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Help Us Help You: A Fourth Circuit Primer on Effective Appellate Oral Arguments

Karen J. Williams
United States Court of Appeals for the Fourth Circuit

HELP US HELP YOU: A FOURTH CIRCUIT PRIMER ON EFFECTIVE APPELLATE ORAL ARGUMENTS

THE HONORABLE KAREN J. WILLIAMS*

I. INTRODUCTION

According to Chief Justice Rehnquist:

> [T]he All American oral advocate . . . will realize that there is an element of drama in an oral argument . . . . But she also realizes that her spoken lines must have substantive legal meaning . . . . She has a theme and a plan for her argument, but is quite willing to pause and listen carefully to questions. . . . She avoids table pounding and other hortatory mannerisms, but she realizes equally well that an oral argument on behalf of one's client requires controlled enthusiasm and not an impression of *fin de siècle* ennui.[1]

The Chief Justice has high expectations of the litigants who appear before him, as do the judges who sit on the United States Court of Appeals for the Fourth Circuit. In fact our demands for excellent oral advocacy have increased in this era of expanding federal jurisdiction and burgeoning dockets. Today, a case must be somewhat novel or complex to merit oral argument in the Fourth Circuit.[2] Not surprisingly, the number of orally argued cases that are easily decided is rapidly diminishing. As a result we need expert advocates well versed in the history, facts, and relevant law affecting their case to answer our last remaining questions before we settle on a final disposition. Oral argument is important, and any reports of its death have been exaggerated.[3]

The lawyer's job at oral argument is straightforward—to help the judges

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* Judge, United States Court of Appeals for the Fourth Circuit; B.A., Columbia College, 1972; J.D., University of South Carolina, 1980. I would like to thank the Editorial Board of *South Carolina Law Review* for their kind invitation to participate in this special symposium issue. I also appreciate the assistance that my clerk, Sara Gottovi, provided in preparing this Article.

1. WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 281 (1987).

2. For the year ending September 30, 1998, 658 Fourth Circuit cases (25.6%) were terminated on the merits after oral argument. In contrast, 1911 Fourth Circuit cases (74.4%) were terminated on the merits after submission without oral argument. *Judicial Business of the United States Courts 1998* (visited Mar. 22, 1999) <http://www.uscourts.gov/dirrpt98/index.html> (Table S-1).

3. Cable from Mark Twain in London to the Associated Press (1897), *in* JOHN BARTLETT, FAMILIAR QUOTATIONS 679 (13th ed. 1955) ("The reports of my death are greatly exaggerated.").

decide the case.[4] Of course as any advocate who has prepared for an appeal knows, that task is not as simple as it sounds. After a brief review of Fourth Circuit procedures, the balance of this Article is devoted to practical advice to assist advocates in meeting their goal of preparing and presenting appellate arguments that are helpful to the court.[5]

II. FOURTH CIRCUIT BASICS

The United States Court of Appeals for the Fourth Circuit hears appeals from the United States District Courts that sit within its geographic boundaries: Maryland, North Carolina, South Carolina, Virginia, and West Virginia.[6] We also hear statutorily authorized appeals from administrative agencies, such as the National Labor Relations Board, that arise within the circuit's geographic boundaries.[7] Although Congress has authorized fifteen active judges for the circuit,[8] we currently have only thirteen.[9] Generally, the court meets in Richmond, Virginia to hear cases for one week each month for nine months during the course of the year.[10]

The judges are arranged in panels of three to hear each appeal.[11] The panels are selected randomly, and the attorneys arguing the appeal do not know prior to arriving at court on the day of their argument which judges will hear their

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4. As Justice White said, "All of us on the bench are working on the case, trying to decide it.... [The lawyers] think we are there just to learn about the case. Well, we're learning, but we're trying to decide it, too." David G. Knibb, Federal Court of Appeals Manual § 30.11 (3d ed. 1997) (citing Byron White, *The Work of the Supreme Court: A Nuts and Bolts Description*, N.Y. B. J. 346, 383 (October 1992)).

5. Of course other aspects of the appellate process are just as important as oral argument. Brief writing is too often neglected. My colleague, Judge Hamilton, has ably addressed aspects of brief writing in this issue. *See* Clyde H. Hamilton, *Effective Appellate Brief Writing*, 50 S.C. L. REV. 581 (1999). Therefore, there is no need for me to repeat his good advice here.

6. *See* 28 U.S.C. § 41 (1994).

7. *See, e.g.*, 29 U.S.C. § 160(e) (1994).

8. *See* 28 U.S.C. § 44.

9. Currently serving with me on the court as active circuit judges are J. Harvie Wilkinson III (Va.) (Chief Judge); H. Emory Widener, Jr. (Va.); Francis D. Murnaghan, Jr. (Md.); Sam J. Ervin, III (N.C.); William W. Wilkins, Jr. (S.C.); Paul V. Niemeyer (Md.); Clyde H. Hamilton (S.C.); J. Michael Luttig (Va.); M. Blane Michael (W. Va.); Diana G. Motz (Md.); William B. Traxler (S.C.); and Robert B. King (W. Va.). Additionally, John D. Butzner, Jr. (Va.); K. K. Hall (W. Va.); J. Dickson Phillips, Jr. (N.C.); and Robert F. Chapman (S.C.) continue to serve as senior circuit judges.

10. During the rest of the year, the circuit judges are resident in their home chambers in their home states. Should the case load require, additional sittings are held over the summer. Summer sittings are not held in Richmond. Rather, panels of judges sit in a variety of locations throughout the circuit.

11. *See* 28 U.S.C. § 46(c). During oral argument, the judges are seated in accordance with their seniority. The most senior judge presides at argument and sits in the middle of the bench. To the presiding judge's right is the next senior judge. The most junior judge sits to the presiding judge's left.

case.[12] Each active circuit judge is assigned to hear approximately twenty cases during each term of court. Individual cases are allotted up to one hour for oral argument—thirty minutes per side. Certain appeals from the Benefits Review Board and Social Security benefits cases are routinely allotted only thirty minutes total argument time—fifteen minutes per side. For each term of court, therefore, each judge must read between forty and sixty briefs (about 2000 pages per month) and twenty joint appendices (often 500 to 1000 pages each), as well as the applicable statutes and case law, in preparation to listen to approximately twenty hours of oral argument.[13] Although the advocates file their briefs well before argument, we generally receive the calendar of upcoming cases and the briefs four or five weeks in advance of the court term.

After each party completes its argument, the presiding judge will announce whether the panel will proceed directly to the next argument or will take a brief recess to hold conference. If the panel is proceeding immediately to the next argument, it is important that the advocates move quickly to remove their belongings from the tables and make room for the next parties after we have come off the bench to greet counsel.

When the judges on the panel hold conference, they retire to the robing room and explain their tentative votes on each case. The presiding judge on the panel reports the outcome of conference to the chief judge, who makes opinion-writing assignments based upon the reports received from each panel. The judge who receives the writing assignment on a case drafts an opinion and circulates it to the entire court for comment.[14] When the authoring judge circulates the draft opinion, the other judges on the panel cast their final votes on whether to concur or dissent and often ask questions or suggest clarifications. No opinion is published until each panel member is satisfied and

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12. Each circuit sets its own policy on whether it will identify panel members in advance of the argument date. It is always wise to become familiar with the local rules of the court before submitting any filing.

In the Fourth Circuit, because you will not know which judges will sit on your panel when you file your briefs with the court, you should take pains not to disparage the opinions of the court or to criticize the views of individual judges as expressed through their opinions. I will never forget the brief in which counsel decided to spend several pages characterizing a recent opinion that I had authored as "mendaciously perverse." That attorney was probably quite uncomfortable when he discovered that I would be one of the three judges hearing his appeal.

13. Of course these figures do not take into account other ongoing work in chambers; they merely reflect a month's preparation for oral argument. We have many responsibilities in addition to orally argued cases. Each judge on the Fourth Circuit also handles a high volume of motions, rehearing petitions, and cases that are screened off of the oral argument calendar. Additionally, the circuit has a judicial council and many committees that handle a variety of administrative matters. Further, judges serve on a number of committees outside the circuit sponsored by the Judicial Conference of the United States and other organizations dedicated to improvement of the judicial system and development of the law. We also undertake a range of public service activities in the legal community. This public service may entail judging moot court competitions, delivering speeches to local bar organizations, delivering commencement addresses, or writing articles for law reviews.

14. This is not the practice of all of the United States courts of appeals.

each of the court's judges has had ten days to acknowledge the opinion. During this circulation process, judges who were not on the panel will often make valuable suggestions for improvement to the draft opinions.

After an opinion is released, the parties have fourteen days from the date of entry of judgment during which to file a petition for rehearing by the panel or rehearing en banc.[15] In a rehearing petition, the parties point to significant legal or factual errors that mandate reconsideration of the case's disposition.[16] For a matter to be reheard en banc, a majority of judges in active service must vote in favor of rehearing.[17] When a party's case is reheard en banc, the attorney undertakes the ultimate oral argument experience available in the Fourth Circuit—a hearing before all active circuit judges in the large "Green Courtroom" in Richmond.[18]

Whether for en banc rehearing or for initial hearing by a panel, the essentials of a sound oral argument are the same. In the next two Parts of this Article, I discuss the two essential components of oral advocacy: preparation and presentation.

III. PREPARATION

The appellate attorney must develop a legal issue as it relates to the set of facts established in the court below. During oral argument, it is impossible to focus the court's attention on the most relevant facts and legal analyses with the required precision if you have not invested the time in thorough preparation.

To accomplish this end, you must become completely familiar with your case. As you prepare for argument, learn or reacquaint yourself with the parties, the facts, the record, and the proceedings below. Review all of the briefs. Know the arguments on all sides of your issues, including those of any amici. Know the significant cases cited in each of those briefs, including the facts, the holdings, and how your case is distinguishable. You must master both the relevant facts and the relevant law. There is simply no excuse for ignorance of what occurred below or of what an important precedent holds. As you prepare an outline of argument, you may want to include citations to significant decisions and statutes so that it becomes second nature for you to identify which citations relate to which arguments.

As you prepare for argument, it is important to take off your advocate's hat and take stock of your case with the objective eyes of the judges who will hear your appeal. In the process of reviewing the already-prepared materials, it is

15. *See* FED. R. APP. P. 40. In civil cases in which the United States or an agency of the United States is a party, however, a party has 45 days in which to seek rehearing. *See id.* By local rule, we strictly enforce these deadlines. The Clerk's office will automatically deny any later-filed petition as untimely. *See* FOURTH CIR. LOC. R. 40(c).

16. *See* FED. R. APP. P. 35, 40.

17. *See id.* 35.

18. Senior circuit judges who participated in the decision issued by the panel may also sit on the en banc court. *See* 28 U.S.C. § 46(c) (1994 & Supp. II 1996).

important to consider what your briefing has, and has not, accomplished. Switch places with the court and consider what the judges hearing your case will need and want to know. Do not waste your opportunity to persuade the court to your view of the case by treating oral argument as a summary of what you said in your briefs; the judges have read the briefs.[19] To be thoroughly prepared for oral argument, you need to try to begin thinking about your appeal from the point where you ended in the briefs. Identify those points of law upon which the outcome of the case is likely to turn and which, when viewed objectively, could be resolved in favor of either party. Those issues should be the focus of your oral argument. Make notes on what points are clear and unclear as discussed in your briefs. You should concentrate on clarifying the most important points for argument.

This focused analysis of the materials that you have previously submitted to the court should lead you to a subset of the legal points discussed in your brief that merit discussion during oral argument. You should feel comfortable limiting the issues. In the short amount of time allotted for oral argument, you may not be able to address all of the points raised in your briefs, and you should not attempt to address all of the points. Time is too short to expand on anything except the most crucial points. Rather, you should inform the court that, although you are happy to field any questions that the judges might have, you will rely on your brief for unaddressed arguments. Once you have separated the wheat from the chaff, discard everything but the most significant issues and stay focused.

Also, as you prepare your case, it is important to stay abreast of recent developments. Update your research and Shepardize the cases you have cited in your brief(s) so that you are aware of any recent developments. It is highly embarrassing to an attorney when he appears at court unaware of a controlling intervening Fourth Circuit or Supreme Court case that dictates the outcome of his appeal. Although counsel are not prohibited from citing cases for the first time in oral argument, you should always follow the requirements for submitting any newly issued or newly discovered cases as supplemental

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19. There is a common misconception among practicing attorneys that the judges are not familiar with the cases prior to argument. Advocates should bear in mind that it is not possible for a judge to become as familiar with the facts of a case after reading the briefs and the joint appendices as counsel are after litigating the case over a long period of time. Our knowledge from the case flows directly from the advocate. If a relevant piece of information is not included in the briefs or in the joint appendix, you cannot expect us to know it. Although the advocate usually argues only one case per term of court, the judges hear 20. Sometimes we hear several cases with similar fact patterns. It may take a few moments early in the argument for the judges to refresh their memories regarding the significant factual details of your case that distinguish it from the others. Patience with judges is also a virtue.

Sometimes attorneys complain about the opposite problem—that the judges were "sidetracked" by some obscure procedural ruling or fact in the record that is "irrelevant" to the outcome of the case. In all likelihood, the judges are not off-track. Rather, what is more probable is that, in the course of studying the applicable law, there was some reason for the judges to conclude that the issue was important to the outcome of the case.

authorities. In our court you must follow Rule 28(j) of the Federal Rules of Appellate Procedure.[20]

It is impossible to be prepared fully for oral argument without detailed knowledge of the record. The more fact intensive an appeal is, the more important it is for you to know the record. Even when your case turns on a pure question of law, you will need to know where in the record important points were raised and ruled upon, where objections were lodged, where issues were preserved for appeal, and where critical facts were established. Before you begin your argument, you should be familiar enough with the record to have significant rulings and facts at your fingertips within a second or two. Fumbling around with the record during oral argument is excruciating, both for the advocate and for the court.[21]

Aside from just the details of the case or the page references from the record, it is equally important that you understand the bigger picture of your case—namely, how the requested resolution fits within the law and policy concerns in the legal field of your appeal. It is our job as judges not only to consider how to resolve the individual dispute concerning your client, but also how the rule we announce in your case will affect all of the similar cases that will follow. Therefore, to assuage our concerns, you must understand the rule of law that you are requesting and be able to enunciate its parameters. Be prepared to explain the policy arguments supporting your requested relief and be ready to respond to the policy arguments that detract from your case. Know the settled law and understand its application on the fringe.

When you invest the time and energy to master the larger legal context of your client's appeal, you also will be able facilely to answer hypothetical questions posed from the bench. Your answers to hypotheticals can be quite significant. We ask hypotheticals to test the outer limits of the rule that you are requesting the court to adopt. If the answers you give reveal an absurdity, it is a signal to the court to rethink the legal rule you have requested.

Be careful, however, not to get totally lost in the forest. The best oral

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20. Federal Rule of Appellate Procedure 28(j) provides:

> If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state without argument the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. Any response must be made promptly and must be similarly limited.

FED. R. APP. P. 28(j).

21. Do not make the mistake an attorney recently made in an argument before me. The case involved a contract dispute. When asked by a judge about a certain clause in the very contract under dispute, the advocate not only did not know upon which page of the joint appendix that clause appeared, but he also seemed unfamiliar with the text of the clause.

advocates also have complete command of legal details. They know the standard of review the court is bound to apply. I cannot overstate the importance that the standard of review plays in shaping the appellate judge's outlook on the issue. If we review only for abuse of discretion, the advocate must clearly demonstrate an obvious error, or no relief will be forthcoming. Under the de novo standard of review, however, we are free to reverse a judgment call in a grey area. Also, many areas of substantive law have complex, multi-part tests that need to be mastered. Before oral argument you should be able to explain quickly how your case meets each of the required elements of the test. In sum, if you are, for example, facing a challenge to the sufficiency of the evidence you must be prepared to: (1) state the correct standard of review, (2) know the underlying substantive elements of the claim or defense, and (3) tell the court which specific evidence from the record proves each element. If you are the appellee in the case, it is just as important that you directly address the same points. The appellant may have misstated controlling law. If so, do not miss the opportunity to tell the court about the error. Additionally, the evidence, when understood in the appropriate context, may not support the appellant's argument.

A moot court can be a helpful preparation tool and can assist you in putting the disparate portions of your preparation together to form a cohesive whole. Steve Shapiro, a former Deputy Solicitor General and currently a successful appellate litigator at Mayer, Brown and Platt, a Chicago firm with an extensive Supreme Court and appellate practice, describes the value of moot court at his firm in these terms:

> [I]n a large matter where a lot is at stake, we will have a moot court group that includes not only the lawyers who have worked on the case and the clients, but outside attorneys who are expert in the area.
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> . . . .
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> Initially, I present the argument without interruption to get reactions to the substantive points. Then we run through the argument with the clock running—30 minutes, 20 minutes or 15 minutes, depending on the time frame of the real argument, with questions. We see how much of the argument can be delivered while responding to questions. The final session has no time limitations, and we take up every question that anyone can think of. . . . Effective spontaneity grows out of the kind of understanding that you get through the moot court process.[22]

If you hold a moot court, be sure to schedule it at a time when your preparation

22. Jeffrey Cole, *An Interview with Steve Shapiro*, LITIG., Winter 1997, at 22.

is nearing an end so that you are ready to argue, but with sufficient time before your scheduled court appearance so that you will be able to implement any necessary changes. Be sure to allow your panel of "judges" to critique substance and style so that you gain the most from the experience.[23]

IV. PRESENTATION

The other key to a successful appellate argument is presentation. The presentation skills required for oral argument are somewhat different than those used in other aspects of a typical legal practice. Unlike jurors or the audience at a CLE seminar, appellate judges are not a captive audience. Quite the contrary, we ask questions. The biggest mistake that you can make in preparing your presentation is to harbor the expectation that you will give an uninterrupted oration before a panel of the Fourth Circuit. Oral argument is the only opportunity we have to interact with you; it is our chance to obtain oral briefing on issues that particularly concern us.

If you are to get any uninterrupted time to present your case it will be at the beginning of your allotted argument time. Thus, the introduction you prepare is very significant. In the minute or two before the judges on the panel begin their questioning, you must succinctly present your issue and explain to the court the most important reason why you should prevail. You may wish to use this time to give an outline of the points you would like to cover during your argument. Then the judges on the panel can direct you immediately to the point that concerns them most.

At all times during your argument before the court, you should remember this cardinal rule: do not read your argument. The worst thing you can do is deliver a stiff presentation by attempting to read your argument verbatim. Such a presentation style is tedious and makes it difficult for you to answer questions from the bench. If you spend your time looking down at the podium reading your argument, you are likely to miss signals from the bench, and you cannot engage in a dialogue with the judges. Try to argue extemporaneously, or at least leave us with the impression that you are.

Speak in a normal tone of voice when making your argument. Courtroom acoustics are not always perfect, but they usually do not require attorneys to shout in order to make their point. If a judge is thinking about your tone or style, with admiration or annoyance, the judge is not thinking about what you are saying. Speak naturally and make your style unobtrusive so that your words, rather than your voice, are the object of the judge's attention.

Plan to address your points in descending order of significance: most important point first. That way, if you are inundated with questions about the first point of your argument, you can rest assured that the time was spent on the

23. All of the advice contained here applies both to appellants and appellees. It can, however, be more difficult for an appellee to prepare an argument because a good appellee's argument should be adapted to respond to what the appellant has said.

most important legal question.

Questions and your reactions to them are singularly the most important aspect of oral argument. Carefully listen to the questions posed, answer them as directly as you can, and if possible use them as stepping stones to other points. Prepare to answer the question that exposes the weakest point in your case (it is likely that a judge will ask it) in a way that explains why you should nevertheless prevail. Also, be prepared to explain why certain weaknesses, such as the failure to preserve the alleged error below, are not fatal.

You should want lots of questions during your oral argument. Often attorneys complain that they could not get to the meat of their prepared argument because the judges interrupted them with too many questions. Questions are not interruptions, they are opportunities. The questions from the bench are the only indication of what issues are bothering the judges and may clue you in on what is preventing them from seeing the case your way. Thus, the most important task in successfully responding to a judge's questions is to listen carefully to the question itself. Make sure you understand what the judge is asking before you start responding. If you answer the wrong question, you have missed your opportunity to clarify the judge's concerns.

Respond immediately to a question with a "yes," "no," "it depends," or "I don't know." Follow the short answer with a concise explanation and citation to the record or precedent as necessary. Sometimes questions raised by judges can take you off on what you consider, rightly or wrongly, to be a tangent. In those instances you must be patient and courteous with the judges. Always resist the temptation to characterize such questions as irrelevant, silly, or unimportant.

Sometimes a judge will display skepticism about your argument in the questions she poses. This is your opportunity to win a dissenter over to your view of the case. Do not get distracted; do your best to address the judge's concern. Even if the skeptical judge is not convinced by your argument, all is not lost. You only need two votes to attain a majority. On the other hand, you may encounter a judge who is in favor of your position and spends time asking you easy questions that lead you to an even stronger version of your position.

Often the court will ask hypothetical questions or seek concessions from you. Responding to these questions requires great care because it is very easy to concede away your case by your responses. Be especially aware of questions that begin, "Counselor, let me be sure I understand your argument. You're saying the sky is not blue, but rather it's pink?" Do not blithely respond, "Yes, judge, that's absolutely right," without ensuring that the judge has accurately restated your argument. The judge may be leading you down the slippery slope to an absurd result. At the same time, nothing hurts an advocate's credibility with the court more than the failure to concede an obvious point.

Of course it is futile to avoid questions that are difficult to answer. If you are evasive, the court will quickly lose patience with you, and you will lose your credibility in the eyes of the judges. The best approach to even the most difficult question is to respond briefly and directly; if you do not feel that you

can make a concession, just say so. If the hypothetical proffered by the judge is not your case, answer it first, but then explain specifically why the hypothetical situation is distinguishable from your case and why that hypothetical should not decide your case. If your opponent is evasive in answering a question from the court, you should benefit your cause by taking the opportunity during your argument to answer the question directly. It goes without saying that you should be honest with the court at all times. Sometimes, however, an advocate's ego can interfere with the truth; if you do not know the answer to a question, admit it and move forward.

It is easy to avoid many of the troubles that plague the oral advocate. Although we were all taught otherwise in law school, many advocates continue to break the cardinal rules of effective oral argument technique. Some attorneys race through an argument to cover a maximum number of points. It is much better if you cull your arguments to a manageable list of winners and address each point thoroughly. It is also not effective when you argue the facts to the appellate court as if it were a jury. Generally, an appellate court cannot alter the fact finder's determinations. You may argue that a particular finding was clearly erroneous, but emotional rhetoric rarely achieves anything—we are bound by the law and are not free to follow our emotions, no matter how strong they may be. It should go without saying, but an advocate should never become combative, get angry, air disrespect, or interrupt a judge while he or she is speaking. We always expect civility in our court.[24]

Additionally, you should not overstate the controlling value of precedents. Our clerks will catch you every time, and you will simply have to endure sharp questioning from the bench. Leave unnecessary rhetoric or hyperbole at home; we are seeking reasoned discussions and logical responses to our questions. You should not bluff in response to a question. If you guess wrong, you could breach your ethical duty by lying to the court. Never disclaim knowledge of the record because you did not try the case. If you are unfamiliar with the record, you are not qualified to argue the appeal.[25] Do not answer questions with questions or answer questions with, "I'll address that in a moment." Finally, avoid delivering your argument in a monotone. These practices detract from a good oral argument and should be avoided.[26]

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24. You should not behave like the attorney in the old story who, during trial, was sitting at his table with a sour, sulking look upon his face. The trial judge asked, "Are you trying to show your contempt for this court?" The attorney replied, "No, your honor, I am trying to conceal it."

25. If you are truly a last-minute, emergency replacement, let the panel know.

26. No list of "don'ts" would be complete if I failed to mention that if you choose to address a judge by name, you should probably ensure you are using the correct name and pronunciation. You need not venture from "judge" or "your honor." In the tense moments during oral argument, it is not an uncommon occurrence for an advocate to mispronounce Judge Luttig's name. (For reference, it is pronounced "Lew-tig.") Williams is not a difficult name to pronounce, but I am surprised by how often I am called "sir." You need not worry that such an error will affect the merits of your case—of course it will not. We often laugh and attribute the errors to nervousness.

Also, it is probably wise to avoid making jokes. Humor can be extremely effective in an oral argument, but it is difficult to know judges' senses of humor. A failed joke may detract from your self-confidence and may alter the atmosphere in the courtroom for your entire argument. Unless you are 100% certain that the joke will be well received by the panel, it is better to keep it to yourself. Also, an understanding of the rules of football or baseball is not a prerequisite for judicial selection. Thus, using a sports analogy—or any analogy from other possibly unfamiliar territory—to make your case may sacrifice a judge's ability to comprehend fully your argument.

In our court when you have five minutes left to argue, the yellow light on the podium illuminates. At that time prepare to move to your concluding statement. As you finish your argument, be sure to tell us what you want the court to do with your case—do you want an affirmance, a reversal, a remand, an evidentiary hearing, or a stay? If there is more than one acceptable resolution of your appeal, let us know by stating it straightforwardly in your conclusion: "We urge you to reverse, or at least to remand for further fact finding."

Even if the yellow light has not yet illuminated, it is perfectly acceptable for an advocate to complete her argument when she has made all of her important points. In other words, know when to stop talking. If judges who were once engaged in lively questioning during the argument begin to appear obviously weary, it is time to move on to another point or to sit down. There is no need to belabor a point that we all understand. Sometimes the court will be merciful, and the presiding judge will announce, "I think we understand your position, is there anything else?" Likewise, the court might offer, "We have read your briefs. Unless you have something new to add, we understand your arguments." The best and clearest signal, though, always came from the late Judge Russell, who often said, "Son, you keep beating that dead horse, and he's likely to jump up and run away from you."

When you have exhausted your points of discussion, inform the court, "That concludes my prepared argument, but I am happy to answer any remaining questions." More often than not, we will simply thank you, signaling that it is safe to sit down. Once the red light comes on, however, you should not continue speaking without permission from the court. If you are in the midst of answering a question when the light turns red, quickly wrap up the answer and politely say, "I see that my time has expired, would you like me to elaborate further?"

In the Fourth Circuit, unlike any of the other United States courts of appeals, the end of argument does not signal your last contact with the judges on the panel. Before we hear the next case on the docket or retire to conference, we will come down from the bench to greet you and shake your hand. As Alan Dershowitz remarked, "The [Fourth] Circuit is the most polite court in the country .... Just before they affirm and send your client to prison, they come down and shake your hand and tell you how much they enjoyed your

argument."[27] After the handshake, you are free to leave the courtroom or you may stay to hear the remaining arguments. Just quickly try to clear your papers from the lectern and attorneys' table so that the next lawyers can begin their arguments.

V. CONCLUSION

Following the advice in this brief Article does not guarantee that you will win your appeal. Even the most brilliant advocate cannot not win a reversal when the rulings below are legally sound. But after hearing over one thousand oral arguments, I believe that following this guidance will help you be of better service to both your client and the court. Thorough preparation and solid presentation will enable the court to tap your expertise to become fully informed about your case and reach the just result.

27. Mark Johnson & Tom Campbell, *A Courtly* Upholding *of Law's Rightness*, RICHMOND TIMES-DISPATCH, Jan. 10, 1999, at A1 (quoting a speech delivered by Alan Dershowitz in Richmond, Virginia).