

ADLER POLLOCK & SHEEHAN P.C.

FAST FIVE

RHODE ISLAND APPELLATE PRACTICE

WHAT IT MEANS TO BE PREPARED FOR ORAL ARGUMENT BEFORE THE RHODE ISLAND SUPREME COURT

“By failing to prepare, you are preparing to fail.”

— Benjamin Franklin

Fall is my favorite season. As the foliage begins to take on the shades of yellow, orange, red and brown that are representative of the change of the season, squirrels and chipmunks begin their feverish efforts to collect and stockpile enough food to sustain them for the winter months that inevitably lie ahead. Days after our transition to autumn, the Rhode Island Supreme Court commenced its Fall 2013 Term with oral arguments on September 24, 2013. Just as Mother Nature began to prepare for winter, those lawyers assigned to the fall oral argument calendar began to prepare for their upcoming arguments. As a law clerk, I had the opportunity to observe hundreds of oral arguments, most of which were delivered by attorneys who were well prepared and some of which were not. I do not believe any of the attorneys who came before the Court ever believed they were unprepared. As it turns out, those who were unprepared just had a different understanding of what it meant to be prepared for an appellate argument. This edition of the Fast Five on Rhode Island Appellate Practice helps define what it means to be prepared for an appellate argument before the Rhode Island Supreme Court.

(1) BEING PREPARED FOR ORAL ARGUMENT MEANS KNOWING THE SIZE OF THE LECTERN.

Perhaps the greatest strength an appellate advocate can have is organization. Delivering a concise and persuasive appellate argument in 30 minute or less in a case that was pending before the trial court for years is difficult. It is even more difficult when five smart, seasoned jurists inquire about the intricacies of your argument. Being prepared means having your materials well organized and accessible so you can easily transition from point to point and readily locate the citation to an obscure case at a moment's notice. The surface of the lectern in the Rhode Island Supreme Court is 20 inches wide and 15.5 inches high. The ledge that keeps materials leaning upright on the lectern's surface is narrow. Be careful to ensure that the materials you bring to the lectern fit on the lectern and avoid shuffling too many papers.

(2) BEING PREPARED FOR ORAL ARGUMENT MEANS KNOWING THE RECORD AND THOSE FACTS THAT ARE NOT IN THE RECORD EVEN IF YOU WERE NOT TRIAL COUNSEL.

For a variety of reasons, clients sometimes retain different counsel to handle their case on appeal. As a result, a familiar refrain in response to the Supreme Court's questioning is "I don't know, Your Honor. I was not trial counsel." Often times, the question that prompts such a response is one that inquires about facts outside the record.

While the Supreme Court may only consider and review facts that are in the record, there are occasions when the Court will inquire about facts outside the record to put the facts that are in the record in context. Whether or not the appellate practitioner was trial counsel, he or she should be prepared to answer the Court's questions about facts outside the record. If a question

requires you to reference facts that are not in the record, you should provide the answer but also advise the Court that such facts are outside the record.

(3) BEING PREPARED FOR ORAL ARGUMENT MEANS KNOWING THE WEAKNESSES IN YOUR ARGUMENT.

Before stepping off the seventh floor elevator at the Licht Judicial Complex on the day of your oral argument, you should not only know the weaknesses in your argument, but also have anticipated questions about those weaknesses and prepared responses to those questions. If time and resources permit, a mock oral argument before colleagues or fellow practitioners can be a tremendously beneficial exercise. Chances are, the first questions you will receive from the bench will concern the weaknesses in your argument and having anticipated them in advance will ensure that your argument stays on track.

(4) BEING PREPARED FOR ORAL ARGUMENT MEANS KNOWING THE COMPOSITION OF THE COURT.

In Rhode Island, we are fortunate to have a very visible Supreme Court. The five justices of the Supreme Court are frequent participants at Rhode Island Bar Association Continuing Legal Education Programs and are present at many programs hosted by the legal community. Nevertheless, for those unfamiliar with the Court, being prepared for oral argument means knowing the composition of the Court and being able to reference the justices by name when responding to or referencing questions from the bench. As a guide, the Rhode Island Supreme Court justices sit for oral argument in the following order (from left to right) Justice Robinson, Justice Goldberg, Chief Justice Suttell, Justice Flaherty and Justice Indgelia.

(5) BEING PREPARED FOR ORAL ARGUMENT MEANS KNOWING THE PURPOSE OF ORAL ARGUMENT.

Oral argument is not an opportunity to read your appellate brief to the Court. It is an opportunity for the Court to gain a better understanding about particular factual and legal issues and explore the limits of the principles you are advocating. The Rhode Island Supreme Court has often been described as a “hot bench,” a colloquial phrase used to describe an engaged and inquisitive court. Counsel will find that most of their allotted time will be spent responding to the Court’s questions. As a result, brevity is a virtue. Distilling your argument to as few points as possible is critical to ensuring that you inform the Court of the points it is absolutely necessary for you to make, while allowing for enough time to respond to the Court’s questions. Finally, keep track of where you are in your argument by watching the timer on the lectern, which will alert you when you should begin your argument, when you have two minutes remaining and when you must conclude your argument.

For more updates on Rhode Island appellate law, pointers for practice before the Rhode Island Supreme Court and past editions of the Fast Five on Rhode Island Appellate Practice, please visit our blog site <http://www.RIAppeals.com>.



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