



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com  
 Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

## Why You Should Argue Your Appeal

By **Stewart Milch**

Law360, New York (July 10, 2017, 1:02 PM EDT) -- Conventional wisdom — and more than one judge — says that oral argument is a mere formality; that in courts where judges read briefs in advance, their minds are made up and will rarely — if ever — change. In fact, one writer claims that “[m]ost lawyers can count on the fingers of one hand the number of times oral argument actually seemed to make a difference.”[1] So, does oral argument really matter? Is it worth the time, effort, and inevitable gut-wrenching discomfort to stand before a panel of judges, answering rapid-fire questions? In a word, yes. Here’s why.



Stewart Milch

First, conventional wisdom isn’t necessarily conventional wisdom. In fact, oral arguments have even changed U.S. Supreme Court justices’ minds. Former Chief Justice William Rehnquist once wrote that his view of a case changed in a “significant minority” of those where he heard oral argument.[2] The late Justice Antonin Scalia also placed some importance on answers to questions during argument, once noting that a lawyer who could answer a critical question or two would have his vote.[3] Justice Ruth Bader Ginsburg isn’t quite as generous regarding an argument’s impact, but admits that they have, on occasion, changed her mind.[4] More important than changing a judge’s mind, she says, is that oral argument may give a court an opportunity to build consensus around a narrower holding.[5] That opportunity is lost if you waive argument.

What about a case that’s not so clear-cut? Argument can sway an undecided judge by “provid[ing] information and perspective that the briefs don’t and can’t contain.”[6] Not only that, but what lawyer has anticipated every question a judge may have about a case? Oral argument affords lawyers an opportunity to fill those gaps. And, sometimes judges just “need the advocates’ help,” because lawyers are far more familiar with their cases than are generalist judges.[7] Or consider Chief Justice John Roberts’ perspective: The briefs are important, but because voting conferences are held so shortly after argument “the discussion at conference is going to focus on what took place at argument.”[8]

And hasn’t there been a time in every lawyer’s career where he or she thought their case was so straightforward there was only one possible outcome? Perhaps a judge or two see it differently — but you lose your chance to convince them you’re right because you declined argument. Or even the opposite side of that coin: You’re sure there’s not even a sliver of hope; your appeal is a loser and you may as well accept it. But what if the panel has different thoughts and you miss the opportunity to guide them down your path? As former Justice Peter B. Skelos of New York’s Appellate Division, Second Department has noted, lawyers just don’t know which way a judge or panel is leaning unless they argue; it’s therefore “your opportunity to help solidify the judge who is in your favor, tip the scales of the judge who is undecided, and yes, you may even move the judge who was leaning in favor of the adverse position.”[9]

Finally, even if it is true that the outcome is preordained, an inexperienced appellate advocate should always take the opportunity to hone his or her craft. Justice Sonia Sotomayor has admitted being frustrated by Supreme Court neophytes — even joking that she may one day jump off the bench in frustration.[10] But you’ll certainly meet the same judges more than once if you continue to handle appeals. Why not use argument as way to demonstrate that you’re a skilled advocate and build

credibility?

Conventional wisdom notwithstanding, oral argument can be critical. And, as Justice Skelos reminds us, “[d]o not waive oral argument. From a selfish perspective, appellate judges enthusiastically consider the oral argument the most exciting part of their work.”<sup>[11]</sup> Whatever the reason — whether the panel has serious questions that will help resolve the case or as a simple confidence booster for an inexperienced advocate — relish the opportunity to engage in a meaningful dialogue with the court.

---

*Stewart G. Milch is a partner in the New York City office of Goldberg Segalla LLP, and a co-chair of the firm’s appellate practice.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] Robert E. Shapiro, *Advance Sheet—No Argument*, 27 Litig. 59, 59 (Summer 2000).

[2] William H. Rehnquist, *The Supreme Court*, at 243.

[3] Duvall, “When is Oral Argument Important? A Judicial Clerk’s View of the Debate,” *Journal of Appellate Practice and Process*, Vol. 9, Issue 1, at 123, citing Jeffrey Cole, *Discovery: An Interview with Steve Shapiro*, 23 Litig. 19, 24 (Winter 1997).

[4] Justice Ruth Bader Ginsburg Sits Down with Law360, June 15, 2017 (<https://www.law360.com/appellate/articles/934676>).

[5] *Id.*

[6] Scalia and Garner, *Making Your Case: The Art of Persuading Judges*, at 139.

[7] Richard A. Posner, *From the Bench—Convincing a Federal Court of Appeals*, 25 Litig. 3 (Winter 1999).

[8] *Oral Advocacy and the Re-emergence of a Supreme Court Bar (2005)*, *Journal of Supreme Court History* at 68.

[9] Peter B. Skelos, “Preparing for Oral Argument of Your Appeal,” *New York Law Journal*, April 10, 2017.

[10] Justice Sotomayor on Working a Room and the Post-Scalia Void, June 23, 2017 ([https://www.law360.com/appellate/articles/936106/justice-sotomayor-on-working-a-room-and-the-post-scalia-void?nl\\_pk=33e96d54-d1a5-471b-84d6-ad21ae47ed1a&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=appellate](https://www.law360.com/appellate/articles/936106/justice-sotomayor-on-working-a-room-and-the-post-scalia-void?nl_pk=33e96d54-d1a5-471b-84d6-ad21ae47ed1a&utm_source=newsletter&utm_medium=email&utm_campaign=appellate)).

[11] Skelos, *supra*.

---

All Content © 2003-2017, Portfolio Media, Inc.