What Part Does the Oral Argument Play in the Conduct of an Appeal

John M. Harlan

Follow this and additional works at: http://scholarship.law.cornell.edu/clr

Part of the Law Commons

Recommended Citation
John M. Harlan, What Part Does the Oral Argument Play in the Conduct of an Appeal, 41 Cornell L. Rev. 6 (1955)
Available at: http://scholarship.law.cornell.edu/clr/vol41/iss1/1

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
WHAT PART DOES THE ORAL ARGUMENT PLAY IN THE CONDUCT OF AN APPEAL?†

John M. Harlan*

The informal remarks I am about to make are on a subject which is very close to my heart, and which is of interest particularly to those members of the profession who are engaged in the strife of litigation. My subject is, what part does the oral argument play in the conduct of an appeal?

The subject is of interest to trial lawyers, because it is they who have to make the oral arguments, and it is of interest to judges, because it is they who have to listen to them. I think that from my own standpoint, having come very freshly from the trial bar to the Court, the subject has interested me peculiarly because the sixteen months since I left the active practice of law as a trial lawyer in New York City to become a member of the Court of Appeals of the Second Circuit have given me some opportunity to examine and test some of my preconceptions as a trial lawyer as to what part the oral argument should play in the conduct of appeals, against the part which, it seems to me, looking at it from the point of view of a Judge, it does play in the decision of appeals.

I think that there is some tendency at the trial bar—I speak particularly from my knowledge of the trial bar of New York—to regard the oral argument as little more than a traditionally tolerated part of the appellate process. The view is widespread that when a court comes to the hard business of decision, it is the briefs, and not the oral argument, which count. I think that view is a greatly mistaken one. It is quite different from the view at the English bar, for in England appeals are still heard only on oral argument, without the submission of any briefs.

I do not mean to suggest that briefs do not play an important part in the appellate process. They do, of course, particularly where the litigation is a complicated one. But I think that the lawyer who depreciates the oral argument as an effective instrument of appellate advocacy, and stakes all on his brief, is making a great mistake. There are several reasons for this.

First of all, judges have different work habits. There are some judges who listen better than they read and who are more receptive to the spoken than the written word./

† This article is part of an address by the Hon. John M. Harlan, Associate Justice, Supreme Court of the United States, delivered before the Judicial Conference of the Fourth Circuit at Asheville, N. C., June 24, 1955, and printed by permission of the author.

* See Contributors' Section, Masthead, p. 105, for biographical data.
Secondly, the first impressions that a judge gets of a case are very tenacious. They frequently persist into the conference room. And those impressions are usually gained from the oral argument, if it is an effective job. While I was on the court of appeals, I kept a sort of informal scoreboard of the cases in which I sat, so as to match up the initial reactions which I had to the cases after the close of the oral argument with the final conclusions that I had reached when it came time to vote at the conferences on the decision of those cases. I was astonished to find during the year I sat on that court how frequently—in fact, more times than not—the views which I had at the end of the day’s session jibed with the final views that I formed after the more careful study of the briefs which, under our system in the Second Circuit, came in the period between the closing of the arguments and the voting at the conference.

Thirdly, the decisional process in many courts places a special burden on the oral argument. I am giving away no secrets, I am sure, when I say that in one of the courts of appeals where I was assigned to sit temporarily the voting on the cases took place each day following the close of the arguments. In the Supreme Court, our practice, as is well known, has been to hold our conferences at the end of each week of arguments. They have been on Saturdays up until now, but under a more enlightened schedule they will be on Fridays next term, because beginning October we are going to sit four days a week. Under either of those systems you can see the importance which the oral argument assumes.

Fourth, and to me this is one of the most important things, the job of courts is not merely one of an umpire in disputes between litigants. Their job is to search out the truth, both as to the facts and the law, and that is ultimately the job of the lawyers, too. And in that joint effort, the oral argument gives an opportunity for interchange between court and counsel which the briefs do not give. For my part, there is no substitute, even within the time limits afforded by the busy calendars of modern appellate courts, for the Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies.

Now, let me turn for a moment to some of the factors which seem to me to make for effective oral arguments. The art of advocacy—and it is an art—is a purely personal effort, and as such, any oral argument is an individualistic performance. Each lawyer must proceed according to his own lights, and if he tries to cast himself in the image of another, he is likely to become uneasy, artificial, and unpersuasive. But after you make allowance for the special talents of individuals, their different methods of handling arguments, their different techniques, it seems to me that there
are four characteristics which will be found in every effective oral argument, and they are these: *first*, what I would call "selectivity"; *second*, what I would designate as "simplicity"; *third*, "candor"; and *fourth*, what I would term "resiliency." Let me address myself briefly to each.

By "selectivity," I mean a lawyer's selection of the issues to be argued. There is rarely a case which lends itself to argument of all of the issues within the normal time limitations upon oral argument. On the other hand, there is hardly a case, however complicated, where, by some selection of the issues to be argued, one hour is not enough. I am not talking about the unusual type of case, which we have from time to time in all courts, where in the nature of things extra time is essential. But in most cases, I think, the skillful advocate would not want more time for oral argument than the ordinary rules of court permit. However, it often happens that lawyers who attempt to cover all of the issues in the case find themselves left with the uncomfortable feeling that they have failed to deal with any of the issues adequately. You will find that thoughtful selection of the issues to be argued orally is a basic technique of every good appellate advocate.

Most cases have one or only a few master issues. In planning his oral argument the wise lawyer will ferret out and limit himself to the issues which are really controlling, and will leave the less important or subordinate issues to the court's own study of the briefs. Otherwise, one is apt to get tanglefoot, and the court is left pretty much where it began.

The next thing I refer to is "simplicity." Simplicity of presentation and expression, you will find, is a characteristic of every effective oral argument. In the instances where that quality is lacking, it is usually attributable to one of two reasons—lack of preparation or poor selection of the issues to be argued. There are some issues that do not lend themselves to oral argument as well as they do to written presentation. The preparation of an oral argument is a good deal more than merely making a short form summary of the briefs. An oral argument which is no more than that really adds nothing to a lawyer's cause.

The process of preparation that the appellate advocate undergoes involves, *first*, the selection of the issues he will argue; *second*, a marshalling of the premises on which those issues depend; *third*, planning the structure of his argument; and, *fourth*, deciding how he shall express his argument. It is sometimes forgotten by a lawyer who is full of his case, that the court comes to it without the background that he has. And it is important to bear this in mind in carrying out the preparation for argument in each of its phases. Otherwise the force of some point which may seem so clear to the lawyer may be lost upon the court.
The third thing which is of the essence of good advocacy is "candor." There is rarely a case, however strong, that does not have its weak points. And I do not know any way of meeting a weak point except to face up to it. It is extraordinary the number of instances one sees where through a question from the court or the argument of one's adversary a vulnerable point is laid bare, and the wounded lawyer ducks, dodges, and twists, instead of facing up to the point four square. Attempted evasion in an oral argument is a cardinal sin. No answer to an embarrassing point is better than an evasive one. With a court, lack of candor in meeting a difficult issue of fact or of law goes far to destroying the effectiveness of a lawyer's argument, not merely as to the point of embarrassment, but often as to other points on which he should have the better of it. For if a lawyer loses the confidence of the court, he is apt to end up almost anywhere.

The fourth and final thing which I have suggested goes to the root of a good oral argument is "resiliency." For some reason that I have never been able to understand, many lawyers regard questioning by the court as a kind of subversive intrusion. And yet, when one comes to sit on the other side of the bar, he finds very quickly that the answer made to a vital question may be more persuasive in leading the court to the right result than the most eloquent of oral arguments. I think that a lawyer, instead of shunning questions by the court, should welcome them. If a court sits through an oral argument without asking any questions, it is often a pretty fair indication that the argument has been either dull or unconvincing.

I am mindful, of course, that the court's privilege of asking questions is sometimes abused, and that often the price a lawyer has to pay is some interruption in the continuity of his argument, and perhaps some discomfort—and in extreme instances perhaps never getting through with what he had planned to say. And yet, I think that the price is well worth what the lawyer may have to pay in the loss of the smooth-flowing quality he would like his argument to have. A lawyer can make no greater mistake, I can assure you, in answering questions by the court than to attempt to preserve the continuity of his argument by saying: "Judge, I have dealt with that in my brief" or by telling the judge who asks the question that he will come to it "later"—usually he never does. Even if the lawyer does come back to the question later on, the force of his answer, if it is a good one, and often also of his argument in other aspects where he perhaps is in a stronger position, is usually lost—at least upon the judge who has asked the question.

No doubt some judges ask too many questions, and I hasten to say,
again as one freshly from the trial bar, that I am one of those who believe that competent lawyers ought to be allowed to try their cases and argue their appeals in their own fashion. Where an over-enthusiastic judge exceeds the bounds of what the lawyer might consider fair interruption, the lawyer will have to handle that problem for himself. I can tell you, however, how two lawyers, one a freshman and the other a seasoned barrister, dealt with such a situation. The freshman lawyer was trying his first case, a negligence case, in which his client, the plaintiff, was a lovely young lady. Of course, he called her as the first witness. After the young man had gotten his client's name, age, and address on the record, the court interrupted and started to ask questions. The young lawyer stood first on one foot and then on the other as the court's questioning continued. He finally sat down, and in due course the court came to the end of his questioning and said: "Counselor, you may now continue with the witness. Proceed." The young man arose and said: "If your Honor please, I have no more questions to ask because I think the court has covered my case very thoroughly. But," he added, "I would like to make a statement. If your Honor please, this is my first case, my first client. I have prepared my case thoroughly. I have gone back to the Year Books on the law; I have questioned all eye witnesses to the accident with the greatest care; but if your Honor wants to try this case, it is all right with me, except, for goodness' sake, don't lose it!"

The examination of the more seasoned barrister was interrupted at a sensitive point by a question which the lawyer did not care for. "Have you an objection, counselor?" said the court as the lawyer put on a remonstrative look. "Perhaps, your Honor," replied the lawyer, "but I would first like to inquire on whose behalf your Honor put that question." "What difference would that make, counselor?" asked the court. "All the difference in the world," said the lawyer, "for if your Honor is asking the question on behalf of my opponent, then of course I must object to it, but if your Honor asks the question on my behalf, then I simply withdraw it."

Now I suppose that most of what I have said is an old story to a group of such experienced trial lawyers as composes this audience. My excuse for saying it is that of the varied sensations that a man going from active practice to the bench experiences, in the short time that I have been on the bench one of the things that has astonished me most is the number of disappointing arguments to which courts have to listen. They seem to be due, in some cases, to lack of preparation; in others to lack of capacity; but more generally, I think, the explanation is to be found in the increasing tendency to regard the oral argument as being of little
importance in the decision of appeals. I should like to leave with you, particularly those of you who are among the younger barristers, the thought that your oral argument on an appeal is perhaps the most effective weapon you have got if you will give it the time and attention it deserves. Oral argument is exciting and will return rich dividends if it is done well. And I think it will be a sorry day for the American bar if the place of the oral argument in our appellate courts is depreciated and oral advocacy becomes looked upon as a pro forma exercise which, because of tradition or because of the insistence of his client, a lawyer has to go through.