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AVOIDING AND OVERCOMING POST-ARGUMENT REMORSE

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I. Introduction

Robert H. Jackson is best known as a Justice on the United States Supreme Court and as the chief United States prosecutor for the Nuremburg Trials. Before undertaking those roles, however, he was an accomplished attorney in private and government practice. He served as both Attorney General of the United States and Solicitor General of the United States. During his years as an advocate, he won twenty-seven cases that he argued before the Supreme Court, losing only a few. Warner W. Gardner, *Government Attorney*, 55 Colum. L. Rev. 439, 442 (1955). Justice Louis Brandeis is said to have remarked after one of Jackson's arguments that he was so good he "should be Solicitor General for life."[1]

Of his oral advocacy as Solicitor General, Justice Jackson famously observed:

> I used to say that, as Solicitor General, I made three arguments of every case. First came the one that I planned—as I thought, logical, coherent, complete. Second was the one actually presented—interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.

Hon. Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A.J. 801, 803 (1951).[2] This feeling of disappointment—or, as referred to in this article, post-argument remorse—will be familiar to most appellate advocates. It is comforting to know that as renowned an advocate as Justice Jackson experienced the same feelings.

But is there a way to avoid this post-argument remorse? Experience suggests that the answer is "not entirely." Nevertheless, this article discusses strategies for avoiding or at least lessening post-argument remorse by preparing for and giving that "utterly devastating argument" the first time around. Even the most diligent preparation, however, will not necessarily prevent post-argument remorse; therefore, this article also discusses strategies for overcoming that remorse when it inevitably occurs. Those strategies include a fourth argument not mentioned in Justice Jackson's quote about the three arguments he gave in every case, and, as we shall see, perhaps even a fifth and sixth argument.

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[1] *See* http://www.roberthjackson.org/the-man/timeline/government-service-1934-1954/solicitor-general-robert-h-jackson/, *last visited on* May 3, 2013.

[2] This article was taken from Justice Jackson's address to the California State Bar Association on August 23, 1951, in San Francisco, California.

II. Avoiding Post-Argument Remorse: How to Prepare for Oral Argument and Give That "Utterly Devastating Argument" the First Time Around

Justice Jackson's address on *Advocacy Before the Supreme Court* contains a wealth of invaluable information on appellate advocacy in general, and oral advocacy in particular. His tips on oral advocacy will be discussed throughout this article. Most of the other guidance herein is based on my experience as an appellate attorney and what I've learned from listening to and observing other appellate attorneys and judges.

This article is not intended as a comprehensive guide on how to prepare for oral argument.[3] Preparation basics such as reading the briefs, studying the applicable law, and re-familiarizing yourself with the record, will not be covered, although they are obviously important. This article instead concentrates on steps you can take, beyond those basics, to improve your argument performance.

Confront the unfavorable facts and law in your briefing. As the appointed time for oral argument approaches, appellate practitioners will begin their routine, developed through years of trial and error, to prepare for the argument. Before discussing the actual preparation, however, it's worth considering what can be done to ease your path at oral argument before you even receive notice of the argument.

Most appellate practitioners will have experienced the feeling of dread that arises when, during the midst of your preparation for oral argument, you are reminded of a troublesome fact or unhelpful case that you managed to forget in the respite between briefing and the argument. If you are fortunate, you will have an opponent whose briefing will have already forced you to confront the unfavorable facts or law. But you will not always be so fortunate. If you are not, it will be up to you to save yourself by addressing the unfavorable facts or law in your brief.

"The successful advocate will recognize that there is some weakness in his case and will squarely and candidly meet it." Jackson, *supra*, at 803. One of the surest ways to invite a hostile question at oral argument is to spend your brief studiously avoiding the elephant in the room. The task of addressing weaknesses at oral argument will be easier if they have already been confronted in the briefing. This approach will help prevent what can be the monumental distraction of trying to decide out how to address adverse facts and law while scrambling to prepare for argument. Better to confront those issues in your briefing, when you have complete control over what you say and how much time (space) to devote to it. This will allow you to avoid the damaging appearance that you are hiding from unfavorable facts and law and have no good response. And it will also help you sleep better the night before the argument—no small thing.

Adopt the proper mindset. Of the many differences between my preparation for oral argument now and at the start of my career, one of the biggest is mindset. During the first part of

[3] For comprehensive discussions on preparing for oral argument from a commentator and Texas practitioner, see, respectively, Bryan A. Garner, *The Winning Oral Argument: Enduring Principles with Supporting Comments from the Literature* (2007), and Kendall M. Gray, *Thinking Out Loud: Why We Still Argue Cases and Just How to Prepare for the Joust*, 2010 Conference on State and Federal Appeals.

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