar to 00:49 to view the scene ending at 1:59 in which Ward Cleaver describes Eddie as “so polite, it’s almost un-American”).

concede points that are unnecessary to the result; they would win even with a concession. This can backfire. As Chief Justice Lynn notes, a lawyer who fights too hard over something that makes no difference may be in danger of suggesting that the case is not as strong as the lawyer would otherwise have the court believe.

One problem with concessions can be the lawyer's relationship with the client. A lawyer may want to avoid saying anything during argument that will result in an opinion noting that the lawyer conceded a point. For that reason, some judges, including Judge Boudin, believe that that pressing a lawyer to concede can be embarrassing and so will not insist on a concession. Nevertheless, Judge Coffin explains that "[t]he discipline of preparation for oral argument should include a conscious inventory of facts, inferences, arguments, and issues which counsel *can* fairly concede without jeopardizing his client—and those which counsel *should* take the initiative in conceding."³⁶

IV. COUNSEL'S Demeanor, CONDUCT, AND MANNER

Although, as Chief Justice Gants emphasizes, form in oral argument should never be elevated over substance,³⁷ some matters of form make a difference. Judge Coffin explains that, "[m]anner without substance will not do; but manner and substance will do better than substance alone."³⁸ He defines manner as "the composite of language, posture, pace, tone, facial expression, eye contact, gestures . . . all the ways in which an advocate's thoughts and emotional intensities become conveyed to others."³⁹

36. COFFIN, *supra* note 6, at 27 (emphasis in original).

37. Judge Lynch says that appellate advocacy "is not just a matter of how good you are at your own legal skills. Some cases you can't win and you shouldn't feel badly when you lose."

38. COFFIN, *supra* note 6, at 37.

39. *Id.*

A. Conduct at the Podium

Judges are accustomed to lawyers gesticulating vigorously or pacing around the podium because they are nervous. Nevertheless, oral advocates should avoid wandering too far from the microphone because it distracts the judges from following the argument and may compromise the quality of any audio recording. Excessive athleticism can also give the impression that the lawyer is addressing a jury, not appellate judges, which was a common complaint. Any repetitive physical behavior—pointing pens, wagging fingers, pounding the podium—at a minimum is distracting and can come across as unduly aggressive. Judge Thompson encourages advocates to “leave the weapons at home.”

Judge Thompson also says that when a judge asks a question, the lawyer should look at the judge who asked it, not at the other members of the bench. To do otherwise suggests that the lawyer has not heard, does not understand, or is simply ignoring the interrogating judge.

Justice Breyer cautions against clock-watching during oral argument, which can be interpreted as discourteous. This is especially the case if it appears that the advocate is trying to will the argument to come to an end.

Chief Judge Howard advises that volume and tone must be controlled during oral argument. Although oral advocates should speak audibly, they should not shout. Neither should they raise their own decibel level to match that of opposing counsel, or even the judges.

Judge Kayatta reminds advocates to breathe. He views oral argument as not only a mental exercise, but a physical one as well. Lawyers can become so nervous that they stop breathing and speak so quickly that their anxiety is palpable. In a related vein, Chief Judge Howard urges lawyers to relax. He says, “We’re not ogres. . . . People are just way too stressed out about argument. . . . If you can just get to the point where we’re having this discussion . . . you’re going to fare so much better. And you’re going to enjoy it more.”

Certain words and phrases are over-used during oral argument, ineffective, annoying, or all three. According to Judge Selya, every appellate judge will agree that saying “I wasn’t

trial counsel' sets his teeth on edge." Judge Coffin interprets the phrase to suggest "Someone else made a botch of this. I haven't got much to work with on appeal."⁴⁰ Filler words and phrases such as "er," "um," "you know," "okay," "as I was saying," and "let me repeat" should be eliminated from a lawyer's vocabulary, as should phrases bearing a whiff of arrogance like "as I said before" and "let me repeat."⁴¹ As Chief Justice Saufley explains, argument time is short and should not be wasted with words that have no meaning. Judge Coffin wryly comments that phrases like "honestly," "in all candor," and "frankly" should be avoided because they "signify that most of the time the advocate speaks with forked tongue."⁴² The phrase "I am court-appointed counsel" can undermine the lawyer's credibility because it can often be translated to mean "I am just doing my job. I didn't choose this client or case."⁴³

Judge Selya advises lawyers to adopt an argument style that is consistent with their skillset and personality. Although inexperienced lawyers can learn by watching veterans, they should not try to copy anyone. Chief Justice Wathen echoes that view:

You've got to be authentic. . . . You may not be the most polished person in the world but if you're authentic, if it's really you and you're speaking from the heart, it's going to come through. If you're pretending that you're somebody else, it isn't ever going to come through.

B. Conduct at Counsel Table

The jurists all agreed that, when seated at counsel table either waiting to argue or having just argued, lawyers should give no visible reaction to anything. There should be no shaking of heads, grimacing, scowling, or rolling of eyes.⁴⁴ Judge Lipez

40. *Id.* at 26.

41. *Id.* at 22.

42. *Id.* at 103.

43. *Id.* at 26.

44. Judge Coffin includes in this category of behavior to avoid:

The Violently Confirming Nod (after a judge asks his adversary a question) meaning "That's precisely right, Your Honor. You've hit the nail right on the head."

explains that even when the judges' focus is on the lawyer at the podium, opposing counsel is visible and signaling disapproval detracts from the lawyer's professionalism and credibility.

Occasionally, opposing counsel will make an assertion of fact that is plainly wrong. Some judges, Chief Justice Gants among them, will tolerate a gentle shake of the head, especially on the part of a lawyer with a reputation for trustworthiness. However, all of the judges discouraged facial expressions that demean opposing counsel. To quote Judge Barron, "the right face is a blank face." When they are not arguing, lawyers should behave like congregants in a house of worship: be still, silent, and attentive.

C. Demonstrative Aids

Demonstrative aids are seldom used in appellate courts and no judge encouraged them. Judge Coffin describes demonstrative aids as "devices suitable for a salesmen's meeting, but seldom for an appellate argument."⁴⁵ Most judges find them not only ineffective, but a nuisance, especially because technology has made it possible for color copies of exhibits and audio and video recordings to be included in the record appendix.

Appellate courts generally have at least three members, and sometimes as many as nine, which makes visibility an issue almost no matter where a demonstrative aid is placed. Set in the middle, the aid cannot be seen by the public. Putting an exhibit at one end of the bench or the other means that the judges at the opposite end cannot see it. Often the print on demonstrative aids

The Emphatic Shake (after a statement by his adversary at the lectern) meaning "Your Honors, that's what *he* says but that isn't the way it happened.

The Look of Scorn meaning "This lawyer is to be pitied; his client is such a contemptible liar."

The Home Free Look (after an exchange between his adversary and a judge) meaning "Well done, Your Honor. You've certainly seen through his case."

Seismic Shock (after a particularly telling argument of his adversary) meaning "Incredible that he could stoop so low." This response can range from lifting one brow skeptically, lifting both brows, opening wide the mouth, lifting both hands palms up, to turning to the rear of the courtroom and waving a clenched fist for the benefit of his client.

Id. at 22–24.

45. *Id.* at 51.

is so small that no judge can read it. The rare case in which a demonstrative aid might be useful is a land dispute, where geography matters and a visual aid will help the court to understand the facts. In general, however, even when demonstrative aids are allowed by permission of the court, they should not be used.

D. Confidence

One of the qualities of oral advocacy that judges find most persuasive is confidence: the conviction that the lawyer truly understands the case, the record and the pertinent area of law. Judge Coffin describes confidence as “a quality which, however manifested by counsel, if it stems from hard analysis, stands a good chance of spreading its benign influence to the court.”⁴⁶ True confidence is often the product of experience. Although polish and professionalism probably should not play a role in oral advocacy, they do, and a lawyer’s confidence can help, especially, in Judge Kayatta’s view, in cases that are at the margins.

All of the judges distinguished between confidence that is the product of being well prepared, and bravado or swaggering. Judges are put off by lawyers who suggest that they know the law better than the judges. As Judge Coffin explains, “[a]rrogance is bad, not because it is unmannerly, but because it tempts judges to be unjudicial. It stimulates a devilish—or is it merely human?—desire to rule against the party because of the lawyer’s communicated sense of superiority.”⁴⁷ Chief Justice Wathen proves the point with a story about his predecessor, Chief Justice McKusick. During one oral argument in the Maine SJC, a lawyer from a large, out-of-state, big-city law firm began his argument by saying that he, like Justice McKusick, had been editor-in-chief of the *Harvard Law Review*. Otherwise unfailingly civil toward lawyers, Justice McKusick “pummeled him, climbed all over him . . . just bombarded this guy every chance he got.” As Justice Lowy summarizes, “it’s great to come into court like a colossus, but not like an arrogant twit.”

46. *Id.* at 35.

47. *Id.* at 21.

At the other end of the spectrum is the lawyer who is too hesitant. Some judges find it difficult to evaluate a lawyer's degree of conviction in their argument because good lawyers tend also to be good actors, or perhaps good poker players. Other judges, however, can sense by a lawyer's hang-dog appearance and apologetic tone that they have no confidence in their case and believe such behavior undermines the lawyer's effectiveness. As Judge Lipez explains, "If you don't believe in your case, how can you ever expect us to believe in your case?"

Some jurists are willing to excuse a lack of conviction on the part of a lawyer with little experience. Tentativeness that is the product of not being prepared, however, is dangerous. Out of a duty to their clients, some lawyers may need to make a point they know will not prevail. This is especially true of counsel for indigent criminal defendants. Chief Justice Saufley's view is that good lawyers in this position will acknowledge to the court that they have an uphill battle, but will mount it as best they can. Judges tend to appreciate *pro bono* or court-appointed counsel and will generally try to avoid embarrassing them.

E. Client in the Courtroom

Part of a lawyer's job is retaining clients, and clients have a right to hear their lawyers present oral argument. Nevertheless, the judges advised lawyers to exercise extreme caution in this regard. A client's presence may be problematic because the client may have a visible reaction to the presentation that confirms a weakness in the lawyer's argument or may engage in disruptive histrionics. Judge Coffin explains that a client does not help the cause by "deep frowning, violent head shaking, mutual comforting, and even the frenetic sending of notes down to the counsel table."⁴⁸ The only benefit Justice Breyer sees to having the client present for argument is that it may help the parties to settle the case.

Many judges think an appellate advocate should never inform the court that the client is present at argument. To introduce the client amounts to treating the appellate court as if it were a jury and can be seen as in poor taste, especially if the

48. *Id.* at 33.

client is a victim in the litigation. Clients should never sit with their lawyer at counsel table. Neither, the judges agree, should the lawyer tailor an argument to satisfy the client. A lawyer's job is not to please the client, but to win the case. Clients should be warned not to scoff, frown, smile, or engage in any conduct that gives the appearance of trying to lobby the judges from the gallery.

Some judges are able to tell who the client is by looking out at the spectators. Even when clients are emotionless, lawyers should be careful about appearances. Judge Lynch advises that the governor of a state who is a party to litigation should sit in the gallery, not in front of the bar. Well-known figures should avoid giving any sign of being entitled to preferential treatment.

As potentially problematic as the client in the courtroom can be the client's supporters. Judge Selya tells a story from his own days as a practitioner when he represented a young woman who had been sued for workplace harassment. To then-advocate Selya's dismay, the young woman's mother appeared at oral argument dripping in diamonds and furs. Fearful of the judges' reaction, but certain he could not persuade the mother to leave, Judge Selya settled on his best alternative: he seated the mother in the gallery behind opposing counsel.

F. Rebuttal

When it is allowed under court rules, appellants' lawyers frequently ask permission to reserve a portion of their allotted time for rebuttal. Many judges, including Judge Lipez, recommend this practice because it gives the appellant the chance to have the last word. Other judges find rebuttal to be generally a waste of time because counsel—especially inexperienced counsel—tend to use rebuttal simply to regurgitate their opening arguments. For a time, the Massachusetts SJC experimented with allowing rebuttal, but abandoned the practice because so few lawyers used it wisely.

The best use of rebuttal the judges identified is as a pointed response to the appellee's argument. It is the appellant's opportunity to do what appellees are able to do: listen to the colloquy between the court and opposing counsel and emphasize

the most helpful points. Judge Lynch sees rebuttal as especially appropriate when there is a dispute about the record.

It can be an effective tactic for the appellant to reserve time for rebuttal but not use it. Just as an appellee's counsel who finishes early communicates a sense of confidence in the outcome, the same is true of an appellant who relinquishes reserved rebuttal time.

G. Dress Code

One surprise in the interviews was certain judges' reactions to how advocates dress for oral argument. Although informal dress may be expected of *pro se* litigants, one judge expressed dismay when remembering a lawyer who argued in a track suit. In some courts, such as the Massachusetts SJC, incarcerated defendants whose cases are scheduled for argument appear by video conference and they necessarily wear prison uniforms. For better or worse for lawyers, however, clothes make a statement and for some judges, sloppy appearance can suggest sloppy work.

To the extent they expressed an opinion on the subject, most judges recommended dressing in a manner that is appropriate for any serious occasion.⁴⁹ For men, a dark suit, white shirt, and red or blue tie is customary and always acceptable. Themselves women, Judge Lynch and Chief Justice Saufley acknowledge that female lawyers' attire can be more challenging. Chief Justice Saufley frequently advises groups of young lawyers that oral argument is not a fashion show, but a serious professional environment. She agrees with Judge Lynch that female lawyers should avoid mini-skirts, revealing fabrics, plunging necklines, or any other suggestive or flamboyant attire that draws attention away from the argument and toward the lawyer.

49. See also, e.g., GUIDE, *supra* note 25, at 3 (advising lawyers to wear "conservative business dress in traditional dark colors (e.g., navy blue or charcoal gray)" for oral argument in the Supreme Court).

H. Humor

Most judges think there is some place for humor at oral argument, but lawyers should be cautious about efforts to be funny. Humor is often at someone else's expense and can easily offend. As Judge Torruella points out, there is nothing humorous about what appellate courts do, and telling jokes can give the public the wrong impression that there is. Although a spontaneous, tasteful quip may be appropriate, lawyers should never plan comedy as part of their prepared remarks.⁵⁰ Oral argument should not be funereal in tone, but when in doubt, humor should be avoided.

V. A FINAL WORD ABOUT CIVILITY

All of the judges expressed concern about civility. Although few of them witness discourtesy in their appellate courtrooms, they often detect it in the trial record or occasionally in the briefs. To a person, the judges see no place or reason for name-calling, *ad hominem* attacks, or any other form of rudeness. They can tell from the record that the parties are tense and the litigation has been difficult. Denigrating another party or opposing counsel is never acceptable and according to Chief Justice Suttell, may even result in the imposition of sanctions. Chief Judge Howard is also put off by oral advocates' efforts to disparage the trial judge by suggesting that a trial ruling was the result of chicanery, partiality, or incompetence.

Judge Thompson disapproves of even the seemingly lesser incivility of "snarkiness." She acknowledges that "You can't stop to have a street fight while court is in session," but encourages counsel who has been attacked to respond, if at all, only briefly, and to "keep the hiss to yourself." In general, a lawyer who is the subject of a personal affront should try to rise above it.

Some judges think that mannered conventions like referring to opposing counsel as "my brother" or "my sister" have become

50. One judge mentioned an otherwise brilliant oral argument that collapsed when the lawyer told what was clearly a rehearsed scatological joke.

antiquated and prefer “opposing counsel,” “counsel for the appellant,” or using the other lawyer’s name. Other judges see the reference to “my brother” or “my sister” as an effort to return to a bygone era of greater civility. Customs such as beginning an argument by saying, “may it please the court” may be unnecessary, but remain traditions.⁵¹ As a matter of deference to their colleagues, many judges begin opinions that disagree with the majority by using the established form: “I respectfully dissent.” Judges tend to notice and appreciate lawyers who show each other respect by shaking hands at the end of an argument.⁵² This recurring theme—courtesy, politeness, respect, civility in general—may be the feature of effective oral advocacy that is most commonly overlooked.



51. According to Judge Coffin, this phrase is not intended to mean “May what I say tickle your fancies.” Instead, it is among those “expression[s] of respect” that are “not only genuine but also stem[] from one who respects himself.” COFFIN, *supra* note 6, at 102.

52. The judicial interviews on which this article was based all took place before COVID-19 appeared. Whether the handshake will survive the pandemic is uncertain as of this writing, but judges are certain to appreciate lawyers’ use of any gestures of civility and good will that may emerge to replace it.