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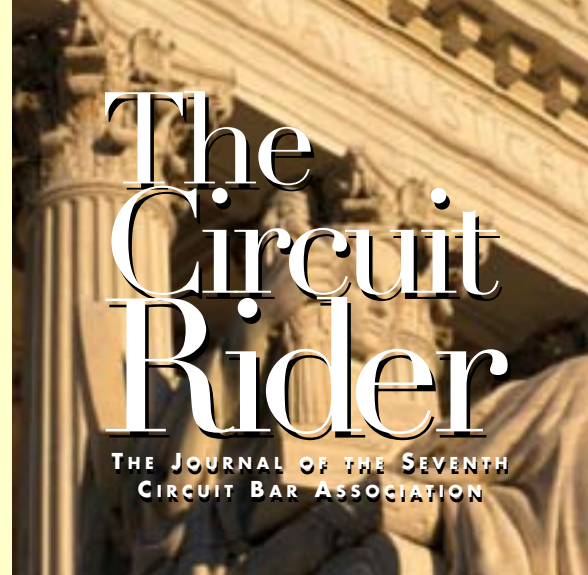
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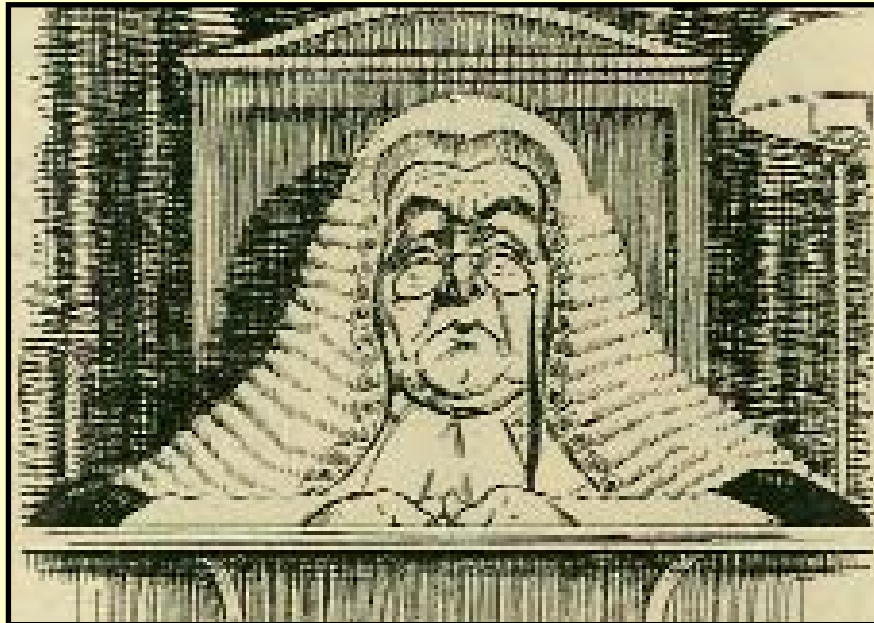
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JUDGES, JURIES, AND  
*Je ne sais quoi*





OTHER MINDS:  
*The Use and Uses of*  
Oral Argument

By Barry Sullivan <sup>1</sup>

*Bunting was not an eloquent speaker. . . . [U]nlike Harry who could speak in many manners, and in all of them give the impression of naturalness and simplicity, Bunting had only one manner, and he unselfconsciously was natural and simple. Along with the virtue, he had the vice of unselfconsciousness. Absorbed in what he wished to say, he never thought of standing off and looking at himself to see how he was doing, or of asking himself if this was the way he would like to be talked to.*

James Gould Cozzens, *The Just and the Unjust* 360 (1942)

*[I]f I appear to overrate trifles, remember that a multitude of small perfections helps to set mastery of the art of advocacy apart from its counterfeit -- mere forensic fluency.*

Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 ABA J 801, 801 (1951)

These are the words of two giants of the mid-twentieth century about the work of oral advocacy. James Gould Cozzens was not a lawyer, but a novelist who wrote insightfully about the work and lives of lawyers. The critic Joseph Epstein has called Cozzens “the best American writer about lawyers,” one who wrote “with a genuine understanding of the inner drama of the legal life as one carrying a heavy burden of moral responsibility.” Robert H. Jackson, of course, was a great Supreme Court justice, but he was also a great Supreme Court advocate before that. Such was Jackson’s skill as an advocate that Justice Brandeis facetiously suggested that Jackson should be made “Solicitor General for life.” There is not much that one can add to their insights about the work of oral advocacy. One can only show how and why they were right in what they said. One can only elaborate upon their themes.

Of course, oral advocacy takes many forms. Cozzens, who is reflecting on the presentation of jury arguments, describes the advocate’s challenge in terms of being able to stand aside and ask whether “this [is] the way he would like to be talked to.” Jackson, who is discussing the specific challenges of Supreme Court advocacy, is at pains to distinguish between “mastery of the art of advocacy” and “mere forensic fluency.” The success of an oral argument is measured not by whether the speaker is fluent, but by whether the listener is persuaded.

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## The Use and Uses of Oral Argument *Continued from page 11*

The contexts described by Cozzens and Jackson are different in several ways, most notably with respect to the situations of the respective listeners and the special conventions of persuasion applicable to each. For example, jurors generally cannot ask questions. They cannot convey their concerns or reservations to the advocates who seek to persuade them; they cannot tell the advocates what is on their minds. By contrast, appellate judges typically ask questions, and they often do so strategically. Appellate judges tell the advocates what is on their minds, but what they say often requires interpretation. For example, some questions are meant as much for another judge's consideration as for counsel's; the answer may or may not matter.

In essence, Cozzens's and Jackson's observations about oral advocacy rest on the same foundation. Their fundamental text is the same: Oral advocacy is not about oratory or making a "good speech." Oral advocacy is about persuasion, which entails communication, listening, interaction, and real dialogue. The advocate should know as much as he possibly can about his audience and their likely concerns; he should know how much time he will have; and he should be realistic about what he reasonably can hope to accomplish. In a jury trial, the advocate must work hard to imagine what is on the jurors' minds. In appellate advocacy, the advocate must work hard to listen to the judges, to understand what is on their minds. The basic task of oral advocacy, like all advocacy, is to reach another human mind, and to persuade that mind, as Kenneth S. Geller has suggested, that "the world will be a better place," in some way, large or small, if the advocate's view of the facts and law prevails. (Stephen M. Shapiro, *Oral Argument in the Supreme Court of the United States*, 33 *Cath. U. L. Rev.* 529, 538 (1984).) That requires knowing the facts and the law of the case, understanding the equities, and then stepping aside to ask how you "would like to be talked to."

This all seems straightforward. So why do appellate judges, in moments of candor, complain about the general quality of oral arguments? Why do we see so many oral arguments that fall short of the mark? I think there are basically two reasons. The first is that many appellate advocates do not take the purpose

and possibilities of oral argument seriously enough. For them, the role of oral argument in the decision of an appeal is analogous to that of the appendix in the physiology of the human body. Perhaps it once served a purpose, but now its only function is to cause pain. The second reason is related to the first, namely, that many advocates, because they do not take seriously the role of oral argument in the appellate process, do not see the need to think strategically about what they might hope to accomplish at oral argument, and how best to accomplish it. They forget that the purpose of oral argument is persuasion, and that persuasion requires being attentive both to one's listener and her concerns and to one's own concerns. I would like to say something about both of those points.



First, the notion that oral argument lacks importance in contemporary appellate practice may be wrong-headed, but many lawyers (and some judges) have long accepted it. More than 50 years ago, for example, Justice John Marshall Harlan described the prevailing view of the New York trial bar, during his years in practice, as one that attributed little importance to oral argument in "the hard business of decision." (John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 *Corn. L. Q.* 6 (1955).) That view may be rooted in lawyers' nostalgia for the "good old days," when the importance of oral argument seemingly was confirmed by the fact that several days were often devoted to it, or it may simply reflect the lawyer's insight that human beings grasp complex ideas better by reading rather than by listening.

Lawyers are conditioned by many aspects of contemporary legal practice to accept the view that it is the briefing of a case, not the oral argument, which matters. For example, lawyers will not infrequently hear judges say that they have never changed their minds about a case based on oral argument. Moreover, in many trial courts, judges with heavy dockets routinely decide dispositive motions in complex cases without oral argument. Others allow oral argument, but then proceed to read lengthy, written opinions into the record as soon as the argument is over. The judge may have intended to test the validity of her conclusions one last time, but lawyers are likely to perceive the argument in such circumstances as empty ritual.



## The Use *and* Uses of Oral Argument *Continued from page 12*

More important, the practice of appellate courts has changed significantly in the past half-century. As appellate courts strove to deal with their own burgeoning caseloads, they responded in two ways: deciding many cases without oral argument, and allocating less oral argument time to most of the rest. Both changes initially evoked strong reactions from members of the bar, some of whom viewed the presentation of oral argument in every appeal (for at least a half hour to the side) as a right enshrined in Magna Carta. That time has passed, and most lawyers now recognize the need for one or both reforms. However, it seems inevitable that many should come to doubt the importance of oral argument in a world in which many cases are decided without it and only a few minutes are allocated to most of the cases that make the cut.

That doubt will also serve to reinforce the wrong-headed view of many lawyers that the appellate brief is everything. Clearly, briefs are important. In most cases in many courts, there will be no oral argument, and the briefs *will* be everything. In such cases (assuming proper selection), there is nothing more to be said for one side or the other, and the path of decision will be obvious. There is nothing to be gained from oral argument. By the same token, if one or more presumably competent and experienced judges or court officials have determined that a particular case warrants oral argument (even a short one), that fact should suggest to both advocates that there is work to be done, and something to be accomplished, at oral argument.

Whether the briefs or the oral arguments are more important is a false question. They serve different purposes. This is not the place to assay the good brief or attempt to distinguish the good from the bad. Obviously, the brief has many purposes, and some are accomplished more easily than others. But the best of all briefs cannot possibly anticipate all of the concerns or questions that a judge may have in a difficult or complex case. A good brief can come close, but it will never totally succeed. It cannot be as fully interactive as an oral argument. If there is a point to oral argument in contemporary appellate practice (as I think there is), it is this: the oral argument provides human minds (those of advocates and judges), confronted with an important question, the opportunity to consider that question together by engaging each other as directly and immediately as is humanly possible. The judge can make clear her concerns, and the advocate can do his best to explain his side of the case. For zealous, trustworthy advocates and fair-minded, impartial judges, the benefit afforded by that opportunity cannot be overemphasized.

Second, if one does understand the importance of oral argument, and the role that it plays in the decision of an appeal, how does one prepare and present an effective argument? I would answer that question by returning to my central theme: the goal of oral argument is to persuade the court. (I would add an obvious corollary: the goal of oral argument is not to make the advocate or his client “feel good.”) There are three essential conditions for meeting that goal.

The first -- and most important element -- is attitude. The central importance of attitude comes from the fact that all else follows from it. Obviously, an advocate must have a positive attitude about his case. He must believe in it. If he does not believe in his case, that will be obvious to the court, and they will not believe in it either. But attitude also requires more than that. The advocate must also manifest his belief in the importance of the process and of what he is doing. Justice Jackson put it succinctly: “If making an argument is not a great day in your life, don’t make it; and, if it is, give it everything in you.” In other words, the advocate should give the argument, not because his client expects it, or because his stature in the firm demands it, but simply because he cannot imagine anything that he would rather do than argue this appeal to this court on the appointed day. If he is able to think of something he would rather do, he should go and do it. As for the argument, he should stand aside and make room at the podium for someone who will approach the work with the mental attitude it requires.

If the court has allocated only a brief time for the argument, it may seem tempting to try and “wing” it. If that is the case, the advocate should think again. If he is tempted to read into the time allotment a lack of interest or even prejudice on the part of the court, he will do his client -- and himself -- no service by “going through the motions.” He should save himself the embarrassment. Even if the performance is not memorable to him, the court will remember. The judges will dread to see his shadow cross the podium in the future. He should stand aside and let a real lawyer argue the case. Those who allocate time are not infallible. There may be more to the case than appeared to them at first blush. In any event, there is hard work to be done if the client is to receive her due. As Justice Jackson also said, “the shorter the time, the more precious is each minute.”

The second element is good preparation. That means as thorough a mastery of the facts and the law as possible. It means going beyond the briefs to think critically about your strongest and weakest points, about those of your opponent, and about what a judge would need to understand to want to rule in your favor. In this respect, the ideal might be described as never being asked a question at oral argument that you have not already considered yourself.

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## The Use *and* Uses of Oral Argument *Continued from page 13*

As a general matter, we tend to make more points than we should in our briefs. For oral argument, you obviously need to be prepared to answer questions on all of those points. But there is nothing less persuasive than an oral argument that tries to make too many points or discusses too many facts. You must choose one or two points for your affirmative presentation. Whatever questions you are asked, those are the points that you know you need to make, in one form or another, to advance your case at oral argument. With respect to those key points, good preparation also means thinking about them (and the case) in a new way, with the objective of distilling your core points in an even more effective way than you did in your briefs. Often, if this process is successful, you will discover a memorable way of describing the problem and its proper resolution, one that the court will remember and want to use in its opinion. It will serve the same purpose as the “opinion kernel” that Karl Llewellyn thought essential for a good brief.

By the time a case approaches the oral argument stage, there is often a staggering amount of paper. There may be 15 or 20 briefs and an extensive record in a truly important case. If different parties take different views as to what the controlling legal issues are, there may be a truly staggering number of authorities cited in the briefs. An advocate must be able to answer questions about any of those materials, but he cannot know all of them by heart. Good preparation means having a system in place that allows you -- without awkwardness or disruption -- to pull up any factual or legal material that you might need to consult during the argument.

Good preparation also means knowing as much as possible about the court, its jurisprudence, and its work habits. Do they say they have read the briefs, but assign the opinion before the argument, so that there may be only one judge who is thoroughly familiar with the case? How many cases do they hear in a day or a sitting? Perhaps all of the judges will have read the briefs, but, given the number of briefs they read, they may need to have their recollections refreshed. How does one do that without seeming to disregard the court’s injunction to assume that they are thoroughly familiar with the briefs? How do the judges behave at oral argument? Do they ask a lot of questions? Do some of the judges show their hands? Do some pride themselves on pressing both sides as rigorously as they possibly can? Is it their practice to leave the bench during argument? Are they known to lengthen or shorten the time set for argument on the day of argument? Some of these questions point to potentially sensitive matters that must be considered long before you enter the courtroom.

The third element is the actual presentation of the argument. I will not repeat what has been said better by others. But a few points are in order. If your preparation has been thorough, you will have a plan for oral argument. You will know both what you hope to accomplish and what you need to accomplish. You will have a detailed plan for accomplishing the goals you have set. You will also have a good idea of what your opponent will argue, and you will have thought through the issues that are likely to be important to the judges. You also know that things seldom go according to plan, and you will have learned your case so well that you are prepared for any contingency. If the court is more interested in your second point than your first, you can accommodate the court’s priorities without the least awkwardness. You will be flexible in terms of organization, but steadfast in making the points you know you need to make. You will neither resist the friendly question nor grasp the nettle of the needless concession. You will be respectful, but firm.

You will be ready for the conversation. Just as you will have certain things you wish to say, you know that some or all of the judges will have certain things they wish to say. You are prepared to listen carefully because this is your opportunity to hear what may be on the judges’ minds. To use John W. Davis’s simile, this is the only time during the appellate process when the “fishes speak.” John W. Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895 (1940)(“[S]upposing fishes had the gift of speech, who would listen to a fisherman’s weary discourse on flycasting, the shape and color of the fly, the size of the tackle... and all the other tiresome stuff that fishermen talked about if the fish himself could be induced to give his views on the most effective methods of approach? For after all, it is the fish that the angler is after and all his recondite learning is but the hopeful means to that end.”).

Of course, different fishes have different minds, and one fish may not speak for all. What is of interest and concern to the fish who speaks most may be less important than a tangent to the two who remain mute. That, of course, is one of the shoals to be navigated. Finally, it bears repeating that oral argument is also the only time the judges have to hear directly from the advocates, face-to-face, about what the advocates think are the most important points in the case and how those points should be resolved. This is no time to give an oral recitation of your brief or to try and make things even more complicated than you put them in your brief. This is the time to be as simple and as direct as you can. This is the time to explain how the world can be a better place, by a little or a lot, depending on the case. When you have done that, as others have said, sit down.