TABLE OF ATTACHMENTS

QUESTIONS/OUTLINE FOR ORAL ARGUMENT COMMENTS

1. How important do you think oral argument is in terms of your ability to persuasively present case on behalf of your client?
   a. Does it help you to win?
   b. Does it help you to focus issues for court?
   c. What is the goal of orally arguing a case, and how much does it vary from case to case?
2. How do you decide which cases to argue?
   a. What consideration do you give to length of punishment versus complexity or novelty of issues?
   b. What is your process for deciding whether to argue the case? Do you reread all the briefs, discuss choice with someone else?
   c. In-Person vs. Phone Arguments? Do you ever argue by phone? How do you decide which cases to argue this way?
3. Preparation for Oral argument
   a. How do you begin to prepare? Rereading briefs, etc.
   b. Choosing which issues to focus on.
      i. How do you pick the issues to focus on? How often do you focus on more than one, or more than two issues?
      ii. How much do you prepare other issues which aren't your focus?
   c. Is there a Gestalt of Oral Argument? Do you have a particular approach (or different varying approaches) to what you want to present at an oral argument so that it is not a rehash of briefing?
   d. Writing up outline, notes, speech:
      i. Do you start this before or after deciding which issues to focus on?
      ii. What is the goal of your written preparation (i.e., an outline, speech, handwritten vs. computerized)?
      iii. To what extent do you try to anticipate problems with your argument(s) and likely hard questions from the court?
      iv. Do you want to know who is on your panel before preparing, and how can this affect your approach to preparation and argument?
      v. How much time do you devote toward preparation for argument?

e. What more do you do besides writing up an outline or speech?

i. Updating of authority, supplemental notes.

ii. Practice in mirror, moot court of argument; when, if ever will you do this?

4. Argument Itself

a. What do you bring with you to oral argument?

b. Time estimates: how to make them? How much time will you reserve for rebuttal.

c. When you start your presentation for the appellant, how much are you referring visually to your outline/notes?

d. Questions from the court: best suggestions for how to deal with the ones you anticipated and the ones you didn't?

i. The hard questions: When to make concessions, when not to, in response to questions.

ii. How to deal with the really lame question that's on a truly marginal point, completely off the wall, etc.

iii. How to deal with the question that shows the court doesn't grasp your argument or is trying to avoid it?

e. The Death Stare: What do you do when they say absolutely nothing (or just ask one or two polite or not-so-polite questions)?

f. When You Sit Down: What are you doing while the AG argues?

g. Rebuttal: what do you focus on? Do you make an outline/notes while you're sitting there? How can you take advantage of questions the court asked the AG and the nature of the AG's responses?

5. When you are the Respondent: Any difference in your approach to argument?

6. When Oral Argument Seems to Have Made a Difference.

a. Any stories about oral arguments in well known or not-so-well-known cases where you said something or responded to questions in a certain way and it seemed to have an impact on how the case was decided?

b. Has anything else come up as a result of preparation oral argument [realized missing issue, new authority, different way of presenting issue] which ultimately leads to victory in state or federal court, etc.

Bill, I tried to follow your outline, but the remarks turned out a little miscellaneous. I hope they're useful. I'll be fascinated to see what others say.

Mark Greenberg

What does it do and what is it good for?

I was at a seminar ages ago. The Justice Klein and the late Justice Scott were there. Scott said don't waste your time with oral argument. Klein said he likes it and wants to hear it in almost every case. In any event, I can't prove that oral argument helps, but I *believe* that it does.

Like all true believers, I start with a doctrine: the long-established sacrament in this Church of Appellate Practice is oral argument. Some wise prophet, at some time in the distant past, thought that parties in an appeal should be offered an opportunity to appear in person and try to persuade the judges of their position. Persuasion must have been deemed a possibility, and, as with many things in the appellate process, I think it's wise to act *as if* it were true.

I personally have no difficulty doing this because I *like* oral argument. It gets me out of the office; it changes the rhythm of my day from the usual slow pace of contemplation and composition to that of movement, human interaction, and the possibility of spontaneous excitement if not fun.

Okay. Does it actually help the case? Well, does a lawyer help a case? My guess has always been that a good lawyer can be the margin of difference in a close case. Accordingly, my guess is that a good oral argument can be the margin of difference in a close case. In these circumstances, oral argument animates your case, gives it a dimension of actual experience that transcends the intricacies of the substantive law and the ins and outs of your highly technical argument as to why there is no procedural default. I'm not advocating the kind of table-banging indignation that announces what an incredible injustice your client as suffered, or giving a disquisition on the Magna Charta; I'm talking about approaching your argument perhaps from a different angle, or perhaps trotting out some illuminating analogy you didn't use in your brief, -- anything that has a chance to make the argument click with the judges. Sometimes you actually see this, even when the decision pretty much stays the same as you see in the bench memo. But if you can see it, then the possibility is open that it will change something.

There is one case (out of hundreds) in which I know this happened because it happened palpably at oral argument. Sometime back in the 80's I had a San Jose case in which the guy was convicted of selling securities without qualifying them with the state. The law was that whether or not an instrument was a security was a question of law for the court, and accordingly, the court instructed the jurors that the promissory notes in question were, as a matter of law, securities within the meaning of the statute. The case eventually came out all right in *People* v. *Figueroa* (1986) 41 Cal.3rd 714, but at the Court of Appeal level, the panel, which was in the First District at that time, was hostile

because the law was against the specific point and because securities crimes were so different from the run-of-the-mill criminal case that the judges didn't feel the connection, until I said something to the effect that you wouldn't direct a verdict on element of any other kind of crime no matter how obvious or how technical, and I gave the example of directing a verdict of first degree burglary because the burglary (in accord with the law at that time) was in the night time. These arguments were made in the brief in more technical forms, but when I said that, it seemed like a light bulb went on over Harry Lowe's head, and the entire flow of the argument changed. To this day I believe that changed the case and that the live interaction of oral argument did it.

One benefit of oral argument I also believe occurs is that it benefits your cases over the long run. That is to say if you appear often enough and make creditable arguments, you enhance your credibility as an advocate, which helps your cases. Can it do the opposite if you do poorly? Sure. Don't do poorly.

Along the same lines, oral argument educates the Court. I know there are issues that are good, that don't succeed immediately, but for which the seed has been planted in a judge's mind during an oral argument. It may be your seed that eventually comes to blossom in your case; or it maybe someone else's seed or someone else's case. Nonetheless, it's a good, and it's worth pursuing.

Again, none of this is susceptible of scientific proof, but then persuasion isn't exactly a science, is it?

Which cases to argue?

My enthusiasm for oral argument is nonetheless not indiscriminate. There is no need to go when the brief has nothing but throw-away arguments that are being retreaded for purposes of preserving federal issues; there is no need to go when you have been forced in your brief, for want of anything better, to resort to an issue premised on a gross sophistry that will be revealed at oral argument only to make you look ridiculous for showing up. But if you have a good issue without being utterly shutdown on the prejudice aspect, or if you have a good issue *and* what you believe to be real prejudice, then I say go argue. If the decision is a close one for you, then other factors might come into play, such as the magnitude of the sentence, whether your good issue is going to make a practical difference even if you're successful, or whether or not the location of the argument is in Fresno. In regard to this latter problem, I just don't take any 5th District cases.

Also in this regard, phone argument should never be a consideration except in the most urgent or extraordinary of circumstances where physical presence is somehow impossible. I have had three or four telephonic oral arguments over the past twenty-five years and have been present in court, especially in the Sixth District, when the AG has phoned in his presence from San Francisco. It's like making out with gloves on. For *if*

oral argument is to be persuasive, the judges have to be engaged directly in a conversation. Talking to them on the telephone is not like talking to your spouse on the telephone. The conversation in court is still formal and not intimate, and if there is going any chance for real conversation within these sorts of constraints, the mechanical devise that screens out eyes, faces, and body language has to be eliminated.

How to prepare for oral argument?

I think this has to be a highly individual affair. Re-reading all the briefs, however, is the *since qua non*. Making sure you have a complete grasp of the record is also a *sine qua non*. Either it's a cliché or someone said it to me once, but it's true: of all the expertise required to argue your case, you have to be the biggest expert in the room on the record in your case. Everybody knows as much law. By the same token, take at face value the dreary pronouncement that the court is familiar with the facts of the case so that you don't need to repeat them. Your knowledge of the record is to be stored up for when, in the course of argument, the judges finally reveal their ignorance.

Beyond this, this is what I do and don't do: I don't prepare a speech, or a talk, or a presentation. I think of a way to reformulate my argument from a different perspective or in more general terms or in some different manner from the way it was presented in the opening brief. Further, if my argument has serious weak points or the AG has, *mirabile dictu*, a good argument for procedural default or invited error, I want to address these first and do so with the telling analogy or phrase or assertion that will, of course, utterly annihilate the problem. I would note two things in this regard: first, it's pretty much the opposite ordering of my written arguments in the brief, where I will tend to place my strong points first and leave the qualifications for later to clean up the problems from the weaker points; secondly, you probably won't annihilate the problem, but by putting your salient weaknesses out front, you have a better chance of getting a response and engaging the judges, which, to my mind, is the name of the game. For once they are talking and "conversing" with you about the case, more possibilities for persuasion open up for you to take advantage of. If not, what have you lost?

The actual manner in which I do this is by preparing in my mind a *loose* formulation of how I will open and of what I might say in the course of argument either by initiation or in response to a possible question. I'll often say them out loud. This does several things: first, it allows me to state semi-complicated matters in grammatical coherent sentences without tripping over my tongue; secondly, it allows me to say them with all appearance of spontaneity; and thirdly, it allows me to actually edit what I am saying in accord with the dynamics of the situation as it unrolls itself before my eyes.

You ask about a "Gestalt" of oral argument? I actually do think there is one, or at least I have one. I like to clear at least a half day before the argument to "absorb" the case. That's the metaphor I would use to describe what the preparation I described in the previous paragraph kind of feels like. Usually, walking and thinking about the case is the

primary activity of that half day, and only toward the end of the day, or even in the car on the drive to court, do I start pinning down how I will actually begin.

Again, all this is individual, and when I actually read what I'm saying, I'm almost inclined to say idiosyncratic (unless of course it turns out that everybody does this). I have no prejudice against those who prepare by writing out an argument, or making extensive notes. But however one does prepare, the goal has to be the appearance of a controlled spontaneity, in which you seem to know your case, know your argument, and are discussing it with intelligent human beings and, of course, also the Attorney General.

One anecdote as to how I came upon my method of preparing: I used to make extensive notes before argument and to go up to the lectern with pages of notes. Again, sometime back in the 80's I had miscalendared by two full days an oral argument in a case in the First District. About 10 a.m., I got a call from the clerk asking where I was, and why I wasn't in court. I had not prepared. I jumped into my suit, got into the car, and made to the court by about 10:30 a.m. In those days, Division One had monster calendars, and there were still three cases before mine. Sitting there, I read the briefs, thought about what I was going to say, got up there at about 11:15 or 11:30 and proceeded smoothly, comfortably, and coherently in what was a relatively lively oral argument. I of course do not recommend such antics, but since that time I do not use notes except in rare instances when it is necessary to give a citation or refer to some highly intricate statutory language. I suspect that there are many more others who can do that and that it will help their presentation. On the other hand, I know that are some excellent arguers who do use notes and it does not detract from their appearance of spontaneity.

Finally, in my mind, the very best preparation is a moot court. That is hardly ever practicable. So the second best is to interest someone in your case who is knowledgeable and let him play devil's advocate. The third best method is to be your own moot court as best you can. As you may guess, I'm usually stuck with the third best method. The fourth best method is to go on a wing and a prayer and hope your experience makes up for deficiencies in your preparation. This has been known to happen.

The argument itself:

You're goal at the argument, as I have implied above, is to engage the judges. You may not persuade them in any event, but you can't do it at all unless they're engaged. My belief is that if you've given it your best shot and get no response whatsoever, then do not go into a full bore speech. Make the salient points you were hoping would come up and gracefully bring it to a quick close. Then do your best on rebuttal to kindle an interest by responding strongly to the nonsense spouted by the Attorney General. If you still get no response, oh well.

Some pointers about the argument itself: I've emphasized that the appearance of spontaneity is important in the overall goal of persuasion. Spontaneity, or its appearance, requires you to stay true to who you are, your personality, and all the other accidents that

make you what you are. That doesn't mean you should resort to your penchant for swearing, for using slang, for being the class clown, for telling people off, for sneering at their lack of intelligence, and all the other things that endear you to your friends and family; but it does mean you have to speak and use a style that feels natural to you in circumstances which are somewhat formal where you are trying to persuade others on a matter about which you all have some knowledge and expertise.

No matter what you really think of the judges, talk to them as though they are fair, honest, intelligent, and most of all, in charge. Thus, answer their questions directly. If you see the judge leading you with yes-or-no questions to a conclusion you don't want, let him do it. State the conclusion even, and then tell him why the premise of the syllogism that led to this conclusion is the wrong one. Never tell them that you'll get to their question later, as though they've interrupted the flow of your talk. *They're* the object of your talk; you have to persuade them; and they've just done you the favor of revealing how you might have a chance of doing it if you can. I can go on and on, but the basic point is that everything you doing oral argument is dictated by the goal of persuading the judges that you are right. That's all there is to it.

Rebuttal is precious. In your opening you are probing the court to see what they will or will not respond to. Maybe they responded to nothing. Maybe they responded in a way you did not hope for and you did not seem to change their mind. On rebuttal, you now have the foil of the Attorney general's silly and ill considered remarks. You have a fixed target. But don't just confine yourself to jabbing at his points. Think of a way (and you can do this in advance during preparation) of ticking off your points and ending with a conclusion that is concise and memorable and seems to flow from everything that has gone before it in the argument. Caveat: if the court has been tearing the Attorney General apart and it's clear that thing's are as good as they will get in your favor, simply stand up and say, "Submitted," and get the hell out of there before they change their minds.

Finally, you ask if there's anything different about being a respondent. I have been a respondent on more than one occasion. The very first time, it was an appeal by the District Attorney in Los Angeles from a grant of habeas corpus in the Superior Court. It wasn't even close. All the standards of review were in my favor, from sufficiency of evidence to a trial judge who announced clearly on the record the correct burdens of proof and legal standards for the substantive issues. The District Attorney, who had little or no idea about the standards of review, acted like a novice treating them as if they were minor annoyance that could not possibly get in the way of justice, understood as reinstating an LWOP conviction. I flew down to Los Angeles for the oral argument requested by the appellant. It felt like a holiday. I would be the one with my feet, figuratively, on the desk, as the appellant strained and sweated in the face of hostile court. I was the one who would then get up there and consider cavalierly the option of submitting the case on the briefs, or make some brief comment on appellant's multiple inanities. The case was called; I sat in the unaccustomed chair while the deputy D.A. stood at he podium. But before my paper cup was filled with the water I was going to enjoy drinking, the judge announced, "We'd like to hear first from respondent."

I won't retail the bloody details of what followed. Suffice it to say that everything came out right ten years later in the 9th Circuit. But the moral of the story was clear. My foolishness was to forget that as a criminal defense attorney, I wear the mark of Cain; no man will offer me shelter; I am shunned by all. The less melodramatic conclusion is that if you represent a criminal defendant, *you* are the appellant no matter what the procedural posture. Treat the case and school your expectations as though you still have the burden of proving that you are right. More often than not, this will be true in the Court of Appeal, and it will be most true in that situation where most of us do find ourselves to be respondent: on the grant of review to an AG petition in the Supreme Court. Especially there keep in mind that the Court granted review *in order* to place the burden on you to show that the Court of Appeal was right in the first place.

Oh, there was one other of the questions you listed that I had an opinion on: whether or not you should care who your panel is. My answer is generally, no. You are aiming at an ideal audience: reasonable and fair men and women. Your goal is to raise them to this paradigmatic level by the force of your presentation, which will be eloquent, coherent, logical, and persuasive. The specifics of your presentation is dictated by the *matter* at hand, and not by the personalities discussing or judging the matter at hand. On the other hand, there are some judges who say or do quirky things. If you know the kind of quirky things they do, you can prepare for them. For example, there used to be a presiding judge who would at times engage in a conversation with his neighboring judge on the bench when counsel, almost always defense counsel, was talking. When I saw this the first time, it was disconcerting and I simply continued, in a slightly halting manner. However, when I had another argument before this judge, I knew the possibilities, and had prepared: when he started talking to his neighbor, I simply stopped. That was that, and it never happened again. But that sort of thing is a minor matter and it's hardly worth trying to "psych out" your panel. Just stick to the matter and be guided by the overall goal of persuasion, and you can figure out what the right thing to do or say is.

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ORAL ARGUMENT

Lecture to Stanford Law School Moot Court Program*
on March 22, 1979
by Michael G. Millman

How many students here have ever argued a case? Okay. I will spend the next forty-five minutes trying to give you my perspective on oral argument. I'll answer questions at the end, but if you want to ask some along the way, that's cool too.

The subject of oral argument is very dear to me. I don't argue cases as often as I'd like to, but I love it whenever I do. To lawyers it is one of the highlights of their legal experience. No aspect of lawyering has more fascination to lawyers than oral argument. Now that may seem strange, because in fact oral argument plays a relatively small part in the total process. You know that most lawyering never involves going to court -- it involves counseling, negotiating, drafting, or what-ever. Of those cases that do go to court, few are tried. Of those cases that are tried, few are appealed; and of those that are appealed, few are argued. The conventional wisdom is that oral argument is a declining part of the litigation spectrum, and if that is true, then the question arises: why does it have such fascination for lawyers?

I think the answer is that there is nothing you can do as a lawyer which is more dramatic, which is more electric, which is more terrifying -- than arguing a case before an appellate court. Nothing you do leaves you so exposed before your colleagues as oral argument. When you write a brief, you can hide behind the paper. You write it, but who knows if anyone ever reads it. If someone does read it, who knows if that person is a law clerk or a judge. When they read it, they can't be sure you wrote it, because even though your name is on it, you could have had a law student or a colleague do some or all of the work. But when you stand up and make a fool of yourself in front of a courtroom, everyone knows who's doing it.

It is that terror which fascinates both the people who argue and the people who listen. A metaphor I like is the spectacle of someone at a circus walking on a tightrope, with everyone watching and waiting with hushed expectation to see if he will fall off. That is the excitement you experience when you watch good oral argument. There is an aura of unpredictability. You can't control what's going to happen in argument the way you can control what happens in your brief. You never know if within the next seconds you will suddenly fall on your face.

Ed. note: Although this lecture was given to law students, I thought it would be of interest to attorneys preparing for their first oral argument before the Court of Appeal; more experienced counsel will enjoy seeing the "universal experience" humorously and insightfully put into print.

You should know that we all experience that terror when we first argue, as you are about to experience it. That terror is primarily a product of our preoccupation with our own egos. We are concerned about making fools of ourselves in public. We might like to think that when we get up to argue our primary preoccupation is with the law, or perhaps with the welfare of our client, but the reality is that at the moment of argument, especially when you are beginning, your primary preoccupation is with yourself and with not making a fool of yourself.

When you focus on your own ego, you get deflected from the real purpose of oral argument. Oral argument is not to display yourself before the court, but to persuade the court -- the word is "persuade" -- to influence the court, to assist the court in coming to the conclusion you are urging upon it. What you are trying to do is to give the court the benefit of your focused thinking on a problem. That assumes that you have thought about the problem. It means more that just having read the cases. It means having integrated the material and come out with a coherent and intelligent perspective on a problem that will assist the people who have to resolve it.

Now that may seem trivial, but if it is, why do most people argue so badly? Most oral argument is awful -- just awful. First, it is boring. Terribly boring. If you think about argument from the perspective of a judge -- and I will ask you to do that several times this morning -- a judge who is sitting up there listening to case after case on a calendar, you will appreciate how boring it is to hear people just repeat what is already in their briefs. Most argument is rambling, it is incoherent, it is wastefully padded with filler. If you are ever lucky enough to read a transcript of oral argument -- usually you get transcripts of trials, not transcripts of oral argument -- you will see that if all the filler is excised from bad oral argument, you end up with perhaps 30 percent content out of the whole argument.

Much of oral argument is non-responsive. When a judge asks a question, you must operate on the assumption that the judge wants to know the answer. Now I know that moot court is somewhat artificial in that respect. The judges here ask you questions to test you, to watch you suffer. But in actual argument, most judges ask questions because they are grappling with a problem and would really like to have the benefit of your thinking. If you listen to the answers given, you hear garbage, you hear fudge, you hear evasion, you hear song and dance, you hear anything but the advocate attempting to respond to the court's inquiry.

There's a wonderful comment by former Chief Justice White of the Supreme Court of the United States, who said that

when he watched lawyers before him stumble over their inconsistencies, he felt as if he had been stabbed in the mind. I love the metaphor. It's exactly the way I feel when I judge a moot court competition. I ask someone an honest question and would like to hear what he has to say on the point. When I get evasion and double-talk back, I feel as if I am being stabbed in the mind, as if the person to whom I am talking is not really talking back to me.

A substantial fraction of oral argument is impossible to follow. You might think about that. You prepare yourself for oral argument; you get it all together. You have a speech to deliver. You get up there, and you unload. You think that if you're lucky, they won't ask you any questions, and you'll just get to do it straight through from start to finish (which is wrong; we'll talk about that later). But if you listen to oral argument, you will often find it almost impossible to follow. I may be No. 8 on the calendar, so I sit in court waiting and get to listen to arguments 1 through 7. I think that as a lawyer I know something about the issues raised, yet often I simply cannot follow what the lawyers are saying. Of course, when you sit up there as a judge, you don't want to admit this. The lawyer is proceeding with his presentation, rattling through statutes and the facts of the case. He looks good: no obvious pratfalls or blunders. The judge is thinking, "I don't understand what you're saying, but of course, I'm not going to say that, because that might make <u>me</u> look stupid." So the judge sits there and smiles, while you go on arguing -- and nothing has happened. Think about that when you argue. The point is not to deliver a speech, particularly one which no one can follow. The point is to engage, and hopefully to persuade, the court.

One justice has cited four basic characteristics of good oral argument. They're as good as any I've heard. You might make a note of them. One is selectivity. The second is simplicity, the third is candor, and the fourth is resilience. Selectivity, simplicity, candor, and resilience: we'll talk about each of them.

Good argument is simple, intelligent, clear, easy to follow. It's a roadmap to the court. You can just follow along with counsel and see exactly where he wants to take you. I sat on a moot court competition two weeks ago at Boalt and watched a young man do that brilliantly with statutory interpretation. I don't know how well you do on reading statutes. I'm not too bad on cases, but I'm terrible on statutes. It's just impossible to figure out what the damn things say, and even worse to follow them when they are being reviewed orally. This young man had the ability to take the most complicated statutes and explain them in a way that I could follow perfectly. In good argument you might hear something which sounds like: "Well, counsel, does

this statute have any relevance to our case?" "Yes, your Honor, it does. Section 473, as you know, prohibits the blowing of soap bubbles in Berkeley. The demonstration in question took place on the U.C. campus, which is in Berkeley. Therefore, pursuant to the statute the blowing of soap bubbles at the demonstration was unlawful." Hear the clarity. Counsel has set forth the statute and the application of the statute to the facts of his case, and everyone could stay with him. That's very hard to do.

There are two essential components to effective oral argument. The first is experience, the second is preparation. You ask what good does it do for me to tell you that you need experience, when you're about to do your first argument and obviously don't have any. Well, you have to do the best you can wherever you are at the time. Experience takes practice and time. You should not assume that it is easy to do good oral argument. It isn't. You can't acquire the skill overnight. And if you don't use it once you've acquired it, you will get rusty. But if you take argument seriously, and in each one try to do the best you can and afterwards analyze what you did wrong, you will eventually become at least competent.

As you approach each case, the only thing you can do is prepare. Preparation is essential. Pasteur wrote that "chance favors the prepared mind," and what you are doing in preparing for your oral argument is minimizing the risks, minimizing the unpredictability of what may occur in actual argument. By preparation I mean far more than reviewing the major cases the night before you argue.

The single most effective way to prepre is a moot court. That may sound strange to you, because you would be moot courting for a moot court. We encourage attorneys in our office to have a moot court session before argument, particularly in a major case. No matter how good you are, you cannot presume to walk in untested and argue a case to a sophisticated court. I urge you to make it a practice to have a moot court session at least three days before you argue.

There are different types of moot courts. I call them "soft" and "hard". People have personal preferences. Some people like "soft" moot courts. They are more collegial. You sit around and discuss the case. It works pretty well for experienced attorneys, and it's not too hard on the nerves. I prefer "hard" moot courts, where you have to stand up in front of two or three of your colleagues and answer questions as if you were in an actual courtroom setting. That's when the adrenalin starts flowing and you have the challenge of trying to answer questions under fire. The people who will help you prepare are not those who ask you easy questions. You don't need that. What you need are people who are willing to take the time

to read the briefs and some of the cases, and to ask you questions which are harder than any you will be asked by the court: questions which raise your opponent's strongest arguments, those key points on which it is likely the case will turn.

When faced with these difficult questions, you may feel a natural resentment toward the people asking them. Try to get past that. Don't resent the questions. Welcome them, because they prepare you for the ordeal to come. After a good moot courting, you will probably come away feeling, "Good Lord, I don't know anything. I can't do this. I don't understand the law. I don't understand how it fits together. I am not worthy." If it's any solace to you, I had similar feelings when I first started ten years ago, and I still have them.

Now we go back to why I urged you to do your moot court at least three days before your argument. If you do your practice the night before, you will only have succeeded in reducing yourself to quivering jelly, with no opportunity to do anything about it before your argument. That is just destructive. Instead, you want an early moot court at which you, or preferably the judges, make a list of all the things you don't know, all the authority you weren't aware of, all the things you need to research before actual argument. Then use your time to pull it together, so that by argument you have covered all the weaknesses that came out at the practice session. It is surprising how often we realize only very late in the game, perhaps just before or even during oral argument, what our case is really about. I know that sounds strange. But at some point after you have filtered through all the preparation and briefing, it all crystallizes and you realize where the case will actually turn. Unless you're much more prepared than most attorneys, that probably won't happen until shortly before you argue the case. The moot court session is very valuable for doing that. In the process of reading the record and writing the briefs, we tend to lose sight of the fact that most cases will ultimately turn on one or two key, and often rather subtle, points. Often these will have more to do with procedural matters than with substantive law. The case may go off on subtle variations you never contemplated way back at the start, when your focus was primarily on the substantive issue presented. When you understand, finally, where your case really hinges, you will be prepared, and you will have overcome that sense of terror you would otherwise feel.

Now I think I'm supposed to give you some "how-to"'s in this lecture, and I will do that. But I would like to introduce them with this perspective: we usually get a series of how-to's like: "Don't wear a pink tie to court." Which is true. But I would ask you to think about these how-to's from the broader perspective of cognitive principles and a body of

knowledge we sometimes call "rhetoric". This perspective is more psychological and has to do with the process of communication, which in turn has to do with transmitting and receiving signals, and with coding and de-coding information. Because, of course, what we are about when we argue is transmitting information: from us to a court we are trying to influence. I find it helpful to think about that process as involving two components: the first is communication, and the second is persuasion. Persuasion is the goal, but if you have not succeeded in simply communicating your message from transmitter to receiver, you obviously are not going to succeed in persuading the receiver. Many of the things I will discuss are really obstacles to the transmission and reception of signals. It is then helpful to realize that the reason why you don't wear a pink tie to court is not so much because it is a breach of decorum and tacky, as it is that when a judge looks out and sees only the damn pink tie, it is hard for him to think about what you are saying.

If you have a chance, take a look at a little book called "The Art of Persuasion" by Minnick. It talks about communication and provides a useful perspective on the process.

You must be familiar with the record in your case. That is the thing you can know better than anyone else. Judges know the law, more or less, but <u>you</u> know -- or should know -- the facts of your case. The trouble is that you read the record a year and a half ago when you briefed the case. Suddenly one day you get a notice that it's calendared for argument, and you haven't looked at it in months. You must go back and familiarize yourself with the record, either by reviewing an elaborate set of transcript notes, if you have them, or by actually re-reading the record. Otherwise, with a well-prepared court you could find yourself in the embarrassing position that the justices know more about the record than you do -- which is a cardinal sin.

It is imperative that you shepardize the cases cited in your brief before you argue. "Everyone knows that," you say. But not everyone does it. You wrote your brief a year ago. You were on top of the law, and when you filed the brief it was a magnum opus. With a busy law practice you haven't thought about it much since, because you've been representing other clients. Then suddenly you have to argue the case, and you pull out the brief and look through it and say, "Yup, it's just as brilliant as I remember it. I'm ready to go." What you don't know is whether the law has changed since then. There may have been several new cases, or a change in the statute, of which you are unaware. By not shepardizing your cases, you have increased the chances that someone will ask you a question at oral argument for which you have no answer whatsoever.

Cases often involve exhibits. If you want the court to look at an exhibit, you have to get the exhibit to the court. Trivial, but people neglect to do it. The exhibit is in the trial court, the appellate court is over here. There's a procedure for asking that the exhibits be transmitted to the appellate court, but you have to ask, and then you have to check that the exhibit actually made it there.

What do you do to prepare your argument? Obviously you don't memorize your argument. Obviously you won't read your argument. You need to work out your presentation. I focus on two things. First, what am I trying to say? I think about the problem. What do I want, and why? Second, I focus on timing. The first time you practice your argument, it takes two hours to deliver. The most an appellate court will give you is thirty minutes, and in the Court of Appeal in California you are lucky to get ten. If your argument is not pared down to that time scale, you will never get through it. You must rehearse it two or three times just to whittle it down to size. I concentrate on the transitions: the moving from topic A to topic B. How do I avoid those seemingly endless pauses where I'm fumbling around and don't know how to wrap up what I've finished to move on to something else? Prepare a series of devices to get you through those moments of panic. They're really quite simple: "Therefore, your Honors, we have established our first proposition, and we now move to the next consideration." Something simple like that is just enough to get you over the hump, but you need to work it through ahead of time to make it all fit together.

You need an outline of your argument. Some people think they can wing it without one; I think you're a fool to try. You may lose your place in the middle, particularly if there has been vigorous questioning from the court, and you need something to come back to. By an outline, I mean something simple, with large type, that you can glance at while you're up there, because you don't have time to read anything more elaborate. When people first do oral argument, they bring books, clutters of paper, and cases to the podium. You learn very quickly that you don't have the faintest chance of using any of it. All I bring is an outline; sometimes I have digests of the major cases on cards. I bring the briefs, perhaps a quotation I want to read -- and that's all, because nothing else would be of any use to me.

This too may sound trivial, but I suggest you plan to arrive at your argument early. I live in Berkeley; the court is in San Francisco. The argument is at 9:30, so I figure that if I leave at 8:45, I'll have plenty of time. But I didn't count on a traffic jam, and I end up stuck on the bridge getting madder and madder, and by the time I get to court I'm a wreck. The solution is simple: just plan to arrive an hour early, then go have coffee near the courthouse. You'll feel better.

When you start your argument, it is imperative that you start strong. The first words out of your mouth make a big impression. Judges have long calendars, they're bored, and they think they've heard it all. If your start indicates that your argument will be boring, they turn off. So you need to have your introduction worked out, and I suggest that you memorize it. Know what you're going to say for the first thirty seconds, just to get off the ground and over your initial sense of terror.

You must be selective in what you argue. That was the first principle of good argument. You cannot argue everything. There simply isn't time, and even if there were, you shouldn't do it. Yet lawyers get up and indicate they are about to regurgitate the brief. It's painful to watch. As soon as they say, "In the brief, your Honor, we had four contentions; they are. . .," everyone groans. They know what's coming. The brief is coming, and they've read the brief. You can't do that, or if you do, at least don't tip the court off, because it won't bother to listen. You have to sneak it in.

Avoid anything distracting to your presentation. The reason has to do with the transmitting and receiving of signals: the pink tie, fumbling through papers, awkward mannerisms, anything that deflects the court from listening to what you are saying. That includes being irritating, or condescending, or insulting. Sometimes we don't realize how obnoxious we lawyers are. We can be insufferable. We think, "I was No. 1 in my high school class, and I went to Stanford Law School, and I'm going to tell you what this case is all about." Now the judges also went to Stanford Law School, or if they didn't, so much the worse for you. If you run that number, which we do so well, everyone will hate your guts and want to kill you for it. Tone it down as best you can, which isn't easy.

You must avoid being contemptuous toward opposing counsel. Very tacky, and done all the time. Sooner or later you might get to know the other person, and even deal with that person over a period of time. It would be nice to have a decent working relationship. You also have to avoid insulting the judge in the court below whose order you're appealing. Although you may think that the ruling was incredibly stupid and that the fool obviously didn't know the law, what you may not know is that the dumb judge in the court below also plays tennis with the judges before whom you are arguing. You will unwittingly succeed in alienating everyone when you attack that judge personally.

I would suggest that in argument you generally adopt the kind of thoughtful tone you would extend to a senior colleague in your law firm, someone to whom you are explaining a project you had worked on extensively, to whom you want to give the benefit of your work, and whose judgment you respect.

You need a working model of the court you're addressing. Sometimes we don't think about that, because when we think about oral argument we tend to think about ourselves, when we ought to be thinking about the judges we are trying to persuade. To whom am I talking? My working model is that most judges are pretty bright and pretty unprepared. Of course, I adjust the model to fit the particular court, or to what I see when I get into argument. Sometimes I'm surprised.

Remember that judges are generalists. Although you may specialize in one area of the law, judges -- unless they're bankruptcy judges -- handle cases in all areas of the law. Most judges have to hear ten or twelve separate matters in a morning. It is hard for them to be on top of every dispute and to keep up with what the lawyers are saying. In some graceful way, you need to bring the judges along. You say things like, "As the court will recall" and then you review the key facts of your case. Or, "As the decision in Case X indicates, . . ." You bring the judges along with you, so they're not sitting there thinking, "I don't know what this person is talking about."

Begin by telling the court what your case is about and what you intend to argue. I usually tell the court what the key issues are. After I say what I intend to argue, I then proceed to argue it, and when I get done I summarize what I have argued. The emphasis and repetition solidifies the argument in a judge's mind. Ask yourself what you remember about an oral argument you heard a day or a week ago. Usually nothing. You need the reinforcement so the judge retains the essence of your position when he or she leaves the bench.

Have a conclusion, so you don't just fade away at the end. You can end by summing up what you've said, and telling the court what you want. That's something many attorneys don't do, perhaps because they have never really figured out what they want. That principle applies not only to oral argument, but to lawyering in general, and probably to the way we lead our lives. We run around like crazy, and we may never know what we really want. When you litigate cases, it's real important to figure out with your client, who may not know either, what he or she is really after. What are you asking the court to do? What is the bottom line? At the end of your argument you ought to tell the court precisely what you are asking it to do.

When you have finished with what you set out to say, what do you do? You asked for twenty-five minutes, and you've only used twenty. What then? I sit down. I stop. If I've said my piece, and answered any questions from the court, I quit. Everyone will be delighted that I left the podium a little early.

Your argument is not supposed to be the delivery of a speech, but rather a conversation with the court. "Conversation"

conveys a sense of what the process should be. That means you want to welcome, to encourage questions from the court. One way you do that is by leaving little pauses in your argument to provide an opportunity for the justices to ask you a question should they wish to. Some lawyers machine-gun along, and no judge could ever get a word in if he wanted to.

Unless you're awfully good at it, I would suggest you avoid any rhetorical flourishes or bombast in your speaking style. The people who are best at argument are very casual, very easy. They look like they're just there talking with the court, giving the court the benefit of their thinking, and available for questions.

When the court does ask you a question, you must respond to it. Lawyers say things like "I'm coming to that later, your Honor," -- which is another sin of argument. When the court asks a question, you must answer it then, because the court is interested in it then. If you defer answering, you may never get back to it.

One of the best answers to keep in mind is a very simple one. Only three words. "I don't know." If you want to embellish it a little, you can add a comma and a "Your Honor" so it sounds a little better: "I don't know, your Honor." That answer does not stab anyone in the mind. If I'm sitting up there as a judge, and I don't know the answer to a question, and the attorney says "I don't know the answer either," the reply doesn't cause me any pain. The attorney doesn't know any more than I do. What hurts a whole lot is when the attorney starts dancing around in reply. I'm sitting there listening, trying to follow, because I was really interested in the answer to the question. After a while I catch on that what's coming out is garbage, only it took me three minutes to figure that out, and then I resent the attorney for making me go through that, when he could have just said, "I don't know."

It is important to remember which forum you are in, which court you are speaking to. Are you talking to an intermediate court, which basically is going to follow precedent, or to a high court, which makes policy. You have to distinguish. Lawyers continually slide over that little difference -- which is really a very big difference -- between the word "should" and the word "must." Are you telling the court that they "must" do something because as a lower court they must follow controlling precedent? Or are you saying that the court "should" do it for some policy consideration?

You must also distinguish between the "tone" or "atmosphere" of courts. Your argument to the Court of Appeal in California will be vastly different from your argument to the California Supreme Court. In the Supreme Court you are entitled

to thirty minutes for argument. If you ask for thirty, you get thirty. You may bomb for thirty minutes, but no one will make you sit down. In the Court of Appeal, the calendar is longer and the time is unstructured. The court is usually trying to move you along and off the podium. So you have to tailor your argument there to five or ten minutes, to fit the framework of that court. A more formal, lengthy presentation will seem out of place.

Be precise in the words you use. Any time you are sloppy, or worse yet, exaggerate your position, you just invite the judges to jump all over you: "Do you mean to say, Counsel, that . . .?" If you're subtle, if you understate, you're much less likely to invite that kind of attack.

I want to give you an example of two possible responses to questioning from the court to help you understand why one works a lot better than the other. Imagine that you have just given a brilliant explanation of some legal point, and the court asks you a really dumb question. What do you do? One possible response is, "Perhaps the Court did not understand my explanation. I will repeat it." Sounds bad, doesn't it -- yet you hear it said. A second response might be, "I am sorry my explanation was unclear. Allow me to try again." Now both of those answers can be delivered in a calm respectful tone, and yet, as you perceive, there is all the difference in the world between them.

The conventional wisdom is that the second response is the correct response, and it is. It is believed to be the correct response for reasons of courtroom etiquette: it's insulting to suggest to the court that it didn't understand what you said, and it's better for you to accept the responsibility for the confusion than to insult the court. That's true, but there is another reason why the second response is preferable.

Think about the intended receiver of your explanation. The judge has just asked a dumb question. If your answer, in one way or another, communicates the message, "Boy, was that a dumb question," the judge is likely to feel embarrassed. At that point he realizes that he has committed this terrible gaffe in public. Now if your judge is a saint, it won't bother him one bit. He will not worry that he has asked a dumb question; he's above all that. But most judges aren't above all that. They're just people, and they don't like to make fools of themselves in public -- just like you don't like to make a fool of yourself. If your response is, "I don't think the court understood my explanation," the judge may be so busy protecting his ego that he will not be listening to your answer. He'll be trying to formulate a second question down the line which will make it look like he really did understand, even though he didn't, or he'll be trying to figure out some way to pay you

back for what you just did to him. Even worse, you will discourage further questions from the bench, because some judges will not run the ego risk. You increase the possibility of questions if you make it clear that the judges can ask anything they want and you will not embarrass them.

In the process of being polite and respectful to the court, as you should be, you must not allow yourself to be intimidated. The court has a calendar and wants to move the case along. You have to decide if you have something important enough to say that you need to keep going. Use your judgment. If something needs to be said, then just stand up there and stay with it. Take the time that you need, even if the court is crowding you.

Resilience. You will go through points in your argument where you will almost fall off the high wire -- where you fumble over a hard question and realize your answer is not very satisfactory. Do not let that be the end of your argument. There is a tendency for people to get discouraged, to become deflated; when that happens they mutter something like, "Well, um, that's all I have, your Honors," and sit down. That's wrong. You may have made a mistake, or been unable to respond, but there's more to the case than that. Try to recoup your losses. Always have a punt of some kind ready. When the question comes that you didn't anticipate, and can't come up with a rapid reply, say something like, "Your Honor, I did not brief that point. May I have five days to submit a supplemental letter brief to the court?" Now you can't make your whole argument a series of "May I submit a supplemental brief?"s, but that's available to you once or twice if you need it.

You should always know your fall-back position. What is the least that you will take? What is the most you are prepared to concede, what is it that you cannot concede because if you do you have tunneled your whole case? Be very wary of making explicit concessions at argument that you haven't had time to reflect on. They will come back to haunt you.

The most persuasive quality you can have as an advocate is professional sincerity, a sense of candor and integrity that the court recognizes and respects. We are all much more likely to accept information from a source we believe to be reliable and trustworthy. If the court feels that you are being candid, that you are not cutting corners, that you are describing cases fairly and informing it of adverse authority, it will be much more disposed to accept your arguments.

Above all, be interesting. The worst thing in the world is to sit on the bench and listen to boring argument. In our seminar we've been doing demonstration arguments with students as judges, just so they can see what it's like to be on the other side.

Last point. Many of us experience what I describe as post-argument depression. I don't mean the mortification that comes from having made a fool of yourself in front of your peers. Assume you did fine. You stood up there, you answered the court's questions, it seemed to go pretty smoothly. You walk out of court, and after the adrenalin stops flowing you feel depressed, and you don't know why. Whatever it was that you expected to happen in the courtroom, didn't. Then it's months before you get a decision, and somehow it all seems to fizzle out.

I would suggest that one reason for the depression may be that we haven't thought very much about what we really expect to happen. If you expected that at the end of your argument the bench was going to get up and applaud, you're going to be disappointed -- because that doesn't happen very often. What was supposed to happen was that you were to be intelligent and persuasive. And you were. You were helpful to the court. The case may or may not come out your way, but you fulfilled an important function. If you understand that, you won't feel so let down when you walk out of court.

It is important to distinguish between matters that you can control and matters that are beyond your control. Lawyers tend to get ulcers over things they simply cannot control. In your moot court problems, keep in mind that some fiend designed the problem, not you. You didn't make the facts of your case, and you didn't even choose which side you would argue. And in court someone else decides the case. It is pointless to torture yourself because you did not win a case that was not, and perhaps could not, be won. You argue as effectively as you can on behalf of your client. When you have done that, and lost, you go on to something else without regrets -- because losing was not your fault. That may seem trivial, but along the way we often forget it. When we do, we erode the satisfaction we should get from our work.

We should not minimize our sense of accomplishment from doing something well. If you can skillfully argue a case to an appellate court, that is a real accomplishment. Really good argument looks so easy it's deceptive. It's so low-key, it seems effortless. Watching it, you might think, "That must be easy to do." It is not. If it's easy, how come so few people do it well? If you are gifted enough to be one of those people who do it well, don't minimize the satisfaction you derive from doing it. That is one of the rewards of your professional career. It is a real accomplishment to be able to get up in front of intelligent, sophisticated people for half an hour, and not merely keep the ball in the air but have something worth-while to say about a matter of importance. If you are able to do that, you have good reason to feel very pleased with yourself.

I wish all of you good luck in the ordeal to come.