– CHAPTER SIX –

EFFECTIVE USE OF THE SPOKEN WORD ON APPEAL:

ORAL ARGUMENT

ADI APPELLATE PRACTICE MANUAL
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EFFECTIVE USE OF THE SPOKEN WORD ON APPEAL: ORAL ARGUMENT

I. INTRODUCTION [§ 6.0]

This chapter is intended to help counsel use oral argument more effectively. It is not a comprehensive treatment, but rather a basic guide to oral argument practice in the California courts.

A Views of Oral Argument [§ 6.1]

Oral argument is, to many attorneys and judges, the highlight of an appeal. It is the time to step out of cloistered offices and libraries and into the spotlight, to engage one another in dialogue and debate, and to work toward the correct resolution of the case. At its best it is interactive, challenging, lively, and enlightening.

To some attorneys and judges, on the other hand, it is the most dreaded part of appellate work. Many attorneys far prefer the bookishness of brief writing and feel inadequate working "on their feet." They fear they will be tongue-tied, unable to answer questions properly, backed into corners from which there is no escape, and, ultimately, humiliated. Many judges think oral argument is a necessary evil – a waste of time, a boring exercise in futility, a time to think about anything but the case at hand. (A few – fulfilling the more timid attorneys' nightmares – amuse themselves by putting attorneys on the spot for the sheer fun of it.)

Whatever one's personal predilections, oral argument plays an important role in the appellate process. While secondary to briefing in most courts, especially intermediate appellate courts, it can and occasionally does make a difference in the result. Appellate judges have often offered anecdotal evidence of how oral argument has changed some decisions. The potential for influencing the outcome is empirically observable in Division Two of the Fourth Appellate District, which provides tentative opinions before oral argument (see § 6.10 et seq., *post*); on occasion the final opinion has held the exact reverse of the tentative opinion because of oral argument.

B. Functions of Oral Argument [§ 6.2]

Oral argument is counsel's last opportunity to persuade the court before it makes a final decision. It is, ideally, a conversation with the court. It is not a speech or a rehash of the briefs. It is an opportunity to answer the court's questions, the one chance in an appeal when counsel can look the court in the eye, assess its reactions to the issues, make midstream adjustments, dispel doubts, and "nail" crucial points.

> Oral argument is valuable in establishing a human connection between the bench and bar. It is the only opportunity for a dialogue between counsel and the justices and may provide understanding in a manner that cannot be matched by written communication . . . . [It] provides a fluid and expeditious method of getting at the essential issues.

(San Diego County Bar Association, Appellate Court Committee, California Appellate Practice Handbook (7th ed. 2001) § 7.12, p. 274.)[1] Unless the appellate court takes the comparatively rare action of telegraphing its concerns via a pre-argument letter or a request for further briefing, or unless the case is in Division Two of the Fourth Appellate District with its tentative opinion practice, oral argument is "the advocate's only window into the court's decision-making process." (*Id.* at § 7.13, p. 275.) It also provides a forum for discussing new appellate decisions filed after the completion of briefing, presenting a fresh slant to the case, or highlighting a "theme" for the appeal.

II. LAW GOVERNING ORAL ARGUMENT [§ 6.3]

Oral argument in California is governed by the state Constitution, statutes, and the California Rules of Court, as well as case law interpreting this authority. Local practices vary widely within the basic legal framework and can significantly affect the role of oral argument in the decision-making process.[2] (See § 6.8 et seq., *post*.)

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[1]Caveat: This handbook is no longer published and has not been updated since 2001, but may be available in libraries and appellate offices. While some content is obsolete, it does offer excellent guidance for appellate practitioners.

[2]Each court's processes are described in the Internal Operating Practices and Procedures (IOPP's), published by the various courts and revised periodically.

A. Right to Oral Argument [§ 6.4]

The California Constitution gives parties on appeal the right to oral argument on the merits in both the California Supreme Court and the Court of Appeal. (Cal. Const., art. VI, §§ 2, 3; *Moles v. Regents of University of California* (1982) 32 Cal.3d 867, 872; *People v. Brigham* (1979) 25 Cal.3d 283, 287-288; see *People v. Peña* (2004) 32 Cal.4th 389, 398.) Penal Code section 1254 implements this right for criminal cases.

Although it is a legal right, oral argument can be waived. As *Kowis v. Howard* (1992) 3 Cal.4th 888, 899, fn. 3, stated: "We stress that it is the *opportunity* for oral argument that is important, not necessarily the actual argument. Oral argument may be, and often is, waived for varied and legitimate reasons." (See also *People v. Brigham*, *supra*, 25 Cal.3d 283, 288; *Philbrook v. Newman* (1905) 148 Cal. 172, 176-179; see *People v. Lang* (1974) 11 Cal.3d 134, 143, dis. opn. of Clark, J. [waiver of oral argument and submission on the briefs would not per se constitute lack of diligence; "[t]o the contrary, last year two-thirds of the criminal cases in the division considering defendant's appeal were submitted without oral argument"[3]].)

An appeal may be decided only by the concurrence of a majority of the justices who heard the oral argument, although the parties may stipulate to the participation of an absent justice. (Cal. Const., art. VI, §§ 2, 3; *Moles v. Regents of University of California* (1982) 32 Cal.3d 867, 874.) Oral arguments are taped, and the practice is for absent justices to listen later to the recording.[4]

Original proceedings for extraordinary relief (writs) do not require oral argument unless an alternative writ or order to show cause is issued. If the petition is summarily denied or the court issues a peremptory writ in the first instance, there is no right to oral argument.[5] (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1237.) Similarly,

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[3]More contemporaneous data covering 1999-2008, compiled by ADI (from whose district *Lang* arose), confirms this basic pattern is stable and enduring.

[4]Practice tip: If an oral argument is boring live, then it will probably be even more boring recorded. An attorney arguing orally when a justice is absent should take this into account in developing an approach to the presentation.

[5]A grant is in the "first instance" when the court orders a peremptory writ – one giving ultimate relief – without prior issuance of an alternative writ or order to show cause. It is available in mandate or prohibition proceedings, as long as the respondent has an

interlocutory motions during the pendency of an appeal and petitions for rehearing or review do not require oral argument. However, a court may place a motion on calendar at the request of a party or on its own motion. (Cal. Rules of Court, rule 8.54(b).)

B. Rules Governing Oral Argument [§ 6.5]

The procedures for oral argument are prescribed by rule 8.256 of the California Rules of Court for the Court of Appeal and rule 8.524 for non-capital cases in the Supreme Court.[6] These rules apply to criminal and juvenile appeals. (Rules 8.366, 8.368, 8.470, 8.472.)

1. Argument in the Court of Appeal [§ 6.6]

Rule 8.256 of the California Rules of Court governs oral argument in the Court of Appeal. (See also rules 8.366, 8.470.) The Court of Appeal clerk must notify the parties of the setting of oral argument at least 20 days before the date, unless there is good cause for shortening the time.[7] (Rule 8.256(b).) Under rule 8.256(c), the appellant has the right to open the argument. Each side has 30 minutes, unless local rules or orders provide otherwise (see discussion below on Fourth District practices). (See § 6.22, *post*.) Only one counsel may argue for each separately represented party. Argument by multiple parties and/or amicus curiae is governed by rule 8.256(c)(2).

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opportunity to file informal opposition. (See *Palma v. U.S. Industrial Fasteners*, *Inc.* (1984) 36 Cal.3d 171; Cal. Rules of Court, rule 8.487(a)(4).) In contrast, a writ of habeas corpus granting ultimate relief may not be issued without giving the respondent an opportunity to file a formal return. (*People v. Romero* (1994) 8 Cal.4th 728, 740-745.) This topic is covered in §§ 8.42 and 8.80, chapter 8, "Putting on the Writs: California Extraordinary Remedies."

[6]This chapter does not cover the special rules and practices that apply to death penalty cases.

[7] Counsel of course must keep track of the deadline for requesting argument and the date of oral argument itself. In criminal cases counsel can check those dates (and also confirm filings such as briefs, the opinion, and post-opinion petitions) on the court website at http://www.courts.ca.gov/appellate-case-info.htm. Counsel should also register for automatic e-mail notification of major developments and visit the site periodically for notifications not automatically sent by e-mail.

2. Argument in the California Supreme Court [§ 6.7]

California Rules of Court, rule 8.524 governs non-capital cases in the California Supreme Court. (See also rules 8.368, 8.472.) The Supreme Court clerk must notify the parties at least 20 days before the date of oral argument unless the Chief Justice orders otherwise. (Rule 8.524(c).) The petitioner opens and closes, and each side has 30 minutes. Unlike the Court of Appeal, only one counsel per side – regardless of the number of parties on the side – may argue, unless the court orders otherwise upon a request to divide argument among multiple parties and/or amicus curiae. (Rule 8.524(d)-(g).)

III. COURT PROCEDURES AS PART OF THE DYNAMICS OF ORAL ARGUMENT [§ 6.8]

Particular court operating procedures (as well as individual personalities and predilections) may significantly affect the value and uses of oral argument.[8] In a jurisdiction where only a small percentage of cases are argued,[9] oral argument may be extremely influential. Where it is a matter of right and calendars are crowded, arguments may often have minimal value.

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[8]Each California appellate court's processes are described in its Internal Operating Practices and Procedures (IOPP's). The IOPP's are published in conjunction with the California Rules of Court. Many also are on the court website:

Supreme Court:
http://www.courts.ca.gov/documents/The_Supreme_Court_of_California_Booklet.pdf .

Individual Court of Appeal web pages may be accessed through:
http://www.courts.ca.gov/courtsofappeal.htm.

[9]For example, Federal Rules of Appellate Procedure, rule 34(a)(2) (28 U.S.C.) states, "Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary . . . ." Oral argument may not be necessary if, for example, "the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." (Rule 34(a)(2)(C).) "Any party may file . . . a statement explaining why oral argument should, or need not, be permitted." (Rule 34(a)(1).)

Because of differences in internal procedure and "culture," the role of oral argument varies considerably among courts. It tends to play a prominent role in the Supreme Court.[10] The role varies among the districts and divisions of the Court of Appeal. The differences among the divisions of the Fourth District will be discussed here.

A. Traditional Procedures [§ 6.9]

The typical process for most divisions of the California Court of Appeal[11] is that after the reply brief has been filed or the time to file it has passed, the clerk of the appellate court sends a notice to the parties asking whether any party requests oral argument. (See Cal. Rules of Court, rule 8.256(b).)

The assigned justice prepares a memorandum opinion, which is distributed with the case file to the other two members of the panel in preparation for oral argument. After argument, the three panel members confer. If none has any reservations about the memorandum opinion and nothing in oral argument has changed their view, the memorandum opinion will become the final opinion. If any differences emerge, further conferencing and drafts may be necessary.

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[10]See ADI's web page on Supreme Court practice.
http://www.adi-sandiego.com/practice/supreme_court_pract.asp

[11]Court processes are described in the courts' Internal Operating Practices and Procedures (IOPP's), which are published in conjunction with the California Rules of Court. In the Fourth Appellate District, for example:

Division One oral argument is covered in section II-B-3 at page 4 of its IOPP's: http://www.courts.ca.gov/documents/IOP_District4_division1.pdf .

Division Two's internal processes are described in section VII of its Internal Operating Practices and Procedures (IOPP's), which are published with the California Rules of Court but are not posted on the court's website.

Division Three argument is covered by section III-A at pages 1-2 of its IOPP's: http://www.courts.ca.gov/documents/IOP_District4_division3.pdf .

B. Tentative Opinion [§ 6.10]

Division Two of the Fourth Appellate District has a unique pre-oral argument procedure.[12] The court provides counsel with a tentative opinion that usually has the preliminary vote of at least two justices of the assigned panel. When it sends counsel a notice about requesting oral argument, the court includes the tentative opinion. The tentative opinion may indicate whether the panel is considering full or partial publication.

1. Notice of oral argument opportunity [§ 6.11]

Division Two sends two types of oral argument notices – one saying oral argument is unlikely to be useful and one notifying counsel the court intends to calendar the case for argument.

a. "Argument is available but unlikely to be useful" notice [§ 6.12]

The more common notice in Division Two states oral argument is unlikely to aid in the decision-making process, although counsel may nevertheless request it. (Cf. *People v. Peña* (2004) 32 Cal.4th 389, 400-404 [stating the importance of oral argument and criticizing the former version of this letter, which more actively discouraged it].) The letter sets a deadline for requesting argument, which is enforced strictly.

On receiving such a notice accompanied by an tentative opinion unfavorable to the client, counsel should weigh whether there is a reasonable possibility oral argument will persuade the court to change its mind. Merely repeating the briefs will not help if the tentative opinion shows the court has understood the points made in the briefs and has analyzed them under the correct law. On the other hand, argument that spotlights the heart of the client's case and places it in the most persuasive light, clears up confusion evidenced in the tentative opinion, or rebuts the analysis of the tentative opinion might change the result.

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[12]Division Two's tentative opinion program is described at http://www.courts.ca.gov/2519.htm#tab7902. Its internal processes are described in section VII of its Internal Operating Practices and Procedures (IOPP's), which are published with the California Rules of Court but are not posted on the court's website.

b. "Argument will be set" notice [§ 6.13]

The other type of Division Two notice affirmatively "invites" counsel to argue and says counsel will be notified of the date. No request is necessary.

Counsel should treat the invitation as an *order* to appear. The court has suggested the outcome may be hanging in the balance. The tentative opinion may not have the concurrence of a majority of the justices, or the votes supporting it may not be "solid." With this type of notice, counsel can anticipate active questioning by the court.

2. Uses of tentative opinion [§ 6.14]

The tentative opinion can be useful to all sides. First, it gives counsel clues as to the value of orally arguing at all. If the court's analysis is a reasonable application of settled law and suggests the issues are not troublesome or close in any way, counsel may conclude there is no significant chance of changing the court's mind and make a reasoned decision to waive argument. If the opposite is true, counsel is alerted to the importance of further argument.

Second, the tentative is an invaluable guide to preparing for argument. It offers a way around the usual guessing game of where to concentrate the most effort. It helps counsel to avoid areas that do not concern the court and instead hone in on those most open to change. The tentative losing party knows the court's exact reasoning and can target the most vulnerable points at oral argument. If the opinion rests on a particular case, for example, counsel may argue it can be distinguished or is inconsistent with other cases. Faulty logic, unforeseen repercussions, and inaccurate factual or legal premises can be pointed out. The tentative winning party, on the other hand, knows the crucial underpinnings of the decision and can seek to reinforce them.

IV. REQUESTING AND WAIVING ORAL ARGUMENT. [§ 6.15]

After receiving the notice of an opportunity to request oral argument, counsel must consider how to respond.

A. "To Argue or Not To Argue" – That Is the First Question [§ 6.16]

The first decision counsel faces, when given an opportunity to request argument, is whether to ask for it at all.[13] Counsel must be prepared to use oral argument responsibly. If the case is unlikely to benefit from argument, counsel should not seek it just to have a moment in the spotlight or to get some "practice." On the other hand, if the case is likely to benefit materially, the attorney has the responsibility to argue orally, no matter how uncomfortable it seems (and it does get easier with practice).

The decision may be influenced by the court's procedures – whether only orally argued cases are discussed in conference or whether argument will delay the case. The court's or individual justices' reputation for receptivity to oral argument is an intangible but significant consideration. Secondary factors may be the length of the sentence and the client's wishes. Counsel may find it helpful to discuss such matters with the assigned staff attorney or other experienced appellate counsel.

If the client is anxious and heavily involved, and especially if he or she has specifically expressed interest in oral argument, it is highly advisable to advise the client *before* waiving. Although the decision is reserved to counsel as "captain of the ship," and the client has no right to interfere (see *In re Barnett* (2003) 31 Cal.4th 466, 472),[14] counsel's duties do include keeping the client informed of significant developments in the case. (Bus. & Prof. Code, § 6068, subd. (m).)

1. Factors suggesting the need for argument [§ 6.17]

Argument is most effective when the case is complex, or difficult, or novel – whenever the correct resolution is less than obvious and requires exploration. The court may well have questions in such cases. Oral argument gives counsel a chance to assess the court's grasp of the issues and provide additional support for the position urged. Signals from the court, such as requested supplemental briefing or the tentative opinion from Division Two, may suggest the court is wavering and needs further input.

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[13]Oral argument is expected as matter of routine in the California Supreme Court.

[14]Incarcerated criminal defendants have no legal right to argue their own appeal or even to be present at the argument. (*Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.* (2000) 528 U.S. 152; *People v. Scott* (1998) 64 Cal.App.4th 550, 562-563; *In re Walker* (1976) 56 Cal.App.3d 225, 228; Pen. Code, § 1255 [defendant need not be personally present in appellate court].)

In such a case, the briefs may provide inadequate assistance to the court, because they do not offer the give-and-take of conversation. Counsel should not pass up the opportunity to protect the client's interests when they have such a case; doing so could be an abdication of counsel's basic responsibilities.

Needless to say, if the court has asked for oral argument, counsel *must* not waive. Even if the court permits the waiver in spite of its previous request, the attorney has failed to provide the kind of advocacy ADI expects.

2. Responsible waiver of oral argument [§ 6.18]

Oral argument should not be requested in all cases. Counsel should make a professional, reasoned decision.[15]

The reasons for waiver are many, but among the most common are: If briefing is thorough and an interpersonal exchange with the justices seems unlikely to develop their understanding of the issues further, there may be little reason to seek oral argument. California courts' internal operating procedures tends to emphasize written submissions and diminish the role of oral argument in the decisional process, because by the time of oral argument there is usually a tentative decision, and it is harder to "unpersuade" afterward than to persuade before the court has invested effort in a written product. If counsel has filed a reply brief, as ADI *strongly* encourages, then the client has had the last word; oral argument gives the opponent a chance to rebut it and snatch away the momentum created by the reply. Indeed, if counsel's own briefing is complete and effective and the opponent's is not, oral argument may help the other side more. It may also delay the case – an important consideration in time-sensitive situations.

Oral argument is not a vehicle for counsel merely to ask whether the court has any questions. Using it for this purpose does not benefit the client, consumes public resources in the form of the court's time and both attorneys' time and, often, travel, and greatly irritates the court.

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[15]ADI's informational memo for clients before appointment of counsel, *Understanding Your Appeal*, states at page 3: "Oral argument is not held in every case. Your lawyer will ask for it only if he or she believes something needs to be said that was not already said in the briefs." http://www.adi-sandiego.com/pdf_forms/Understanding_your_appeal.pdf

3. When in doubt [§ 6.19]

A rule of thumb is that, if in doubt, counsel should request oral argument. While some justices may wince at this advice, there are reasons for it. First, once requested, oral argument may be waived later,[16] whereas the converse is not true. Second, as discussed above, placing a matter on an oral argument track may result in a different treatment of the case.

Above all, oral argument is a vital tool of appellate practice, and failure to use it when counsel reasonably concludes it will help the client is a failure to fulfill the duty of zealous advocacy. Indeed, waiver of oral argument, combined with defective briefing leaving factual or legal issues unresolved, may constitute ineffective assistance of appellate counsel. (*People v. Lang* (1974) 11 Cal.3d 134, 138-139.) For all of these reasons, if there is reasonable doubt as to the value of oral argument, the doubt should probably be resolved – for the client's benefit – in favor of the argument.

B. Requesting Argument [§ 6.20]

The notice from the court of an opportunity to request argument usually requires an affirmative response by a specified date. In such a situation, the failure to file a timely request is deemed a waiver of oral argument.[17] In Division Two of the Fourth Appellate District, the court may sometimes indicate in its notice letter that the case *will* be set for argument; it is unnecessary to submit a request in such a situation.

1. General thrust of argument [§ 6.21]

Some courts' notices not only ask whether oral argument is requested but also ask counsel to state "the general thrust" of the argument if requested. Whether the "general

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[16]Counsel should notify the court and other counsel of a decision to waive well in advance of the argument date. A last-minute cancellation is frowned upon – it is discourteous and may cause unnecessary preparation and/or travel.

[17]If counsel for some reason does not receive the notice or fails to meet the deadline, counsel can file a late request seeking oral argument. But a caveat: some courts strictly apply the stated deadlines for requesting argument, and so counsel should not count on having any latitude. Promptness in seeking relief from default is essential; a request made a few days beyond the deadline is more likely to be granted than one submitted just before the opinion is to be filed.

thrust" description affects the argument probably varies with the membership of the three-justice panel; since it may have some effect, counsel should prepare the summary thoughtfully.

2. Time estimate [§ 6.22]

The court's notice may also ask counsel to provide a time estimate for oral argument. (See also § 6.35, *post*.) Rule 8.256 allows 30 minutes per side, "[u]nless the court provides otherwise by local rule or order."[18] Some presiding justices will hold counsel to the written time estimate provided in the request, whereas others will go by the one given at the time of oral argument. Because the time allotted may be consumed in varying degrees by questions from the bench, and because counsel will always be allowed to revise their estimates downward but not necessarily upward, *reasonable* estimates on the higher side may be advisable. However, to maintain credibility counsel should not give an inordinately long estimate merely for the sake of having some leeway. Conversely, counsel should not state an unreasonably short time in order to have the case called early on the calendar.

If the issue(s) are especially complex or multiple, and counsel reasonably believes that more than the normally allowed time will be necessary to protect the client's interests, counsel should request it. Be prepared to make a strong showing of good cause and acknowledge that other parties in the case should have their time extended by the same amount. (Cal. Rules of Ct., rules 8.256, 8.366, 8.470, 8.472.)

3. Remote argument [§ 6.23]

To reduce the time and expenses of travel to oral argument, some courts permit argument from a remote location. In some districts, this is done by telephone or televised oral arguments, where counsel argue from a videoconferencing room in a remote location. If an argument is short with relatively simple issues, then a remote presentation may be quite adequate. However, neither telephone nor videoconferencing offers the same perception of the court as a live appearance, and it does affect the quality of the personal interaction. Care should therefore be exercised in choosing the method of argument.

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[18]A court's notice of oral argument may state the court's local time limit. Division One of the Fourth Appellate District normally limits oral argument to 15 minutes per side. (Ct.App., Fourth Dist., Div. One, Internal Operating Practices and Proc., II-B-3, p. 4, Oral argument; Misc. order 021115.) Division Two of the Fourth issues an annual miscellaneous order limiting time to 15 minutes per party except for good cause.

In the Fourth District, only Division One offers remote argument. It is done by telephone. Although not an official limitation, the court's expectation is that this option will be used primarily or exclusively in case of illness.

V. PREPARATION FOR ORAL ARGUMENT [§ 6.24][19]

A month or so before oral argument, counsel will receive a copy of the oral argument calendar. (If counsel registers for e-mail notification of the progress of the appeal, as is highly recommended, counsel will receive an e-mail notification of the calendar.) In most cases, preparation for argument will probably begin in earnest somewhere between that time and the date of argument.

A. Approaches to Preparation [§ 6.25]

1. Reviewing materials and selecting main focus [§ 6.26]

In preparing for argument counsel should review the briefs filed in the case and crucial parts of the record. Because the reply brief is often the most tightly focused brief and takes account of the respondent's points, in many cases it will be the best vehicle on which to construct oral argument.

Counsel should plan to focus on the most important issues at oral argument. Addressing all of many issues will likely cause the justices' eyes to glaze over, and they may lose interest in the argument altogether. Counsel should nevertheless be prepared to discuss any issue, in case the court takes off in unexpected directions.

"Important" is a variable notion. One issue may be important because it is of considerable general legal interest; another issue, because it may mean years off the client's sentence; another, because it is the most likely to succeed. Of course, what the *court* will probably think is important must always be factored in, too. In Division Two of the Fourth Appellate District the tentative opinion will offer considerable insight into this question.

It is often very effective to plan a "theme" that runs through the important issues, ties them together, and gives a focal point to the presentation. This technique enables

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[19]This section addresses oral argument in the Court of Appeal. In the Supreme Court, argument will usually be more prominent and require considerably more preparation.

counsel to construct a cumulative and persuasive case for a decision in the client's favor. If the brief itself has such a theme, the oral presentation can reinforce it and enhance its impact.

2. Updating authorities [§ 6.27]

It is a good idea to do last-minute research on the most important issues, both to refresh the memory and to determine whether there are relevant new legal developments, such as a recent decision, a grant of review on a case involving a related issue, or a change in the legal force of any case cited in the briefs.[20] If there has been such a development, counsel should alert the court and the opponent as soon as counsel finds out about it (in writing, if time permits); the court frowns on "hiding the ball" until the day of the court appearance. In the rare situation where advance notice is not possible, counsel should bring the citation and a copies of the opinion to oral argument and provide both the opposing counsel and the court with them before argument begins.

If any of counsel's own cases can no longer be cited, it is far better for counsel, rather than the opponent, to bring the court's attention to the fact. If the opponent's authority has been undermined, the opponent should be given the courtesy of an opportunity to notify the court, but if that is not practical or the opponent fails to do so promptly, counsel has the responsibility to bring up the matter himself or herself.

If an opponent cites authority for the first time at oral argument and counsel is not prepared to address it, counsel should request leave to submit a supplemental letter brief.

3. Outlining argument [§ 6.28]

Counsel should never write an oral argument as a "speech" to be memorized. However, most counsel find it valuable to outline the salient points. Most importantly, whether writing an outline or just mentally preparing, counsel should assume the position of a skeptical cross-examiner and ask what the hardest questions are likely to be and how those questions might be followed up. Then counsel must develop appropriate responses. If counsel has prepared only to summarize the case or deliver an oration and not to

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[20]Depublication or a grant of rehearing or review eliminates the citability and any precedential value of the previously published case. (Cal. Rules of Court, rule 8.1115; see § 7.8 et seq. of chapter 7, "The End Game: Decisions by Reviewing Courts and Processes After Decision.")

engage in a conversation with the court about the strengths and weaknesses of the issues, oral argument is probably going to be at best ineffectual and at worst disastrous.

4. Rehearsing [§ 6.29]

Counsel should rehearse the oral argument and the various ways it may play out. If possible, other attorneys or even lay persons should help. While the number of oral arguments precludes ADI staff attorneys from providing a moot court in every case, if counsel has not previously argued or if the case is especially important, counsel can request that staff attorneys help prepare for the argument. If counsel has never argued before the particular court, counsel might make an effort to attend an oral argument there beforehand, to get a feel for the process.

B. Coordination with Other Counsel [§ 6.30]

Oral argument may be complicated if the case involves a co-appellant or amicus. When the issues present no true conflict among parties on the defense side, the attorneys should devise a coordinated strategy, so as to present a complete argument without undue redundancy or fragmentation. If possible, one attorney should do the argument – a series of short presentations is confusing and often ineffective.

When a co-appellant has an actual conflict with one's client, the attorney must argue individually. The co-appellant's argument could undermine the client's position, and therefore counsel should prepare to answer multiple opponents – not only the respondent, but the co-appellant, as well.

C. Members of Panel Deciding the Case [§ 6.31]

Knowing who is on the three-justice panel assigned to decide the case may help counsel develop an approach to the argument. Some courts' calendars or websites may expressly name the panel, although the composition of the panel is subject to change before argument. Backgrounds of justices are online, as well.[21]

D. Late Waiver of Argument [§ 6.32]

If during the preparation period counsel concludes argument will not be advantageous, counsel should advise both the court and opposing counsel as soon as a

[21]Fourth Appellate District, for example: http://www.courts.ca.gov/2524.htm

decision to waive has been made, not in the courtroom on the day of argument. (This is especially true as to opposing counsel. The court takes a dim view of causing the opponent to prepare for and travel to oral argument unnecessarily.)

VI. DELIVERY OF ORAL ARGUMENT [§ 6.33]

To put first things first, counsel should plan to arrive early enough to find the courtroom, check in, and become oriented to the surroundings. Cutting the time close invites serious problems, if not outright disaster. Counsel should double-check the starting time (not all courts are the same) and allow time for court security measures.

A. Preliminary Mechanics [§ 6.34]

In most courts, counsel will first check in with a deputy clerk, confirming or revising a time estimate.[22] Rule 8.256(c) of the California Rules of Court provides 30 minutes per side for oral argument, unless the court provides otherwise by order or local rule; counsel should consult the assigned staff attorney for local practices.[23] In any court, questioning from the bench can prolong argument considerably beyond putative limits.

1. Calendar formalities [§ 6.35]

The presiding justice usually will order the oral argument calendar according to estimated time, with the shortest first. A lengthy estimate is almost guaranteed to be near the end of the calendar, unless counsel has a legitimate reason to seek preference. If the calendar is very long, counsel may ask to be excused until a time certain, so as not to have to sit in the courtroom.

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[22]The court will almost always accept a downward revision. Some presiding justices will permit an upward revision, but some will not.

[23]A court's notice of oral argument may state the court's local time limit. Division One of the Fourth Appellate District normally limits oral argument to 15 minutes per side. (Ct.App., Fourth Dist., Div. One, Internal Operating Practices and Proc., II-B-3, p. 4, Oral argument; Misc. order 021115.) Division Two of the Fourth issues an annual miscellaneous order limiting time to 15 minutes per party except for good cause.

In Division Two of the Fourth Appellate District, the calendar order is determined before the day of argument and is posted for counsel. Repeat of time estimates is therefore obviated. Counsel should nevertheless check in to announce their presence.

The presiding justice will typically give the audience a brief statement indicating that the panel has read the briefs and is familiar with the cases and therefore counsel should not repeat what is in the briefs. (Counsel should heed this admonition, but not treat it as an absolute injunction against repeating core concepts necessary to help the court understand the case.) He or she will then call the first case on the calendar.

2. Formalities at the lectern [§ 6.36]

When case is called, counsel should proceed to the lectern. Counsel should first state his or her name and the party represented.[24] It is a good practice for the appellant's counsel at this point expressly to reserve time for rebuttal; while brief rebuttal might be permitted regardless of whether time has been specifically reserved, some presiding justices may not permit rebuttal if the time estimate has been exceeded.

B. Tone [§ 6.37]

Every attorney, like every person, has a different style and at argument should remain faithful to the attorney's own personality. However, it is important to do so adaptively, taking account of the forum, its purpose and internal dynamics, and the expectations of decorum.

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[24]Former United States Supreme Court Justice Robert H. Jackson offered this advice on what *not* to say in opening remarks: "On your first appearance before the Court, do not waste your time or ours telling us so. We are likely to discover for ourselves that you are a novice but will think none the less of you for it. Every famous lawyer had his first day at our bar, and perhaps a sad one. It is not ingratiating to tell us you think it is an overwhelming honor to appear, for we think of the case as the important thing before us, not the counsel. Some attorneys use time to thank us for granting the review, or for listening to their argument. Those are not intended as favors and it is good taste to accept them as routine performance of duty. Be respectful, of course, but also be self-respectful, and neither disparage yourself nor flatter the Justices. We think well enough of ourselves already." (*Advocacy before the Supreme Court: Suggestions for Effective Case Presentations* (1957) 37 Amer. Bar Assn. J. 801, 802.)

1. Respect [§ 6.38]

A court and its members carry the authority and dignity of government and must be treated with invariable respect. Counsel should maintain an attentive posture (avoiding slouching or leaning all over the lectern) and a respectful tone of voice. At the same time, counsel is an advocate and must be assertive; the message should be that the client is *entitled* as a matter of law to prevail, not that counsel is beseeching the court to grant a favor.

Opposing counsel should likewise be shown respect, even in the face of provocation. Taking the high road – resisting the impulse to answer in kind when opposing counsel has breached decorum or made a personal attack – is always right. The court will notice the contrast and appreciate the restraint, and both the client's cause and counsel's reputation will be enhanced.

2. Conversation [§ 6.39]

Oral argument is not a forum for making speeches. The point is to engage in dialogue, to understand where the court is and persuade it to go in the right direction. Justices are legally astute and do not want to be manipulated. A blatantly oratorical style, an overly emotional or strident delivery, or an argument that sounds like one for a jury is going to fall flat. Counsel should strive for a conversational tone, while still showing respect for the dignity of the proceedings.

3. Humor [§ 6.40]

Generally counsel do well to heed the advice, "Humor should be used sparingly if at all." (San Diego County Bar Association, Appellate Court Committee, California Appellate Practice Handbook (7th ed. 2001) § 7:47, p. 284.)[25] There are few absolute rules, however, and some levity might help dispel an emotionally tense situation or revitalize the court and counsel toward the end of a lengthy calendar. It is often more effective when spontaneous, rather than built into the presentation as "entertainment." Sarcasm, put-downs of the opponent, and impertinence are never appropriate.

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[25]This handbook is no longer published and has not been updated since 2001, but may be available in libraries and appellate offices. It does offer excellent guidance for appellate practitioners.

4. Candor [§ 6.41]

As to absolute rules of conduct, there is no exception to the rule of honesty and forthrightness. If counsel has made an error or does not know the answer to a question, a candid admission will do far more for the client and the attorney alike than an effort to cover up. Counsel need not be embarrassed about not knowing an answer; the justice apparently didn't, either, or else he or she would not have asked the question.

C. Dialogue with the Court [§ 6.42]

Since the whole purpose of oral argument is to engage in conversation with the court, eliciting a response from the bench is a key objective. Counsel in turn must be prepared to deal with that response.

1. Process of give and take [§ 6.43]

The court's response takes the form of questions to counsel. When a question is asked, counsel must be certain he or she has understood the question. If unsure, counsel should request clarification. Once the question is understood, counsel should answer it directly and immediately. Attempting to evade or delay it implies that a direct answer would be harmful. In the end, answering the court's questions is more important to the success of oral argument than plowing through a prepared presentation.

Counsel must continuously observe and listen, as well as speak. Both the questions themselves and the justices' body language may offer clues as to whether counsel should abbreviate – or prolong – a particular discussion or change the direction of the argument.

2. "Softballs" [§ 6.44]

Although of course counsel must be prepared for the hard questions, it is a mistake to assume that all questions are hostile or skeptical. Sometimes counsel may be used as a foil among the members of the panel. Although the questions are outwardly voiced to counsel, some may be aimed at another justice on the panel. Counsel should be alert to the possibility of "softball" questions – ones that back counsel's position – and answer them supportively.

3. Loaded questions [§ 6.45]

Some questions, like leading questions in eliciting testimony, will include a foundational premise that counsel does not accept. The best way to approach such a question is: (1) state very briefly that the question contains a premise not conceded, (2) assume arguendo the existence of the premise and answer the question forthrightly, and (3) after answering the direct question, explain why the premise is wrong.

4. "Off the wall" questions [§ 6.46]

Among the hardest questions to answer (and virtually impossible to prepare for) are those that are "off the wall," go in a completely tangential direction, contain logical fallacy, or betray the individual justice's ignorance of the real issue or of basic applicable law. It may be hard to maintain a respectful attitude in dealing with it, but there is no alternative. A patient, tactful answer that shoulders the blame for any confusion ("I'm sorry my brief did not adequately explain this point") may be the most effective response. The other justices will probably be aware of the questioner's errors and be sympathetic to counsel's predicament, unless counsel responds in a way that embarrasses their colleague.

5. Concessions and other damaging answers [§ 6.47]

Sometimes counsel will be put into a position where it is difficult to avoid making a concession or giving an otherwise damaging answer. There is no cardinal rule as to how to respond. If the response relates to a comparatively minor point, counsel may gain credibility simply by agreeing to it. Some answers could spell doom to the appeal and should be resisted strenuously. If counsel's hand is forced into offering a potentially hurtful answer, counsel should control the damage by providing the best supporting explanation available.

This is the very kind of situation in which thorough preparation pays off. Getting blind-sided by a devastating point counsel failed to consider can fluster even the best oral advocate.

6. Supplemental briefing [§ 6.48]

If the court seems concerned about any point not fully briefed or any point counsel was unable to answer during oral argument, counsel can seek leave to submit

supplemental briefing before the case is taken under submission. (Cal. Rules of Court, rules 8.200(a)(4) and (b), 8.256(d).)

D. Concluding Oral Argument [§ 6.49]

Counsel wants the court to incorporate the oral argument into the deliberating and decision-making process. To make a firm impression on the court, counsel should use the concluding part of it effectively and persuasively.

1. Watching the clock [§ 6.50]

Counsel must be conscious of the elapsed time and be prepared to end argument smoothly. Toward the end of the estimated time the presiding justice may ask whether counsel wants to stop and reserve the balance of the time. Some courts use color-coded lights to inform counsel when the time is nearing its end.

2. Cues that it is time to conclude [§ 6.51]

Counsel must be perceptive in gauging the court's reaction to argument. If the court appears to be leaning in a favorable direction, it is wise to heed the old adage "quit while you're ahead" and wind up promptly. Unnecessarily prolonging argument increases the chances the court will change its mind; it is indeed possible to snatch defeat from the jaws of victory. If the court says it would like to hear from opposing counsel, that usually means trouble for the other side and is a definitive signal to sit down.

3. Strong ending [§ 6.52]

The argument should be concluded on a strong point. This is not to advise reserving the clinching "zinger" for the last word. Time may expire without an opportunity to make the point at all. However, the conclusion of the argument should relate to an important aspect of the case and not to a trivial or insignificant point.

E. Rebuttal [§ 6.53]

If rebuttal argument is offered, as generally it is, counsel should use the opportunity to *rebut* the opponent's points and not rehash the opening argument. Unless there is to be supplemental briefing, rebuttal is the last opportunity to address the court and, most importantly, the only opportunity to correct any misstatements, factual or legal, by the opponent or the court (or oneself, if counsel has said something in error). It can

also be used to address concerns raised by the court during the opponent's argument. Rebuttal should be concise and to the point, but not rushed or fragmentary.

A cautionary note: By the end of appellant's and respondent's arguments, the panel may be weary. Making every rebuttal point will risk losing their attention altogether and making no point at all. It may be advisable to confine remarks to a few emphatic points.