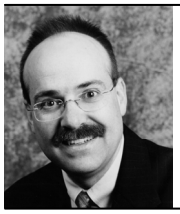
New York Law Journal

TUESDAY, MAY 25, 2004

LITIGATION REVIEW



Judges Offer Insights On Oral Arguments

BY KEVIN SCHLOSSER

Much has been written on the art of appellate oral argument.1 It is almost universally accepted that the "key to a successful appellate oral argument, no matter how long or short, is in the many hours of preparation that precede it, time you must spend in reading and rereading the briefs and principal legal authorities cited therein and familiarizing yourself with the record on appeal. There is no short cut to the preparation process.'2 In viewing the importance of oral argument, however, some commentators have been bluntly skeptical: "Prideful about their oratorical skills, most litigators are loath to admit that their oral argument did not carry the day.... The truth is that most lawyers can count on the fingers of one hand the number of times oral argument actually seemed to make a difference.'3 Notwithstanding this skepticism, as discussed below, rather good authority cautions against treating oral argument lightly in the local appellate division.

Unlike the court of appeals in the federal system, the appellate divisions in the State of New York have jurisdiction and must accept virtually all interlocutory appeals as well as appeals from final orders.4

This does result in numerous appeals that can be disposed of by the appellate division without much debate and with efficient dispatch. Nevertheless, in the close or more difficult cases, oral argument can be instrumental in turning any particular decision around. Knowing as much as possible about the "inner mind" of the appellate court before which the argument is being made is, therefore, critical.

This year marked an important milestone in Nassau County's representation on the Appellate Division, Second Department. Justice Leo F. McGinity retired from the Second Department and has now joined his son in private practice in Garden City. Justice Peter B. Skelos joined the Appellate Division effective April 26, 2004, after serving as a Supreme Court Justice since 1999 and as an associate justice of the Appellate Term since 2002.

For counsel who wonder if the hours of preparation for 5 to 15 minutes of oral argument are worth the effort, the two justices shared important insights. Without question, noted Justice McGinity, the dynamics of a given oral argument have changed minds and had an impact on the ultimate outcome of an appeal. Justice McGinity offered the following advice for attorneys arguing appeals in the Second Department: "Know the facts in your case, particularly if you are not the trial attorney, and be sure you can relate to those facts in the record on appeal. Stress the most important point on appeal, and support that point with previous decisions from the Second Department. It is not advisable to brief many points, some of which may be peripheral. If the court during oral argument is able to get concessions on minor points, that process may undermine the principal point relied upon to convince the court to reverse or modify the trial court's decision.'

As observed by astute appellate practitioners, because "the justices are familiar with the facts ... there is no need to recite them at length on oral argument.... rather, you must be flexible, prepared to make ... a presentation [of your argument], but always expecting to be interrupted by questions at any time.'5

Kevin Schlosser *is a partner and co-chair of the Litigation Department at Meyer, Suozzi, English & Klein in Mineola.*

Justice McGinity added a word of caution to respondents as well: "They should be careful only to respond to appellant's arguments. Occasionally, overeager respondents, hopeful to buttress their cause, attempt to 'gild the lily' and add a point or a fact. That additional point or nonessential fact might pique the interest of the panel to delve further, which could put you on the defensive and change the flow of the argument." Finally, Justice McGinity suggested that counsel should be keenly readied to perceive an ally on the panel to whom the critical point might be driven home and who could thereby become an advocate for that party's position in the after-argument session engaged in by the panel of justices on the appeal.

Justice Skelos offered the following advice to those who argue before the Second Department: "As with any oral argument, listen very carefully to the questions the bench has for you and answer them directly and succinctly. As the appellant, you must be quicker on your feet and carefully perceive the direction the court is taking on the case.

More importantly, if you are the attorney for the respondent, take advantage of what transpires before you present your side and pay careful attention to the questions asked of counsel for the appellant because that is where you may very well be tipped off to the issues about which the court is most concerned.'

If there were any doubt that at least in the close or more difficult cases the issues can be vigorously debated as a result of or after oral argument, Justices McGinity and Skelos laid that to rest. For example, Justice McGinity recalled that often times "the real argument on appeal would come after the attorneys' oral argument" -- when the justices consulted on the second floor of Monroe Place to arrive at a consensus. Reflecting on those conferences with his colleagues, Justice McGinity noted: "The moments I cherish the most were when, after consultation, I was successful in changing the view of two or more of the justices sitting on the panel -- even though those moments were few and far between." Similarly, Justice Skelos has already recognized that "participating in the after-argument conferences can be quite invigorating."

Looking back on his first days as an associate justice of the Appellate Division, Justice McGinity recently remarked: "My initial shock came when, upon my arrival at 45 Monroe Place, Presiding Justice Guy Mangano handed me two large litigation satchels filled with 20 cases set for argument the following week. I had never read that many legal documents and briefs in that span of time in my life. It was obvious that the task of an associate justice was more than a five-days-a-week enterprise." As the months progressed, Justice McGinity recalls that he developed a routine, "with one clear caveat -- if you fall behind you can never catch up if you really want to be prepared for oral argument.' To anyone who has argued before the Second Department, there is no question that this is a "hot" bench, knowledgeable of the legal and factual background of each case scheduled for oral argument. Counsel are well-advised to be prepared in presenting the argument, especially given the importance that these two jurists see in oral argument and the judicial conferences thereafter in which key decisions may be made on close or more difficult cases.

Endnotes

1. See,e.g., T. Newman and S. Ahmuty, "Effective Oral Argument," NYLJ, Jan. 2, 2002, p. 3; Paul R.. Michel, "Effective Appellate Advocacy," Litigation, ABA Journal of the Section of Litigation, Summer 1998, p. 19; Roger J. Miner, "The Don'ts of Oral Argument," Litigation, ABA Journal of the Section of Litigation, Summer 1988, p. 5; Judith S. Kaye, "Effective Oral Argument," in New York Appellate Practice (NYSBA 1995).

2. Newman and Ahmuty, supra.

3. R. Shapiro, "Advance Sheets, No Argument," Litigation, ABA Journal of the Section of Litigation, Summer 2001, p. 59.

4. See generally NY CPLR Article 57.

5. Newman and Ahmuty, supra.