



PROGRAM MATERIALS
Program #32221
November 9, 2022

Practical Tidbits on the Rebuttal Appellate Argument

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Some Practical Tidbits on the Rebuttal Appellate Argument

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What is Oral Argument?

- Oral argument is an opportunity
- You have a defined time in which to clarify important points and to convey what you view to be the most important points about your argument
- You will weave these themes and points into your narrative and in response to the panel's questions
- Some time has passed since the briefing, review the briefs, re-think your approach and distill important themes
- Check to see whether any new case law has developed that you should raise with the panel

A Little Bit About Your Opening Argument

- Be thoroughly prepared
- Know your arguments and the case law thoroughly
- Explain why your side should prevail, not why the other side should lose because you will sound defensive
- Prepare your outline and have notes but do not read
- Be mindful of being engaging and interesting in your presentation and speaking style
- PRACTICE before the oral argument and ask people you trust to moot you

Does Oral Argument Affect the Outcome of an Appeal?

- Chief Judge Rehnquist
- “[Oral argument] does make a difference I think that in a significant minority of the cases in which I have heard oral argument, I have left the bench feeling different about the case than I did when I came on the bench.”
- (Rehnquist, *The Supreme Court: How it was, How it is*, 276, (1987) cited in *Coffin on Appeal* at 135.

What Does a Judge Want From Oral Argument?

- Oral argument provides appellate judges an efficient way to increase their overall understanding of the case after reviewing the parties' submissions and the bench memorandum, prepared by staff
- Oral argument permits Judges to engage in a dialogue with counsel— as opposed to the monologue of the briefs
- Oral argument allows the judges to hone in on and clarify what is really in dispute. Judges like to dispose of appeals on as narrow a basis as possible
- Judges will want to know how your position stands up against existing legal precedent or a statutory scheme
- Judges like to question lawyers concerning the strongest points raised by the adverse party
- Oral argument presents an opportunity for appellate judges to learn about the views of colleagues, through their own questioning. It helps to prevent tunnel-vision

How to Navigate Oral Argument?

- Never respond to a judge's question by saying "I will get to it later in my argument" There probably will be no later for you!
- Always dress appropriately
- If a judge tries to pin you down to a YES or NO answer – provide it, but PIVOT- [importance of being able to Pivot to "Safer Grounds"]
- If you don't understand a judge's question, say so, ask for clarification
- If a judge's question stumps you, don't be afraid to answer "I don't understand your honor" but try not to say this more than one time during your argument!
- Don't use the phrase "with all due respect," it is not respectful
- Be careful about overstating the reach of authority you have cited

Important Considerations

- Questions by one judge could be a signal or message to another judge on the panel and may trigger dialogue on a particular point
- A judge might ask you a softball question, do not miss the opportunity to “knock it out of the park”
- Judges often proceed to a conference after oral argument and points that are raised during oral argument could be the subject of discussion among the judges during that conference

Pointers for your Oral Argument

- Know and understand the forum in which you are arguing in terms of how best to structure your oral argument
- Review the profiles, biographies and prior decisions of your panel
- Look at important recent legal developments from that court
- If available, watch recent oral arguments involving the court and your panel members
- Do not restate what is in your brief; the judges have read your brief
- Know your record
- Prepare to discuss the weak parts of your case, have a strategy for addressing them
- Do not rush through your oral argument but be mindful of your pace
- Take mental notes of what to address on reply, based on the questions you are asked

**Rebuttal Argument –
Why It Makes a
Difference and Why You
Should Take It
Seriously**

- The rebuttal is potentially pivotal in your appellate presentation
- It is your last word as the appellant to the panel and an effective presentation is critical to success on an appeal
- The rebuttal can be conceived of in advance but it will be crafted and honed as you are on your feet and presenting to the panel
- Spend time watching rebuttal arguments to understand techniques that are ones that you can incorporate into your appellate advocacy

What to Do at the Outset of the Appellate Argument

- Determine whether rebuttal is allowed in the jurisdiction in which you are arguing
- Be sure that you reserve some Rebuttal time, usually at the call of the calendar or at the outset of the argument
- Learn the rules of the court in advance to avoid figuring out, after the appellee finishes, that you may have waived your opportunity for Rebuttal

The Goal of the Rebuttal

- Practice is important and using your colleagues to “moot” you with a Rebuttal argument specifically in mind will serve you well in terms of practicing the consolidation of your thoughts and responses in the split second between your adversary concluding and you standing at the podium
- The Panel’s questioning can take the argument in unforeseen directions and the Rebuttal argument can re-focus your position and be the difference between winning and losing
- Rebuttal is a highly useful opportunity to address the concerns of the Panel as well as rebut the arguments of your adversary
- Preparation is key as is formulating and distilling down to a few short moments the parting thoughts you would like to leave with the Panel

How to Prepare

- Do prepare your main argument as an Appellant in advance by outlining important talking points
- Even prepare note cards of likely case summaries that you may be called upon to discuss during your initial oral argument
- Do not prepare your Rebuttal argument in advance by writing it out
- Jot down the broad outline of what your Rebuttal will consist of. We like to call them “Rebuttal Note Cards” and in an appropriate case, they may be useful
- Follow the arguments advanced in your adversary’s brief as to what your principal arguments will be
- But remember, your Rebuttal argument will be a work in progress, constructed during your adversary’s argument

What to Do While Your Adversary is Making Their Presentation

- Instead of a canned rebuttal argument, listen carefully to your adversary's argument and prepare to respond. If the arguments made are persuasive, you must respond to them.
- Remember, the rebuttal or counter argument involves acknowledging your adversary's position and then presenting your argument again – concisely, as the most logical and practical solution to the controversy.
- When your adversary is speaking, take notes even if you are emotionally spent from the rigors of your own argument.
- Keep track of the questions asked of your adversary by the panel – especially those that prompt an evasive response.
- These questions provide a fertile area for your Rebuttal.
- The best rebuttals answer questions that the judges directed at your opposing counsel.

During the Actual Rebuttal Argument

- Don't just walk through the points of your main argument again on Rebuttal or rehash exactly the same arguments as appeared in your briefing. You can assume that the Panel is well-versed in your written arguments and will not appreciate using valuable time to restating that which you have already explained
- Focusing on the Panel's questions provides you with a window into its thought process and should be used in framing your Rebuttal argument
- It can often be helpful to begin your Rebuttal by drawing on the last question asked of your adversary by the Panel. This technique can be a useful starting point to launch into addressing both the concerns of the Panel as well as a point addressed by your adversary
- Don't try to pepper your Rebuttal with references to every point raised by the appellee. If your Rebuttal consists of only responses to your adversary's arguments, you are promoting a defensive posture that doesn't auger well for success. You are lending credibility to your adversary's position and undermining your own
- Importantly, while responding to your adversary's points is necessary, remember that these responses should be structured along the lines of your original points or themes made in your opening arguments. You should try to weave your responses to your adversary's points into the themes advanced in your original argument. That way you are accentuating the positive thrust of your original argument and avoiding defensiveness
- If a judge asked both you and your adversary the same question, now on Rebuttal, you may be able to refine and improve upon your original response. Be alert to that possibility. Such a question is obviously of concern to at least that judge and perhaps the entire bench

CONCLUSION

- If your argument went well and your assessment is that the panel is skeptical of your adversary's position, be prepared in the event the Presiding Justice says: "Counselor, do we really need to hear any further argument?" - to respond, "Your Honors, Appellant waives Rebuttal"
- If you complete your Rebuttal argument and there are no further questions from the Panel, have the confidence to conclude and sit down, even before your time has elapsed
- The Panel will appreciate your giving them back the few remaining moments of your reserved time

Resources

- Title: Oral Argument: Easy Questions, Hard Questions
Be Prepared: APPELLATE PRACTICE: Oral Advocacy
New York Law Journal, August 22, 2022
Authors: David B. Saxe and James McCatterson
- Title: Practical Tidbits on the Rebuttal Appellate Argument
New York Law Journal, July 25, 2022
Authors: David B. Saxe and Danielle Lesser
- Title: Some Thoughts on Oral Advocacy: Some Old,
Some New
New York Law Journal, January 18, 2022
Authors: David B. Saxe and James McCatterson
- Title: The Appellant's End Game: Some thoughts on the
Reply Brief and the Rebuttal Argument
New York Law Journal, July 27, 2018
Authors: David B. Saxe and Y. David Scharf

Resources cont'd

- **Title:** Crafting an Influential and Effective Reply Brief
Appellate Issues, Council of Appellate Lawyers,
August 2012
Authors: Richard C. Kraus
- **Title:** Oral Argument: The Essential Guide
Stetson University School of Law
Institute for Advancement of Communications
Authors: Brooke J. Bowman; Kirsten K. Davis;
Lance N. Long; Jason S. Palmer; Stephanie A. Vaughn
- **Title:** How to Do Oral Argument
Cleveland–Marshall College of Law
Cleveland State University, April 1, 2008
Author: Karin Mika



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Danielle is an experienced trial attorney whose diverse practice involves all phases of litigation.

Successful Resolution of Complex Business Disputes. As Chair of the Business Litigation Department, Danielle leverages her extensive litigation experience to resolve a broad range of business, real estate, and employment-related disputes.

Clients hire Danielle because they want to “win.” She partners with clients to define “winning,” then develops a strategy and budget to make this happen. She collaborates to effectively litigate the matter through trial and appeal or resolves the matter before trial, if that is what the client and circumstances require.

Complex Civil Litigation Experience. Danielle litigates a wide range of complex cases in state and federal courts and in arbitration. She handles matters ranging from breach of contract, tortious interference with contract, fraud-based claims and claims arising under employment agreements. Danielle also regularly represents mezzanine borrowers to avoid UCC foreclosure sales and advises and litigates employment-related restrictive covenant issues. She handles all phases of litigation from pleading through trial and appeal.

Danielle represents publicly traded companies, privately held businesses, partnerships, LLCs, high net worth individuals across a number of industries ranging from real estate to consumer products.

Solving Retail Tenant Disputes. Danielle regularly represents retail and other tenants in their disputes with their landlords. She has litigated key lease terms commonly found in retail leases. When clients are concerned about their lease obligations and want to understand what rights they have under their leases, she can help them quickly investigate and formulate a plan of action.

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Professional Activities

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- Women in Law Section, New York State Bar Association, Executive Committee and Chair of the Partners' Committee
- New York Supreme Court Appellate Division, First Department, Departmental Disciplinary Committee, Member
- Litigation Counsel of America, Member
- The Webster Apartments, a non-profit residence for working women and students, Board Member
- Commercial and Federal Section, New York State Bar Association, Member
- “Pass the Torch” — Ceremony Congratulating Chief Judge Loretta Preska and Judge Colleen McMahon of the SDNY, April 20, 2016, Organizer
- Judicial Committee, “Program for State and Federal Judges on the Judicial Role in Selecting and Appointing of Fiduciaries, Monitors, Masters, and other Judicial Adjuncts,” April 21, 2015, Organizer
- “Meet the Chiefs” — Honoring the Four Women Chief Judges of SDNY and EDNY, March 4, 2015, Organizer

Recognition

- Martindale-Hubbell – AV Rated
- Adjunct Instructor - New York University School of Continuing and Professional Studies, Finance Department, Course: Negotiating Loan Documents - 2009 - present
- Program Chair and Lecturer - New York City Bar Association Continuing Legal Education Program, “What’s Involved in a Bank Financing” - 1998 - 2005



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Hon. David B. Saxe (Ret.), one of the most honored and respected members of New York's legal community, is a partner in the Alternative Dispute Resolution and Business Litigation Departments of Morrison Cohen and a former associate justice in the New York State Appellate Division, First Department. Having recently retired after 35 years on the bench, Justice Saxe is now a sought-after ADR professional, mediator, and strategic consultant. He brings an essential skill to the arbitral process - the ability determine a neutral, impartial, and dispassionate resolution to a complex problem fiercely advocated on both sides. As a longtime distinguished jurist who has heard thousands of disputes and dispositive motions and tried virtually every type of matter, Justice Saxe is entrusted by his clients to provide the same evenhanded impartiality to their cases that he employed in his career on the bench.

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Justice Saxe's ADR practice has a particular focus on resolving complex commercial, insurance, and real estate controversies, as well as high-end matrimonial-related disputes. He is involved in all manner of negotiations, disputes, debates, and legal proceedings. Whether serving as a mediator, arbitrator, or consultant, Justice Saxe offers impartial and meaningful solutions and unparalleled judicial insight in all of his clients' ADR matters.

As the leader of the firm's Appellate Practice, Justice Saxe provides consultation to clients and legal teams on strategy, trial preparation, and brief review in all jurisdictions. Having sat for 19 years on the most prestigious intermediate state appellate court in the United States, he provides a deep understanding and unique perspective on successfully navigating the litigation and appeals process. He is often hired by attorneys when going through an appeal in NY State Appellate Court to advise on presenting briefs and focusing appellate oral arguments for maximum effect.

Justice Saxe's clients benefit from his experience handling a wide range of appellate matters during his tenure on the appellate court, including contract issues, corporate finance, insurance and re-insurance matters, business torts, products liability, intellectual property, real property, land-use and zoning, labor and employment, environmental law, constitutional law and civil rights, matrimonial and family law matters, and probate issues.

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As head of the firm's Strategic Case Review Practice, Justice Saxe provides an impartial review from the perspective of an experienced judge on issues that are important to a judge and jury. He works with his clients and/or their legal team as a set of "fresh eyes" to review and analyze case strategy, papers, or case options.

Justice Saxe currently serves as a member of the Governor's Screening Committee for the Appellate Division, First Department, for which he vets judicial applicants for the court. He is a gifted and prolific writer and has been one of the most published jurists in New York State. His decisions, whether majority opinions, concurrences, or dissents are regularly cited by colleagues and often have been the subject of scholarly critiques.

Professional Activities

- American Bar Association
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- Martindale-Hubbell – AV Rated
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