

BIBLIOGRAPHY

Oral Advocacy

A Bibliography

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I. Introduction

Wither oral argument? That is the question often posed by many of the articles in this bibliography.¹ A centuries-long trend has brought us from an oral tradition of persuasion to one that is writing based. Oral arguments that once consumed days are now delivered in fifteen minutes or less, if at all. And that was before COVID-19. Today, oral arguments are even less common, and they are conducted via glitchy software across erratic broadband connections. Meanwhile, an unlucky cohort of law students whose opportunities to practice oral advocacy in law school were already limited are graduating without ever having stood before a lectern to address a panel of judges.

Does this matter, as other writers ask?² After all, the literature suggests that most judges have their minds made up before arguments are heard.³ Yet, after a year on the bench, Chief Justice John Roberts concluded that “oral argument is terribly, terribly important. I feel more confident about that now than I ever did as an advocate.”⁴ For Chief Justice Roberts, oral argument “is the organizing point for the entire judicial process.”⁵ That may well be the case in the United States Supreme Court,

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¹ See, e.g., James C. Martin & Susan M. Freeman, *Wither Oral Argument? The American Academy of Appellate Lawyers Says Let’s Resurrect It!*, 19 J. APP. PRAC. & PROCESS 89 (2018).

² See *infra* section II.5.

³ Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge’s Perspective on Their History, Function, and Future*, 10 J. APP. PRAC. & PROCESS 247, 267 (2009).

⁴ John G. Roberts Jr., *Oral Advocacy and the Re-Emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 69 (2005).

⁵ *Id.* at 70.

which cherry picks 70–80 cases per year from more than 7,000–8,000 certification petitions⁶ and reverses more than half of the lower court opinions.⁷ Similarly, in my home state of New Jersey, our Supreme Court heard 87 appeals in 2019–2020, and reversed in 55.6% of the cases.⁸ Asked if oral argument matters, Chief Justice Stuart Rabner responded, “[M]ost definitely, yes.”⁹

But what about other courts where cases are not handpicked? Does oral argument matter in the circuit courts of appeals, where, across all circuits, less than 20% of cases were argued in 2020?¹⁰ Does it matter in the federal and state trial courts? In dispositive motions only? What about pre-trial motions, evidentiary motions? In short, does oral argument matter—and should the decline in such opportunities trouble us—based not on the “glamour” of a United States Supreme Court argument, but on the “blue-collar, day-in-day-out thing[s] lawyers do routinely?”¹¹

By and large, the works cited in this bibliography answer “yes.” They tell us why oral argument is important; how to do it; how to teach it; and how to see it through the eyes of the judges we want to persuade. Importantly, many of these authors also see the value of oral advocacy beyond the courtroom and stress the need to continue teaching and practicing these skills. Michael Vitiello reminds us that

oral advocacy training helps lawyers in many areas other than in making formal appellate arguments: whether one is a trial lawyer, a transactional lawyer, or a mediator, she is often called on to make coherent presentations to diverse audiences. She must learn core skills to do so and a good advocacy course can begin that training.¹²

Moreover, the very act of speaking—or even preparing to speak—can sharpen our analytical skills. Edward T. Swaine points out that the specter of oral argument “is consequential . . . disciplining written submissions by forcing counsel to anticipate the possibility of being chewed out” by the

6 *U.S. Supreme Court Research Guide: Overview*, UNIV. MICH. L. LIB. (last updated Feb. 4, 2022), <https://libguides.law.umich.edu/scotus>.

7 The Court issued opinions in 69 cases during its October 2020 term. It reversed 55 lower court decisions (79.7 percent) and affirmed 14. *SCOTUS case reversal rates (2007–Present)*, BALLOTPEDIA (last visited June 1, 2022).

8 Bruce D. Greenberg, *Supreme Court of New Jersey Year in Review–2019–2020*, NEW JERSEY APPELLATE LAW (Oct. 7, 2020), <http://appellatelaw-nj.com/supreme-court-of-new-jersey-year-in-review-2019-2020/>.

9 Bruce D. Greenberg, *Supreme Court Oral Argument Tips From Chief Justice Rabner*, NEW JERSEY APPELLATE LAW (Mar. 20, 2019), <http://appellatelaw-nj.com/supreme-court-oral-argument-tips-from-chief-justice-rabner/>.

10 Mark A. Neubauer, *The Disappearing Oral Argument*, 48 LITIG. 40 (2022).

11 K. Larkins Jr., *Oral Argument on Motions*, 23 LITIG. 16, 16 (1997).

12 Michael Vitiello, *Teaching Oral Advocacy: Creating More Opportunities for an Essential Skill*, 45 SETON HALL L. REV. 1031, 1044 (2015).

court.¹³ Lisa McElroy sums it up this way: “[S]peaking—like writing—is in and of itself a form of thinking.”¹⁴ In other words, while Yogi Berra may have said, “you can hear a lot by listening,”¹⁵ these authors tell us that you can learn a lot by speaking.

II. The bibliography

The universe of materials on oral advocacy is predictably large, and this bibliography does not purport to include them all. By necessity, lines must be drawn, and the majority of the works cited below were published after 2000. The bibliography includes books and articles covering both “oral argument” and “oral advocacy,” but materials on the broader topic of public speaking have been omitted. I am responsible for the inevitable omissions.

Many books combine discussions of both legal writing and oral advocacy, and I have included the relevant chapters in the bibliography. Articles fell roughly into three categories: scholarly articles in law journals; articles written for a national audience in periodicals like *Litigation*, the ABA’s quarterly publication; and short, practice-oriented works that appear in various local and state bar journals. This bibliography is principally comprised of relevant law journal articles and a selection of the widely circulated periodicals, but almost none of the short works, which were overwhelming in number and often jurisdiction specific. The bibliography also largely excludes articles that offer granular analyses of the workings of the United States Supreme Court. While these touch on oral argument, the empirical work done on reversal rates, argument length, and what cases generate the most questions (and from whom) are beyond the scope of this work.

The materials below are categorized, with unavoidable overlap, as follows: (1) Books written about oral advocacy specifically or, more frequently, both written and oral advocacy; (2) Pedagogy; (3) Practice; (4) Oral advocacy beyond the appellate courtroom; (5) Does oral argument matter?; (6) Bias in oral advocacy; and (7) Virtual oral advocacy.

13 Edward T. Swaine, *Infrequently Asked Questions*, 17 J. APP. PRAC. & PROCESS 271, 284 (2016).

14 Lisa T. McElroy, *From Grimm to Glory: Simulated Oral Argument as a Component of Legal Education’s Signature Pedagogy*, 84 IND. L.J. 589, 594 (2009).

15 Kravitz, *supra* note 3, at 267.

1. Books and book chapters about oral argument generally

Oral argument is certainly responsible for “generating . . . adrenaline,”¹⁶ as Mary Beth Beazley points out, but the excitement of standing at the podium is typically preceded by long hours spent researching and drafting the brief. Hence, much of what is written about oral advocacy is coupled with guidance on brief writing, as in many of the books listed below.

AM. BAR ASS’N, *LEGAL WRITING SOURCEBOOK* 116 (3d ed. 2020).

MARY BETH BEAZLEY, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY* ch. 13 (5th ed. 2018).

URSULA BENTELE & EVE CARY, *APPELLATE ADVOCACY: PRINCIPLES AND PRACTICE* (5th ed. 2012).

CAROLE BERRY & RAYMOND MICHAEL RIPPLE, *EFFECTIVE APPELLATE ADVOCACY: BRIEF WRITING AND ORAL ARGUMENT* chs. 8–10 (5th ed. 2016).

BROOKE J. BOWMAN ET AL., *STETSON UNIV.: INST. FOR THE ADVANCEMENT OF LEGAL COMM’N, ORAL ARGUMENT: THE ESSENTIAL GUIDE* (2018).

DAVID J. DEMPSEY, *LEGALLY SPEAKING: 40 POWERFUL PRESENTATION PRINCIPLES LAWYERS NEED TO KNOW* (rev. & updated ed. 2009).

J. SCOTT COLESANTI, *ORAL ADVOCACY: STYLE AND SUBSTANCE* (2017).

ALAN L. DWORSKY, *THE LITTLE BOOK ON ORAL ARGUMENT* (2d ed. 2018).

TESSA DYSART ET AL., *WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT* (3d ed. 2017).

MICHAEL R. FONTHAM & MICHAEL VITIELLO, *PERSUASIVE WRITTEN AND ORAL ADVOCACY IN TRIAL AND APPELLATE COURTS* (Rachel E. Barkow et al. eds., 4th ed. 2007).

DAVID FREDERICK, *THE ART OF ORAL ADVOCACY* (3d ed. 2019).

BRYAN A. GARNER, *THE WINNING ORAL ARGUMENT: ENDURING PRINCIPLES WITH SUPPORTING COMMENTS FROM THE LITERATURE* (1st ed. 2007).

BRIAN K. JOHNSON & MARSHA HUNTER, *THE ARTICULATE ATTORNEY: PUBLIC SPEAKING FOR LAWYERS* (2d ed. 2013).

MARY-BETH MOYLAN & STEPHANIE J. THOMPSON, *GLOBAL LAWYERING SKILLS* (2d ed. 2018).

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¹⁶ MARY BETH BEAZLEY, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY* 288 (4th ed. 2014).

- MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, *ADVANCED LEGAL WRITING AND ORAL ADVOCACY: TRIALS, APPEALS, AND MOOT COURT* (3d ed. 2022).
- EDWARD D. RE & JOSEPH R. RE, *BRIEF WRITING AND ORAL ARGUMENT* chs. IX–X (9th ed. 2005).
- JOAN M. ROCKLIN ET AL., *AN ADVOCATE PERSUADES* ch. 14 (2016).
- RANDALL P. RYDER ET AL., *ADVOCACY ON APPEAL* (4th ed. 2021).
- ROBERT N. SAYLER & MOLLY BISHOP SHADEL, *TONGUE-TIED AMERICA: REVIVING THE ART OF VERBAL PERSUASION* (2011).
- ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* chs. 55–111 (3d ed. 2008).
- MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* (3d ed. 2013).
- STEVEN WISOTSKY, *SPEAKING WITH POWER AND STYLE: A GUIDE FOR LAWYERS AND LAW STUDENTS* (2013).

2. Pedagogy

Alarming, some commentators say that courts are limiting or eliminating oral argument not just because their dockets are bursting, but also because the lawyers are not very good at it. According to the Oral Argument Task Force Report of the American Academy of Appellate Lawyers, “[F]or some appellate judges, the problem with oral argument is the poor quality of the lawyers’ work. We know that appellate courts could be more efficient if they received a better average quality of advocacy in both briefs and oral argument.”¹⁷ Judge Kravitz is more direct. He says, “I am also told that lawyers are not good oral advocates and that as a result, oral argument is a waste of time.”¹⁸ This, of course, sets up a self-fulfilling prophecy, Kravitz says, “for lawyers are unlikely to develop strong oral-argument skills if they almost never have the opportunity to use them.”¹⁹

For most lawyers, practice in oral advocacy begins in law school, in first-year legal writing courses, upper-level appellate programs, trial advocacy programs, and moot courts. These programs, and moot courts in particular, have their critics, who argue that moot courts have a “make-believe quality” that renders them pedagogically ineffective.²⁰ Michael V.

¹⁷ AM. ACAD. OF APPELLATE LAWYERS, ORAL ARGUMENT TASK FORCE REPORT 14 (Oct. 2015), https://www.appellateacademy.org/publications/oa_final_report_10_15_15.pdf.

¹⁸ Kravitz, *supra* note 3, at 270.

¹⁹ *Id.*

²⁰ Alex Kozinski, *In Praise of Moot Court—Not!*, 97 COLUM. L. REV. 178, 178-79 (1997).

Hernandez concedes that “the process can be a bit artificial,” but adds that we who teach in these programs also know “that shortcoming characterizes any simulated activity.”²¹ Those shortcomings vanish when we see people “literally transformed for the better by their experiences in moot court,” Hernandez says.²² “Students who were petrified by the thought of speaking in public, much less making an oral argument before a panel of real judges under adversarial fire, suddenly have come alive in the heat of battle.”²³

These articles help us ignite our students’ passion for advocacy through oral argument. Part 1 includes articles about teaching oral argument in a variety of contexts, while Part 2 is focused on teaching through moot courts.

Part 1: Teaching oral argument

Heather Baxter, *Using Hamilton’s “Farmer Refuted” to Teach Oral Argument*, 27 *PERSPS.* 66 (2019).

Neil J. Dilloff, *Law School Training: Bridging the Gap Between Legal Education and the Practice of Law*, 24 *STAN. L. & POL’Y REV.* 425 (2013).

James D. Dimitri, *Stepping Up to the Podium with Confidence: A Primer for Law Students on Preparing and Delivering an Appellate Oral Argument*, 38 *STETSON L. REV.* 75 (2008).

Jennifer Kruse Hanrahan, *Truth in Action: Revitalizing Classical Rhetoric as a Tool for Teaching Oral Advocacy in American Law Schools*, 2003 *BYU EDUC. & L.J.* 299 (2003).

Joy Kanwar, *Avatars, Acting and Imagination: Bringing New Techniques into the Legal Classroom*, 43 *J. LEGAL PRO.* 1 (2018).

Franklyn P. Salimbene, *Using Moot Court Simulations as Teaching Tools: An Implementation Guide for Business Law Instructors*, 19 *ATL. L.J.* 177 (2017).

Louis J. Sirico Jr., *Teaching Oral Argument*, 7 *PERSPS.* 17 (1998).

Stephanie A. Vaughan, *Experiential Learning: Moving Forward in Teaching Oral Advocacy Skills by Looking Back at the Origins of Rhetoric*, 59 *S. TEX. L. REV.* 121 (2017).

²¹ Michael V. Hernandez, *In Defense of Moot Court: A Response to “In Praise of Moot Court-Not!”*, 17 *REV. LITIG.* 69, 71 (1998).

²² *Id.* at 77.

²³ *Id.*

Michael Vitiello, *Teaching Oral Advocacy: Creating More Opportunities for an Essential Skill*, 45 SETON HALL L. REV. 1031 (2015).

Michael Vitiello, *Teaching Effective Oral Argument Skills: Forget About the Drama Coach*, 75 MISS. L.J. 869 (2006).

C.J. Williams, *Advocating Altering Advocacy Academics: A Proposal to Change the Pedagogical Approach to Legal Advocacy*, 25 SUFFOLK J. TRIAL & APP. ADVOC. 203 (2020).

Emily Zimmerman, *Keeping It Real: Using Contemporary Events to Engage Students in Written and Oral Advocacy*, 12 PERSPS. 109 (2002).

Part 2: Moot court

Books

JAMES DIMITRI ET AL., THE LEGAL WRITING INST., THE MOOT COURT ADVISOR'S HANDBOOK: A GUIDE FOR LAW STUDENTS, FACULTY, AND PRACTITIONERS (2015).

Articles

David W. Case, *A Pedagogical Rationale for the Law Professor as Moot Court Coach*, 89 MISS. L.J. 367 (2020).

Darby Dickerson, *In Re Moot Court*, 29 STETSON L. REV. 1217 (2000).

Richard E. Finneran, *Wherefore Moot Court?*, 53 WASH. U. J.L. & POL'Y 121 (2017).

Michael V. Hernandez, *In Defense of Moot Court: A Response to "In Praise of Moot Court—Not!"*, 17 REV. LITIG. 69 (1998).

Alex Kozinski, *In Praise of Moot Court—Not!*, 97 COLUM. L. REV. 178 (1997).

Barbara Kritchevsky, *Judging: The Missing Piece of the Moot Court Puzzle*, 37 U. MEM. L. REV. 45 (2006).

Gerald Lebovits et al., *Winning the Moot Court Oral Argument: A Guide for Intramural and Intermural Moot Court Competitors*, 41 CAP. U. L. REV. 887 (2013).

Brian Wice, *Oral Argument in Criminal Cases: 10 Tips for Winning the Moot Court Round*, 69 TEX. B.J. 224 (2006).

3. Practice

The literature confirms that you need to do two things to succeed in oral argument: First, prepare. Second: answer the court's questions. It is that easy, and that difficult. These authors give us guidance on how

to prepare for argument; how to handle a hot *or* cold bench; crafting a rebuttal; and when to use humor (never).²⁴ There is no shortage of advice or guidance on how to do an oral argument, but at the end of the day, perhaps Ruth Bader Ginsburg said it best: “At argument, gems will be missed if counsel forgets to speak clearly, slowly, with a full voice, and to maintain good eye contact with the judges.”²⁵

Part 1 includes articles from a variety of sources on topics both broad—like fielding questions from the bench—and narrow, like swearing in court. Part 2 is a compilation of advice from our audience: the judges and law clerks who hear our arguments. Part 3 recognizes that, as Mark Twain is credited with saying, “There are two types of speakers: Those who get nervous, and those who are liars.”²⁶ The articles in this section reassure us that if Simone Biles can survive a bout of “the twisties,” so can we.²⁷

Part 1: General guidance

Articles

Timothy S. Bishop, *Trial and Error: Oral Argument in the Roberts Court*, 35 LITIG. 6 (2009).

Eric Caugh, *Splitting Oral Argument: Avoiding Misadventures in Division*, AM. BAR ASS’N (Nov. 28, 2018), <https://www.americanbar.org/groups/litigation/committees/appellate-practice/articles/2018/fall2018-splitting-oral-argument-avoiding-misadventures-in-division>.

Cynthia K. Conlon & Julie M. Karaba, *May It Please the Court: Questions About Policy at Oral Argument*, 8 NW. J. L. & SOC. POL’Y 89 (2012).

Sabrina DeFabritiis, *Lost in Translation: Oral Advocacy in a Land Without Binding Precedent*, 35 SUFFOLK TRANSNAT’L L. REV. 301 (2012).

²⁴ Okay, *almost* never, according to Sylvia H. Walbolt, who heads the Appellate and Trial Support Practice at Carlton Fields. Sylvia H. Walbolt & Nick A. Brown, *How to Confront Your Worst Fears About Appellate Oral Argument Litigation*, AM. BAR ASS’N. (Feb. 26, 2018), <https://www.americanbar.org/groups/litigation/committees/appellate-practice/articles/2018/winter2018-how-to-confront-your-worst-fears-about-appellate-oral-argument/> (login required).

²⁵ Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 569 (1999).

²⁶ Jerry Weissman, *Another Humorous View on the Fear of Public Speaking*, FORBES (June 17, 2014), <https://www.forbes.com/sites/jerryweissman/2014/06/17/another-humorous-view-on-the-fear-of-public-speaking/?sh=60f448716708>.

²⁷ The “twisties” are “a phenomenon in which gymnasts lose their sense of space, depth perception and positioning in midair,” to which Simone Biles attributed her abrupt withdrawal from competition in the 2021 summer Olympics. See Heidi K. Brown, *What Elite Athletes like Naomi Osaka and Simone Biles Can Teach Lawyers about Performance Anxiety*, ABA J. (Dec. 1, 2021, 1:10 AM), <https://www.abajournal.com/magazine/article/what-elite-athletes-like-naomi-osaka-and-simone-biles-can-teach-lawyers-about-performance-anxiety>.

- Steven J. Dwyer et al., *Effective Oral Argument: Six Pitches, Five Do's, and Five Don'ts from One Judge and Two Lawyers*, 33 SEATTLE U. L. REV. 347 (2010).
- Stephen Feldman & Lance Curry, *Effective Oral Argument and Reflections on the Roberts Court*, AM. BAR ASS'N (Aug. 24, 2015), <https://www.americanbar.org/groups/litigation/committees/appellate-practice/articles/2015/summer2015-0815-effective-oral-argument-reflections-roberts-court>.
- W. Ross Foote & Edward J. Walters Jr., *Stop the Whining: Effective Oral Argument*, 61 LA. B.J. 408 (2014).
- Henry D. Gabriel, *Preparation and Delivery of Oral Arguments in Appellate Courts*, 22 AM. J. TRIAL ADVOC. 571 (1999).
- Alan E. Garfield, *To Swear or Not to Swear: Using Foul Language During a Supreme Court Oral Argument*, 90 WASH. U. L. REV. 279 (2012).
- Barbara Gotthelf, *The Lawyer's Guide to Um*, 11 LEGAL COMM. & RHETORIC 1 (2014).
- Margaret Grignon, *Oral Argument: Facing the Challenge and Embracing the Opportunity*, AM. BAR ASS'N (Mar. 26, 2014), <https://www.americanbar.org/groups/litigation/committees/woman-advocate/articles/2014/oral-argument-facing-challenge-embracing-opportunity>.
- Michael J. Higdon, *Oral Argument and Impression Management: Harnessing the Power of Nonverbal Persuasion for a Judicial Audience*, 57 KAN. L. REV. 631 (2009).
- Judith S. Kaye, *The Best Oral Argument I (N)ever Made*, 7 J. APP. PRAC. & PROCESS 191 (2005).
- Robert A. Mittelstaedt & Brian J. Murray, *Who Should Do the Oral Argument*, 38 LITIG. 48 (2012).
- Brian J. Paul, *Advice to Young Lawyers: Oral Argument for My Adversaries*, 31 APP. PRAC. 6 (Nov. 9, 2011), <https://www.americanbar.org/groups/litigation/committees/appellate-practice/articles/2011/fall-2011-advice-young-lawyers-oral-argument-my-adversaries/>.
- Lawrence D. Rosenberg, *Aristotle's Methods for Outstanding Oral Arguments*, 33 LITIG. 33 (2007).
- Nancy L. Schultz, *Lessons from Positive Psychology for Developing Advocacy Skills*, 6 J. MARSHALL L. REV. 103 (2012).
- Richard H. Seamon, *Preparing for Oral Argument in the United States Supreme Court*, 50 S.C. L. REV. 603 (1999).

- Louis J. Sirico Jr., *Opening an Oral Argument Before the Supreme Court: The Decline of Narrative's Role*, 36 REV. LITIG., THE BRIEF 1 (2016).
- Robert E. Stepp, *Don't Raise Your Voice. Improve Your Argument*, 25 S.C. LAW. July 2013, at 32.
- Roger D. Townsend, *Oral Argument on Appeal: Go Forth and Sin, Sin, Sin*, 22 APP. ADVOC. 20 (2009).
- Jason Vail, *Oral Argument's Big Challenge: Fielding Questions from the Court*, 1 J. APP. PRAC. & PROCESS 401 (1999).
- Stephanie A. Vaughan, *Persuasion is an Art . . . But It is Also an Invaluable Tool in Advocacy*, 61 BAYLOR L. REV. 635 (2009).
- Sylvia H. Walbolt, *Twenty Tips from a Battered and Bruised Oral-Advocate Veteran*, 37 LITIG. 54 (2011).
- Sylvia H. Walbolt & Nick A. Brown, *How to Confront Your Worst Fears About Appellate Oral Argument Litigation*, AM. BAR ASS'N. (Feb. 26, 2018), <https://www.americanbar.org/groups/litigation/committees/appellate-practice/articles/2018/winter2018-how-to-confront-your-worst-fears-about-appellate-oral-argument/> (login required).
- Karen J. Williams, *Help Us Help You: A Fourth Circuit Primer on Effective Appellate Oral Arguments*, 50 S.C. L. REV. 591 (1999).

Part 2: The judicial perspective

Articles

- Marvin E. Aspen, *Ten Tips from the Bench: Motion Practice Oral Argument*, AM. BAR ASS'N (Feb. 6, 2012), <https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/articles/2012/winter2012-aspen-ten-tips-oral-argument>.
- Amanda C. Bryan et al., *Taking Note: Justice Harry A. Blackmun's Observations from Oral Argument About Life, the Law, and the U.S. Supreme Court*, 45 J. SUP. CT. HIST. 44 (2020).
- Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567 (1999).
- Joseph A. Greenaway, *A Judge Comments*, 48 LITIG. 42 (2022).
- J. Thomas Greene, *From the Bench: Oral Argument in the District Court*, 26 LITIG. 3 (2000).
- Rachel Clark Hughey, *Effective Appellate Advocacy Before the Federal Circuit: A Former Law Clerk's Perspective*, 11 J. APP. PRAC. & PROCESS 401 (2010).
- Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices as Advocates*, 94 NOTRE DAME L. REV. 1161 (2019).

- Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on Their History, Function, and Future*, 10 J. APP. PRAC. & PROCESS 247 (2009).
- Bridget Mary McCormack & Len Niehoff, *May It Displease the Court*, 44 LITIG. 33 (2018).
- Margaret D. McGaughey, *May It Please the Court — Or Not: Appellate Judges' Preferences and Pet Peeves about Oral Argument*, 20 J. APP. PRAC. & PROCESS 141 (2019).
- Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge's Views*, 51 DUQ. L. REV. 3 (2013).
- William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 MERCER L. REV. 1015 (1984).
- John G. Roberts Jr., *Oral Advocacy and the Re-Emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68 (2005).
- C.J. Williams & Leonard T. Strand, *Judicial Advocacy: How to Advocate to a Judge*, 43 AM. J. TRIAL ADVOC. 281, 283 (2020).
- Michael A. Wolff, *From the Mouth of a Fish: An Appellate Judge Reflects on Oral Argument*, 46 ST. LOUIS U. L.J. 1097 (2001).

Part 3: Managing nerves

Books

- HEIDI K. BROWN, *THE INTROVERTED LAWYER: A SEVEN-STEP JOURNEY TOWARD AUTHENTICALLY EMPOWERED ADVOCACY* (2017).
- HEIDI K. BROWN, *UNTANGLING FEAR IN LAWYERING: A FOUR-STEP JOURNEY TOWARD POWERFUL ADVOCACY* (2019).

Articles

- Jill Barton, *Oral Advocacy in 90 Seconds: Turning Fear into Fun*, 22 PERSPS. 115 (2014).
- Heidi K. Brown, *The "Silent but Gifted" Law Student: Transforming Anxious Public Speakers into Well-Rounded Advocates*, 18 LEGAL WRITING 291 (2012).
- Heidi K. Brown, *What Elite Athletes like Naomi Osaka and Simone Biles Can Teach Lawyers about Performance Anxiety*, ABA J. (Dec. 1, 2021, 1:10 AM), <https://www.abajournal.com/magazine/article/what-elite-athletes-like-naomi-osaka-and-simone-biles-can-teach-lawyers-about-performance-anxiety>.
- Mark Cooney, *It's Okay to Get Nervous*, STUDENT LAW. (Dec. 1, 2016).

Larry Cunningham, *Using Principles from Cognitive Behavioral Therapy to Reduce Nervousness in Oral Argument or Moot Court*, 15 NEV. L.J. 586 (2015).

Sylvia H. Walbolt & Nick A. Brown, *How to Confront Your Worst Fears About Appellate Oral Argument*, AM. BAR ASS'N (Feb. 26, 2018), <https://www.americanbar.org/groups/litigation/committees/appellate-practice/articles/2018/winter2018-how-to-confront-your-worst-fears-about-appellate-oral-argument/> (login required).

4. Oral advocacy beyond the appellate courtroom

Speaking can be a tool for persuasion and a tool for pedagogy. These authors recognize that lawyers and law students speak in a variety of contexts, for a variety of purposes. They give us guidance on harnessing the power of oral advocacy outside of the traditional appellate courtroom.

John T. Burman, *Oral Examinations as a Method of Evaluating Law Students*, 51 J. LEGAL EDUC. 130, 132 (2001).

Jason K. Cohen, *Attorneys at the Podium: A Plain-Language Approach to Using the Rhetorical Situation in Public Speaking Outside the Courtroom*, 8 LEGAL COMM. & RHETORIC 73 (2011).

Adam Eckart, *From the Courtroom to the Boardroom: Transactional Oral Advocacy*, 34:2 SECOND DRAFT 1 (2021).

Paula Gerber & Melissa Castan, *Practice Meets Theory: Using Moots as a Tool to Teach Human Rights Law*, 62 J. LEGAL EDUC. 298 (2012).

John K. Larkins Jr., *Oral Argument on Motions*, 23 LITIG. 16 (1997).

Lisa T. McElroy, *From Grimm to Glory: Simulated Oral Argument as a Component of Legal Education's Signature Pedagogy*, 84 IND. L.J. 589 (2009).

Michael D. Murray, *The Positive Pedagogy of Presentations to Partners*, 21 SECOND DRAFT 11 (2006).

Sarah E. Ricks, *Some Strategies to Teach Reluctant Talkers to Talk About Law*, 54 J. LEGAL EDUC. 570 (2004).

Rachel Stabler, *Making the Most out of Court Observations in the 1L Year*, 33 SECOND DRAFT 40 (2020).

5. Does oral argument matter?

According to Ruth Bader Ginsburg, "Oral argument, at its best, is an exchange of ideas about the case, a dialogue or discussion between

court and counsel.”²⁸ That dialogue is important to the decisionmaking process. Even when the court does not change its views based on counsels’ arguments, “the lawyers during oral argument can provide judges with a measure of confidence in their decision making that cannot be provided by written briefs alone.”²⁹ Judge Kravitz explains that “[o]ral argument can convey a sense of urgency, sincerity, and (dare I say?) emotion that is not easily communicated by a written brief, for the speaker has at his disposal intonation, gesture, and other non-verbal cues that are unavailable to the writer.”³⁰ To dispense with oral argument, some writers argue, “is a loss like teaching a law school class by reading judicial opinions aloud without discussion or question and answer.”³¹ These articles largely defend oral argument and raise a variety of concerns about its decreasing frequency.

Articles

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Clark Collings, *Oral Argument Reform in Utah’s Appellate Courts: Seeking to Revitalize Oral Argument Through Procedural Modification*, 2013 UTAH L. REV. ONLAW 174.

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²⁸ Ginsburg, *supra* note 25.

²⁹ Kravitz, *supra* note 3, at 267.

³⁰ *Id.* at 286.

³¹ David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. APP. PRAC. & PROCESS 119, 125 (2012).

- Spencer D. Levine, *Differing Schools of Thought: Changing Perceptions of Oral Argument*, 31 ST. THOMAS L. REV. 133 (2019).
- James C. Martin & Susan M. Freeman, *Wither Oral Argument? The American Academy of Appellate Lawyers Says Let's Resurrect It!*, 19 J. APP. PRAC. & PROCESS 89 (2018).
- Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1 (1986).
- Stanley Mosk, *In Defense of Oral Argument*, 1 J. APP. PRAC. & PROCESS 25 (1999).
- Mark A. Neubauer, *The Disappearing Oral Argument*, 48 LITIG. 40 (2022).
- Edward T. Swaine, *Infrequently Asked Questions*, 17 J. APP. PRAC. & PROCESS 271 (2016).
- Joseph T. Thai & Andrew M. Coats, *The Case for Oral Argument in the Supreme Court of Oklahoma*, 61 OKLA. L. REV. 695 (2008).
- Jay Tidmarsh, *The Future of Oral Argument*, 48 LOY. U. CHI. L.J. 475, 478 n.16 (2016).
- Warren D. Wolfson, *Oral Argument: Does it Matter?*, 35 IND. L. REV. 451 (2002).

6. Bias in oral advocacy

From the moot courtroom to the United States Supreme Court, we continue to find bias in oral advocacy. The good news is, we continue to grapple with it and to publish across a range of topics, from the amount of speaking time women get in the Supreme Court to the reality that our clothes, our hair, and our voices may still be seen as measures of our credibility.

- Michael J. Higdon, *Oral Advocacy and Vocal Fry: The Unseemly, Sexist Side of Nonverbal Persuasion*, 13 LEGAL COMM. & RHETORIC 209 (2016).
- Tiffany Lindom et al., *Gender Dynamics and Supreme Court Oral Arguments*, 2017 MICH. ST. L. REV. 1033.
- Mairi N. Morrison, *May It Please Whose Court?: How Moot Court Perpetuates Gender Bias in the "Real World" of Practice*, 6 UCLA WOMEN'S L.J. 49 (1995).
- Daphne O'Regan, *Eying the Body: The Impact of Classical Rules for Demeanor Credibility, Bias, and the Need to Blind Legal Decision Makers*, 37 PACE L. REV. 379 (2017).

- Dana Patton & Joseph L. Smith, *Lawyer, Interrupted: Gender Bias in Oral Arguments at the US Supreme Court*, 5 J.L. & CTS. 337 (2017).
- Susie Salmon, *Reconstructing the Voice of Authority*, 51 AKRON L. REV. 143 (2017).
- Rachel Stabler, *All Rise: Pursuing Equity in Oral Argument Evaluation*, 101 NEB. L. REV. ____ (forthcoming 2023).
- Christine M. Venter, *The Case Against Oral Argument: The Effects of Confirmation Bias on the Outcome of Selected Cases in the Seventh Circuit Court of Appeals*, 14 LEGAL COMM. & RHETORIC 45 (2017).

7. Virtual oral advocacy

It started with a cat or, more specifically, a Zoom cat filter that went viral and reminded all of us that we are not alone in our halting, clumsy, and sometimes riotous efforts to flip the switch on our lives and learn to communicate virtually. Whatever the future may hold in terms of masks, boosters, and variants, the consensus is that virtual arguments are here to stay. They will not replace every argument, but judges and litigants are embracing them for the convenience and efficiency they (usually) offer. Like it or not, this is the future. These articles begin to show us the way.

- Pierre H. Bergeron, *COVID-19, Zoom, and Appellate Oral Argument: Is the Future Virtual?*, 21 J. APP. PRAC. & PROCESS 193 (2021).
- James R. Layton et al., *Remote Video Argument: Suggestions for Arguing Counsel Task Force on Remote Oral Argument*, AM. ACAD. OF APPELLATE. LAWYERS, https://www.appellateacademy.org/publications/Counsel_AAAL_Remote_Task_Force_Recommendations_for_Counsel_Final.pdf (last visited Jan. 15, 2022).
- Susie Salmon, *Training Effective Virtual Oral Advocates*, in LAW TEACHING STRATEGIES FOR A NEW ERA: BEYOND THE PHYSICAL CLASSROOM (2021).
- Christine Tamer & Melissa Schultz, *The Adaptive Law Professor: Ten Tips for Keeping the Magic of an Oral Argument Competition Alive on Zoom*, 52 SYLLABUS 7 (2021).
- Edward Toussaint, *Minnesota Court of Appeals Hears Oral Argument Via Interactive Teleconferencing Technology*, 2 J. APP. PRAC. & PROCESS 395 (2000).
- Margaret D. McGaughey, *Remote Oral Arguments in the Age of Coronavirus: A Blip on the Screen or a Permanent Fixture*, 21 J. APP. PRAC. & PROCESS 163 (2021).