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HOW TO MAKE YOUR APPEAL APPEALING:

Telling A Good Post-Trial Story

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SOME LESSONS FROM APPELLATE ARGUMENT

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The presentation of argument on appeal is made first by written briefs. The contents of those briefs are governed by rules describing the ordering and content of each section, including a statement of facts based on the written record from the lower court, a concise statement of the issues to be addressed, and an argument section addressing each of these issues, with appropriate legal citations. The appellate court (whether state or federal) typically assigns a particular case to a panel of three judges. That panel then hears oral arguments on the numerous cases (sometimes 20 to 30) assigned to it, one after the other over the course of one or more consecutive days. Usually there are time limits for each attorney's presentation, and these may be strictly enforced. In the Third Circuit Court of Appeals, the attorney's lectern has a light system like a reverse drag race; a green light shows at the beginning of the 15-minute argument, a yellow light shows when there are two minutes left, and a red light shows when time is up.

Oral argument is the first and only chance to speak directly to the appellate court, and the last chance to communicate with the court about your case. Unlike the written briefs, your argument need not follow any formal structure. Any of the Judges may ask questions or make observations at any time. The Judges might ask no questions, or one Judge may ask many questions, or all of the Judges may have questions and comments. The appellate attorney must be ready for any of these eventualities.

The appellate attorney should be well-prepared, should aim to focus on a few key points, should have an overarching reason why it is right and fair that his client prevail, should listen to the Judges and adjust the shape of the argument to their questions and concerns, and should speak to the Court in a respectful but conversational tone.

Be prepared. Particularly in appellate argument, the attorney should know the facts and holdings of each case that attorney has cited in his or her brief, as well as about the cases cited by the other parties. The attorney should be especially familiar with the key cases. It can be useful to bring to the lectern brief notes about each of the cases should the Judges inquire about a particular case. The attorney should expect the Judges to be well-prepared. That said, it is not unusual in oral argument for there to be no discussion of the facts of the cited cases, but when it occurs the attorney should be ready. When a Judge focuses on a particular cited case, the appellate attorney needs to be able to discuss its details. One advance clue may be the Court's notification of argument that tells the attorney who the Judges on the panel will be. The attorney should review the case law pertinent to the argument to see if any of the Judges had participated in any of those cases. For example, an appellate judge asked me during argument, "What about the dissent in the [X] case?" Fortunately, I was able to respond, "You wrote that dissent, Your Honor..."

Key points and a theme. Oral argument is quick and, in most jurisdictions, unrecorded. The Judges may hear 20 to 30 arguments in a single day. There is a fleeting opportunity to make an impression. They have already read the briefs, and do not want you to read to them again. The plan for argument is a bit like a plan for battle; the plan often evaporates as soon as the argument (or battle) begins. For all of these reasons, it is best to have no more than three or four key points that you wish to

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convey during the argument. These should relate to a larger theme, and all point the Court toward finding in your favor because the outcome is both correct and fair.

Listen and adjust. The appellate attorney needs to respond to the Judge's questions both as a matter of deference to the Court and because the questions may tell the attorney what issues matter to the Court. While questions may be welcome because they tell the attorney where the Court is focused, a line of questioning may take valuable time and steer the argument in an unexpected direction. The trick is to use the questions as an opportunity to address the Court's concerns while weaving that line of thought back into the core of the argument. This is easier said than done. Sometimes, particularly where one has alternate arguments, the attorney may wish both to respond and to re-focus the argument on another point. For example, I represented the Appellant in a case where we had two completely separate reasons why we argued our appeal should be granted; one involved a negligence claim which turned on the economic loss rule, while the other involved a contract claim which turned on the proper application of third-party beneficiary law. Fortunately, we were the fourth case to be heard that morning, and I had the opportunity to observe the Judges question other attorneys. I observed that the presiding Judge began to ask questions almost immediately, and focused on the weak point in the attorney's argument. If the attorney wished to contest that point, he could use up his time in doing so. I had a co-Appellant whose attorney also was presenting argument, and the Court had split our argument time so that I went second and had seven minutes. I came to the lectern, introduced myself, and immediately the presiding Judge said to me, "How are you going to get around the economic loss rule?" This was the weaker of my two arguments, and I did not want to spend my precious time discussing it at any length. I responded, "With great difficulty Your Honor." The Judge smiled. My implied concession allowed me then to turn to the stronger argument regarding third-party beneficiary law, which was where I wanted to focus.

Converse with the Court. It is a good idea to bring some notes to the lectern, but the notes should never become a crutch. Do not write out an argument and read it (or memorize it); this probably annoys the Court, and does not permit you to listen and be flexible. So long as you know your case and your case law, the absence of notes permits and requires you to think and speak, rather than to recite. I like to bring to the lectern a single page of notes that has on it, bullet-points style, the three or four key points to be made, and no other detail. Usually, I write at the top of the page the word "SLOW," which reminds me not to speak too fast. I also may bring a brief summary of each of the cases cited, in the event that the Court inquires about a particular case and I need to refresh my recollection. I think that if one brings a complete outline of the argument, or worse, the entire argument written out, the temptation to use it rather than just thinking on your feet makes the argument stilted. Instead, work hard to prepare, and then rely on your wits, and you will be able to speak to the Court in a manner which shows your grasp of the material and your confidence in your position.

Virtual Arguments. Since the beginning of the Covid-19 pandemic, many appellate courts have switched, at least temporarily, to holding arguments telephonically or over a videoconferencing platform. The guidelines discussed above apply equally in these settings, but there are certainly a few other suggestions to keep in mind as well. In particular, the advocate should make sure he or she is participating in the argument from an appropriate location. The location should be quiet, without distractions, and have good internet connectivity. If the argument is on video, the attorney should make

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sure there is nothing in the background that is distracting for those watching the presentation. I highly recommend doing a practice session before the live argument to test internet connections and become familiar with the Court's platform. Most Courts have IT professionals or other staff who are willing to assist in these run throughs. Although these suggestions may seem basic, every virtual appellate argument session in which have participated has had at least one attorney with a significant technology problem that hampered his argument.

Oral argument is challenging and, when it goes well, exhilarating.