

Foreword*

Oral advocacy is an art, but it is one that can be learned by determined effort. Still vibrant in my mind is the first of my six 1970s arguments before the Supreme Court. In those years, the Court regularly heard four arguments in a sitting day. I was scheduled to appear in the afternoon. Anxiety mounted as I observed the morning's arguments. I skipped lunch to guard against the butterflies fluttering inside. Then, after delivering a well-rehearsed opening sentence, I looked up at the bench and experienced a feeling of extraordinary power. There sat the nine top judges in the land. They had no place to go. They were my captive audience for the next several minutes. Then a teacher by trade, I relished the opportunity to persuade them that my cause was just, my legal argument sound.

Having observed oral argument for some 22 years from the other side of the bench (13 years at the D.C. Circuit, 9 at the Supreme Court), I applaud the publication of *Supreme Court and Appellate Advocacy*. It is a well-designed guide, offering sound advice on preparing and delivering oral arguments capable of capturing the Court's sympathetic attention.

The author, David Frederick, is an accomplished advocate, veteran of twelve arguments in the Supreme Court and numerous appearances in courts of appeals. He has drawn on his own experiences, encounters of his colleagues in the Office of the Solicitor General, and interviews with skilled practitioners in the private bar. His book is comprehensive in scope, novel in approach, and

* *Author's Note:* Justice Ginsburg wrote this Foreword for the First Edition of *Supreme Court and Appellate Advocacy* and graciously permitted it to be used again in subsequent editions. The author remains grateful for her generosity.

engagingly instructive. Frederick first traces the history of advocacy before the Court from two centuries ago, when Daniel Webster and other Bar luminaries would argue a case for days on end, to today's precious half hour per side. He describes in detail how the careful advocate prepares for oral argument and then, what counsel must do to use that preparation effectively.

To reach the nine minds, Frederick conveys, the advocate must be agile. He or she must appreciate that oral argument nowadays seldom accommodates set speeches. At best, oral argument is a conversation, a discussion between knowledgeable attorneys and jurists who have done their homework, a "hot bench," as appellate advocates say. The justices' homework generally starts with the decision the Court is reviewing, then proceeds to the relevant portions of the record, the statutes and other judicial decisions in point, the briefs filed by the parties, and, depending upon their quality, the briefs of supporting amici. Frederick counsels lawyers not to resent questions from the bench as annoying interruptions of an argument's flow. Instead, he cautions advocates to address the Court's concerns directly, while remaining alert to opportunities to use a question to advance a key point. Not many cases, it is true, are won on the oral argument alone, but a case can be lost if a lawyer is unable or unwilling to answer a justice's question honestly and persuasively.

Although a conversational exchange with nine justices can be a daunting endeavor, in essence, oral argument at the Supreme Court is what it generally is in most U.S. appellate tribunals, both federal and state. Our appellate courts, unlike many appellate forums abroad, do not assign reporting judges. The presiding judge does not decide who may speak or when inquiries may be made. Any justice or judge asks a question whenever he or she pleases within the allotted argument time. Frederick's step-by-step analysis, his account of the components of oral argument, can arm an attorney to perform to best effect before any of our nation's multi-judge courts. He knows that examples work more forcibly on the mind than precepts. His text is rich in illustrations showing how an advocate can rise or fall with the occasion. Constantly informative, the book is also laced with humor that eases the reader's way.

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In sum, in chapters and verse, Frederick teaches advocates how to achieve what Justice Joseph Story counseled nearly two centuries ago (in words I borrow, with some editing):

“Be brief, be pointed
Lucid in style and order
Spend no words on trifles
Condense
Strike but a few blows, strike them to the heart
Scattered fires smother in smoke and noise
Keep this your main guide
Short be your speech, your matter strong and clear
And leave off, leave off when done.”

Ruth Bader Ginsburg