



# THE ART *of* ORAL ADVOCACY

Second Edition

David C. Frederick

*Foreword by*

Ruth Bader Ginsburg

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# THE ART OF ORAL ADVOCACY

**Second Edition**

By

**David C. Frederick**

*Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.  
Washington, D.C.*

FOREWORD



**Ruth Bader Ginsburg**

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# **THE ART OF ORAL ADVOCACY**

**Second Edition**

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Ingrid Gehle

*To my family*

## Foreword<sup>1</sup>

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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 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

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1. *Author's Note:* Justice Ginsburg wrote this Foreword for the author's *Supreme Court and Appellate Advocacy* (West 2003), and has graciously permitted it to be used here for this abridged

and revised edition of that book. Her references to the history of oral advocacy in the Supreme Court are to Chapter Two of *Supreme Court and Appellate Advocacy*.

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.

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.<sup>2</sup>

RUTH BADER GINSBURG

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2. I have several times recounted this concise advice. See, e.g., “Remarks on

Appellate Advocacy,” 50 SC. L. REV. 567, 670–71 (1999).

## Preface to the Second Edition

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Since the first edition of this book was published in 2003, a number of readers have made various suggestions for ways to improve the book. I have benefited greatly from talking with students about ways to improve this book. Those suggestions have led to this new edition.

My principal aim has been to enhance the best parts of the first edition without undergoing a major overhaul of the book. Some parts have been lengthened, other parts shortened, and some examples have been revised. In all of the changes, my hope has been to convey additional attributes of high-quality advocacy that I have learned from observing others and conversing with the best advocates.

My assistant, Katherine Tondrowski, has been a tremendous help in the process of producing this second edition. She ably picked up the work of her predecessor, Jessica Otto, in many ways, including preparing the index. David Burke has been his usual careful and critical reader, and has made valuable contributions throughout. I am very grateful to both of them for all the work they have done. My firm, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., has been supportive of my practice and my work on this advocacy book. I greatly appreciate the encouragement that I have received from my partners.

My editors at West have been terrific to me. Louis Higgins has encouraged me for several years to undertake work on a second edition and has been unfailingly polite and understanding when the time never seemed right to begin work on it. Ryan Pfeiffer has taken up the effort from Louis with patience and polite persistence. Roxanne Birkel has led the production process with skill, patience, and good humor. And Kathleen Vandergon has been a complete pleasure to work with. I also very much appreciate Pamela Siegel Chandler's efforts as publisher.

My family once again has tolerated the distractions at home occasioned by my work on this book with humor and understanding.

My children, Aaron, James, and Isabel, are wonderful. My wife, Sophie, has been a constant source of love and encouragement throughout.

D.C.F.

Washington, D.C.  
November 2010

## Preface to the First Edition

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At its core, oral advocacy is an art form learned through assiduous preparation and practice. Each great oral advocate will have a distinctive and individualized method for approaching an argument, but there are a sufficient number of universal truths about the process that permit generalized description. The idea behind this book is to break down the process of preparing and presenting oral arguments and to explain it as a series of distinct steps.

This book is a revised and abridged version of *Supreme Court and Appellate Advocacy* (West 2003), which is a detailed treatment of how to prepare and present oral arguments in the Supreme Court and other appellate courts. In the course of writing that book, it occurred to me that the principles of advocacy I was explaining and describing were universal to most any forum—from trial court motions practice to advocacy before administrative agencies. I have substantially revised the longer book, which is published in West's practitioner treatise series, to adapt those principles for a more general practice and to present the material in a way that would be especially useful to law students. It is my hope that an attorney arguing before any type of tribunal or a law student preparing for moot court will benefit from reviewing the principles and practices set forth in this book. Like the longer treatise, this book is set out with distinct chapters on preparing for oral argument and others on presenting it.

Throughout the book, I have used illustrations from cases. The purpose of those examples is to make the principles of advocacy more concrete. An example from a real case can more often inform about the do's and don'ts than a drier recitation more akin to black-letter rules. Many of those examples are drawn from Supreme Court cases. For several reasons I have intentionally included them in this version of the book. First, a Supreme Court argument often raises the same types of questions and concerns as arguments in other tribunals, except generally in a more intense and compressed format. As illustrations of advocacy principles, therefore, those examples can be used efficiently to describe the process. Moreover, many of the examples are drawn from cases that will be familiar to readers through their legal education, such as *Bush v. Gore* and *Dickerson v. United States*. Although lawyers and students may be

familiar with the Court's opinions, they may be less aware of how the arguments were presented leading up to those decisions. Finally, many law school moot court competitions and clinics use the Supreme Court as a model for the types of issues presented and multi-judge tribunals for argument. For one seeking to emulate Supreme Court practice, real examples from that court of how some of the best (and worst) advocates have performed can be illustrative.

In writing this book and adapting it from *Supreme Court and Appellate Advocacy*, I have drawn from the lessons I have tried to learn as an advocate, both in private practice and, for more than five years, as an Assistant to the Solicitor General at the United States Department of Justice. In the latter capacity, I argued twelve cases before the Supreme Court of the United States and represented the United States in the oral argument before the en banc U.S. Court of Appeals for the District of Columbia Circuit in *United States v. Microsoft Corporation*. I have also interviewed some of the finest lawyers in the country and studied transcripts of their arguments. In reporting on what others have accomplished as advocates, I have strived to make this a book about "best practices," while using examples of common mistakes to illustrate pitfalls that may trap an ill-prepared advocate.

I wrote the vast bulk of the manuscript during a break between leaving the government and joining the Washington, D.C., law firm of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., which generously allowed me to defer my start and provided a wonderful place from which to complete *Supreme Court and Appellate Advocacy* and to revise that book into this one. My colleagues both at the Office of the Solicitor General and at the firm aided me immeasurably in discussing the finer points of advocacy and offering suggestions of key points to make and examples to use.

In putting together this book, I have tried to be sensitive to gender usages. To avoid references to gender is impossible in a book like this, where I am attempting to describe what a hypothetical person—the advocate—should do. I have adopted the compromise of referring to the "advocate" in odd-numbered chapters in the male form and in even-numbered chapters in the female form. I hope whatever awkwardness the reader may experience will be compensated for by a sense of balance.

A number of people contributed in large and small ways to the development of *Supreme Court and Appellate Advocacy*, from which this book is derived. I thank them here again to show a small part of my appreciation for their help. The following advocates gener-

ously agreed to speak to me about their process for preparation and their approaches to the presentation of oral argument: Lisa Blatt, Michael Dreeben, Irving Gornstein, Jeffrey Lamken, Edwin Kneedler, Maureen Mahoney, Jeffrey Minear, Theodore Olson, John Roberts, Malcolm Stewart, and Seth Waxman. I learned a great deal from each of them. Linda Greenhouse and Tony Mauro shared their perspectives as seasoned journalists who have observed hundreds of oral arguments in the Supreme Court. And William Suter not only permitted me to interview him, but he also provided historical materials and carefully read the manuscript in draft. The following persons read all or part of *Supreme Court and Appellate Advocacy* and offered much helpful advice, including how that book might be adapted and revised specifically for law students: David Bederman, Harold Bruff, E. Christi Cunningham, Mark Evans, Dennis Hutchinson, Michael Kellogg, Richard Lazarus, Daniel Marcus, Maeva Marcus, David Meyer, Michael Ross, Michael Sturley, William Suter, and Richard Taranto. Meagan Jeronimo provided invaluable assistance through many changes to the manuscript and offered a number of stylistic suggestions. David Burke also carefully reviewed the book for consistency and accuracy in citations; he contributed a vast number of useful ideas. Finally, I would like to thank Pamela Siegel Chandler and Jon Olson of West Group. Pam was a wonderful editor and Jon offered special assistance and many important insights. Both appreciated the importance of taking the longer book, condensing it, and presenting it in a form that would be useful to a broader audience. Tim Payne nursed the manuscript for *Supreme Court and Appellate Advocacy* and this book through the production process with skill and dedication. I am also deeply indebted to Dana Verkouteren, who took on the task of creating the sketch for the cover design and completed it under great time pressure, and to Ingrid Gehle, who designed the cover.

I dedicated the longer book to my two sons, Aaron and James. When it was published, my younger son James wanted to know why his name wasn't first on the dedication page. In a spirit of generosity, Aaron suggested placing James's name first in this version. And so here I gratefully dedicate this book to James and Aaron, who fill me with hope and energy each day, and whose youthful insistence on justice and equity exemplifies the highest calling of legal advocacy.

D.C.F.

# **THE ART OF ORAL ADVOCACY**

**Second Edition**

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