Thank you, Mr. Macedo and Chief Judge Prost. I am very grateful for this opportunity to contribute to these annual formal conversations on appellate advocacy, which are such a fitting memorial to Judge Daniel Friedman. I offer my deep thanks to his families—from his private life and his judicial life—for allowing me to stand today in his shadow.

I have long wished that I had had the chance to know Judge Friedman. We have some similarities of background: he was an appellate advocate, including in the Solicitor General’s office, then an appellate judge, soon on this court. But he had moved on from the SG’s office before I got there—even before I served as a law clerk where I might have seen him in action as an advocate. Later, I argued a number of cases before this court, and studied his opinions on many topics, but I never had the good fortune to have him sit in judgment in one of my cases. And he had departed before I arrived here as a judge.

So, beyond the out-of-sync filling of similar professional roles, my connection to Judge Friedman is thin. I can say that I met him once, just to shake his hand in hello, at an SG Christmas party. I can say that, over many years, I heard warm and admiring recollections of him from my law partner, Bartow Farr, who worked with him in the SG’s office for a time. And of course I have heard similar recollections from my present colleagues.

I can add that my arrival here was sufficiently soon after his departure that I inherited his set of U.S. Reports, which line a wall of my chambers.

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This lecture was delivered on November 20, 2015. It was the fourth in a series of annual lectures—on excellence in appellate advocacy—established to celebrate Daniel M. Friedman, who, after a long career as an appellate advocate for the federal government, served as Chief Judge of the United States Court of Claims from 1978 to 1982 and as a judge of the United States Court of Appeals for the Federal Circuit from its creation in 1982 until his death in 2011. There are a few small non-substantive differences between the current text and the words spoken on November 20. The delivery of the lecture was preceded by introductory remarks given by Charles Macedo, a former law clerk to Judge Friedman, and by Chief Judge Sharon Prost of the Federal Circuit.
I like to think that this gives me a place one branch down from him in the legal tradition that passes from one generation to the next. Sometimes I even imagine a more literal genealogical connection, because my mother was born named “Friedman.” I enjoy the thought of possible bloodline connection too much to research the facts.

And I feel a connection, though it is only an aspirational one, to the aspect of Judge Friedman I know best—that is, to ideas about judging that seem implicit in his opinions. I may be projecting somewhat in my reading of his work, but I hope not too much. There is the suggestion that arguments about broad principles are often not what decide cases. There is the message that hard work is needed to identify the principles that actually matter in the case, sometimes hidden from view by the litigants, and, then, to apply them carefully to the facts, scrupulously examined within the important limits on appellate review. There is an implied recognition of the dangers of bold generalizations in opinions. There are the implied recognitions that even complex matters can be presented with clarity, sometimes with simplicity, and that it is useful where possible to identify which considerations, amidst a welter of details, ultimately matter. And there is the relentless focus on substance soberly considered and presented with directness and clarity—a style that not only reaffirms the goal of truly reasoned decision-making, but communicates an all-in respect for the parties, most importantly for the one who is losing the case. I honor Judge Friedman for his decades-long career exemplifying a model of appellate judging.

The topic for this gathering is appellate advocacy, which was central to Judge Friedman’s professional life, first on the arguing and responding side of the lectern, then for decades on the questioning and deciding side. I spent my career as an appellate advocate, writing briefs and presenting oral arguments at the appellate levels. I thought then that each case required a challenging exercise of craft—at least it was always challenging for me. The challenge varied in content and magnitude from case to case, but the task was never rote or formulaic. Even though the goal was always to find and present an argument so clear and logical that it could read as formulaic, in the positive sense of being inescapable in forcing the desired conclusion, the pursuit of that unreachable ideal always involved, for me, considerable work. And that is partly because, as everyone here knows, a substantial share of appellate cases have genuine positives and negatives on each side—which, from the judges’ point of view, can make them difficult to decide and, from the advocate’s point of view, creates the challenge of showing why the seeming problems are at worst just a bit of noise around the main message. For me, talking to the appellate bench, on paper and live, was a difficult, case-specific craft.
Well, I’ve looked at advocacy from both sides now, and still I think the craft is difficult and case-specific. I no longer have those post-argument night-dreams replaying what happened with a kick-myself focus on my missteps and missed opportunities—well, not as often anyway. From where I now sit, I still notice and admire excellence when I see it, wince a little at deficiencies when I see them, and occasionally ponder the difficulties the advocates in a particular case faced with the hand, and bench, dealt them. I am not alone as an appellate judge in remembering and recognizing the challenges of the needed judgment calls of various types. They involve substantive challenges—genuinely figuring out the facts, the range of fair meanings of the relevant legal standards, and the best application of the latter to the former. They involve presentation challenges—figuring out how to select your arguments and how to present them effectively, to highlight the helpful and downplay (but deal with) the knurls. And they involve role challenges—you have a client (a special kind if you represent the government), and your job is to win the case if you can and, if you can’t, lose it in the best way possible for the client.

Those were the kinds of subjects I used to dwell on when I was an attorney, when I was working on my own cases and when, as I so loved doing, I was helping other attorneys work on their cases, often through moot courts. But only occasionally these days do my thoughts run along those lines. My job now is not to grade the quality of advocacy or help advocates serve their clients. My job is to reach decisions based on the merits of the cases, and to do so impartially, which is to say without any partisan investment in the cause of either party, and within the institutional setting of the appellate court.

And so today I will try to say some things about appellate advocacy from my comparatively new perspective. I am aware that remarks like these, perhaps especially coming from a judge under constraints on speaking off the bench, tend to be full of generalizations that are difficult to bring home to become concrete lessons for what is, after all, a brief-by-brief, argument-by-argument craft. Nevertheless, I hope that I can say something to this audience, consisting mostly of advocates or soon-to-be advocates, that you will find useful, if only indirectly and a little bit.

Of course, I have my own interest in this: it is just a side-benefit from your perspective, but when you understand our perspective and shape your arguments accordingly, you help us do our jobs better. On behalf of my colleagues, I thank you for that. But I also have to believe that you can be better advocates for your clients by improving your own understanding of the perspective of the judges you are seeking to persuade. After all, you cannot help yourself to a win. You must go through us; you get a win only by persuading us—or our reviewing court—to rule for you. Therefore, it is central to your job that you help us help you—but help you only de facto, not as a consciously sought objective on our part, because that is not our objective. Your job is
to put yourselves in our shoes, to understand our mission statement, and to persuade us to reach your result on our terms.

I will try to do three things, though I won’t entirely separate them. I will say something about judicial perspective, the thinking of your audience. I will identify a couple of generic practical aspects of appellate judging, at least in our court, whose importance I appreciate now more than I did when in practice. And I will point to a few concrete implications, those most prominent in my mind, for how you conduct yourself in your filings and in your oral arguments—and in your discussions with clients about filings and arguments.

I hope that this will be useful. A jockey might benefit from hearing from the horse about what makes it run or not. Or, in this more technologically sophisticated forum, and with a little imagination, one can say: A ligand might benefit from hearing from its target receptor about what makes it perform or not. So here I am, a receptor, with some words that might benefit you who might be ligands in your efforts to bind with me and my co-receptors, whether to activate or inhibit us.

C

A moment ago, I said “judicial perspective” without a “the” in front of it. In doing so, I was acknowledging the following truth, which is also a disclaimer. The perspective I am conveying to you today is my perspective, about which I think I have already begun to tell you something. I do think, based on my experience, that my perspective isn’t utterly idiosyncratic. But I am not speaking for other judges, and it is an undeniable fact that judges vary in their perspectives.

In this fact there are some lessons, but I immediately want to counteract the implicit message I have just conveyed by my beginning with an assertion about differences. It is true that there are real differences among judges (and among courts), manifested in differences in writing styles and registers, and in related differences of emphasis among the several considerations that affect a host of interpretive and other judgment calls made in reaching decisions. But: It is easy to overemphasize such differences in thinking about judging, to focus too much on appealing to each judge individually with an eye on building up a majority. In reality such differences are often subtle, small, and non-determinative in the context of the powerful common understanding of the judicial mission and the demands of institutional decision-making.

To veer toward a few practical points for a minute, I will add that it is also easy to overemphasize individual judges’ perspectives in overt practice as an advocate. Evidently this is counterintuitive, but many appellate judges react badly to arguments that appeal to them personally and seem on their face like compliments—statements like, “as you so perceptively wrote, Judge Taranto, in your recent opinion in ….” Why the uneasy reaction? Mostly, as the black robes remind us, we think of ourselves as part of an institution, whose opinions
speak for the institution, and of which we are all equal members. We don’t like being put in a position of being asked to accept a personal compliment that separates us from and risks insulting other judges. A related point applies to the even more tempting, response-delaying locution when asked a question: “that is a good question,” as if other questions (perhaps from other judges) weren’t, or as if the fact that it was asked with sincere interest in getting an answer isn’t reason enough to take it seriously.

That is not to say, however, that you can safely ignore differences, among courts or among judges, in your career as an appellate advocate. To the contrary, you should try to get to know your audience—the customs and mores, the expectations and voices, the almost-unrecognized assumptions about craft, the range of methodologies within the prevailing legal culture—both those which are shared among the judges and those which vary among them. These are hard-to-articulate but real factors in your ability to persuade, so there is no rulebook for doing this. Karl Llewellyn used a phrase about law students’ learning law that can be adapted to capture something about preparation for appellate advocacy: you should “pickle yourself” in the ways of the court you are addressing.

Fortunately, the most important task in doing that is the substance-focused study of perspectives not peculiar to any particular judge—developing arguments that practically all judges will view as central and, if strong enough, controlling. In your allocation of time and effort, that is where you should concentrate, because that is where the payoff is likely to be found. The explanation lies in the width and depth of what is common to judges in our mission statement, as distinct from your mission statement as an attorney with a client.

What is common is, at root, something so basic that we take it for granted most of the time, not focusing on how precious it is except when we are reminded that it is not universal. Our courts play a role within our democratic constitutional system different from that of the branches Hamilton described as properly and necessarily exerting force and will—and, I add, properly and necessarily exercising a broad authority to make policy judgments based on anecdote and informed conjecture. The courts, in contrast, are dedicated to implementing the rule of law, with all that means, including acting with good-faith respect for the laws that our lawmaking institutions prescribe and applying those laws through adversarial procedures committed to fairness and aiming for reliable accuracy.

Within the judicial system, we at the appellate level are performing a particular role in carrying out that mission. That role is defined by important standards of review that reflect the different roles of the trial courts and (in most other contexts) agencies we review. We respect our reviewed tribunals’ findings of fact, within limits, and the numerous exercises of discretion needed for the often-intense, often-complex, live-witness process of pre-appeal deci-
Our job is done in the comparative calm of after-the-fact review, on a cool paper record, with the number of issues reduced to a small fraction of those litigated pre-appeal, and our job is to try to ensure that the law as we best understand it, on the issues selected for our review, has been respected and reasonably applied—which includes generally seeing that the facts found were reasonable ones to find on the evidence. I said at my investiture: “I have long understood appellate judging to aim, within important institutional constraints and stubborn human limits, for the reasoned application of legal standards supplied by the hierarchies of law-prescribing authorities.” A mouthful and a bit theoretical, but I haven’t seen a reason to change my understanding.

That condensed statement, for me, identifies the framework for seeing both our collective approach to decision-making and some of the ways we may differ with each other. We do have hierarchies of authorities for the prescribing of law. There are, most importantly, the primary authorities—typically, the Constitution, statutes, and regulations or rules—all of it written in words that, individually or in context, often need interpretation when they are applied to a messy world. And there is the body of judicial decisions, precedents, which in an important sense are secondary—because they are opinions issued in support of judgments rendered in resolving disputes that arise under typically non-judicial prescriptions—though over time they can come to be treated as primary as a practical matter. That body of judicial decisions itself has a complex structure, with no precise rules specifying the proper force for a later case of what appears in an earlier opinion. To simplify a bit, there is vertical precedent (decisions from a higher court) and horizontal precedent (decisions from our own court). And there are the various aspects of prior judicial decisions, having varying force under “rules” that often leave uncertainty—the judgment on the facts and arguments presented, the explicit statement of a ruling, the rationale offered for a conclusion, the observation or characterization made en route toward a conclusion, the broad statement of law that extends beyond anything presented for decision in the case.

All of this quite often presents challenges. Sometimes, I hasten to add, the challenge is of finding and understanding what turns out, when found and understood, actually to be clear and decisive. My own experience is that this happens a lot. Sometimes, though, the challenge is one of interpretive judgment, with room for different weighing of considerations—among them, correctness, coherence, guidance, stability—that are part of the varying mixes found among common interpretive methodologies. Moreover, every one of our decisions has a dual character: necessarily it resolves, in part or full, the specific dispute between the parties; more optionally, it has the potential to serve as precedent for the future. That dual character gives us room for choices about precedential or non-precedential resolution and about breadth or narrowness of reasoning if we take the precedential route.
We all come to this job with outlooks and experiences that affect how we go about performing the tasks of judgment. We will often have different takes on the required judgments. But, importantly, we make the judgments through an institution, with its own place in a hierarchy of institutions, and the institutions are an important part of giving real-world meaning to the rule of law. A key aspect of those institutions is that we appellate judges sit in panels, almost never alone, and panels’ work may be reviewed by our full court, and all of our court’s work may be reviewed by the Supreme Court. Those arrangements are a powerful force for, among other things, tempering the more individual aspects of our perspectives. They do so by forcing all of us, and the system as a whole, to emphasize the common language of *reason*. The institutional structure reinforces that high ideal.

I turn now to a couple of real-world aspects of the appellate process—at least my appellate process—that I appreciate more than I did as an advocate.

1. First is the mundane, self-evident, and hugely important fact of time constraints. Given the number of cases we hear, there is only so much time an individual judge can personally devote to a case, on average, in preparing for the oral argument and post-argument vote on how to decide the case. Suppose, realistically, that I hear 15 cases in our argument week each month and have three weeks to prepare. You can do the arithmetic to estimate how much time I can spend on each case, on average, after making due allowance for the fact that I also have opinions from earlier sittings to work on, rehearing petitions to review, en banc cases to attend to, pre-release precedential opinions to think about. Not a great deal, and even less if the question is how much time I can spend with a particular brief, since each case typically involves several briefs, at least one substantial opinion being reviewed, and key record material. Of course, the curve has a real spread around the mean, and we have the blessing of law clerks to help us. But the time constraints inherent in our work are tight, and they must affect how you write for our reading if you are to be effective.

The time constraints we operate under have a consequence for our decision-making process. We have a discussion about how to decide the case, and take a vote on it, immediately after oral argument. And, while our votes are not final and binding, as a practical matter they must be final to a large degree. Our system cannot run efficiently, with the press of new cases, unless we can rely in a pretty strong way on the decision that is made at the post-argument conference.

2. The additional fact about our process that I want to discuss, and dwell on a bit more, is one whose reality I did not feel with anything like the concreteness I do now that I am inside the court. It is this: While each judge recognizes his or her duty to make an individual judgment about each case,
we also recognize that we are acting as an institution, and we positively want to decide based on what we share, not what differs among us, where that is possible. It is often not a controlling consideration, because there can be powerful reasons to want to press a view not shared by one or even both of one’s co-panelists. But it is a real force in our acting as an institution.

Some reasons have often been noted. Perhaps particularly for a court of essentially exclusive appellate jurisdiction in certain areas, there is an interest in the added measure of reliability that comes from our speaking with one voice, at least where our doing so reflects an institutional commitment to the strong, though not absolute, value of stability. As I have noted, that is not always possible, and it is not always advisable. There are competing considerations, including the interests in avoiding premature treatment of an issue as broadly settled and in airing differing perspectives, for the benefit of improved decision-making, whether by our court or the Supreme Court in later stages of the case or by our court or the Supreme Court in future cases where the proposition at issue may be extended, followed, cabin’d, or repudiated. But reaching agreement on decisions is valuable in fact and as a goal, in our court as in the Supreme Court, where it is possible.

Internal institutional forces, perhaps less apparent to the outside, also urge us toward agreement where possible. One involves the scarcity of available time and effort, which I have mentioned. Preparing a dissent costs time and effort that could otherwise be devoted to other matters. A judge seeing that the majority’s result won’t be changed needs to decide if expending his or her own time and effort on preparing a dissent is worthwhile. Dissents impose costs on colleagues, too. The majority will likely have to do more work, in initial writing or in post-dissent revisions, if a dissent is promised or written. A dissent then produces a need for more attention by other judges on pre-release court-wide review and encourages the filing of rehearing petitions that require more attention from judges even though they are singularly unlikely to succeed. All of this, having obvious systemic effects, encourages decision-making that seeks to reduce, or even eliminate, disagreement.

The systemic impetus favoring agreement where possible can be seen in another way. A lot of work is needed to produce an opinion—a lot of work after preparing for oral argument and voting at conference. Much effort is needed to identify and to fully master all relevant details; to work through the various possible decisional rationales, testing them for readiness for precedential adoption—for fit with primary law, for fit with precedents, for breadth of formulation; and to produce a coherent written opinion. If each one of us had to do that work individually for every case, the job would be impossible, or crushing, without a significant sacrifice of quality. So we divvy up the work by opinion assignments; and the author then carries the load, the responsibility, and the other panel members rely on the authoring judge’s good faith in putting in the needed work and in carefully attending to the other panel
members’ articulated concerns. The authoring judge assumes responsibility, and the other judges can generally put that case out of mind—and concentrate on their own opinion assignments—until the draft opinion comes around. This process depends on each of us owning the responsibility sufficiently that our colleagues can pretty reliably expect the required work to be done by the author, and not have to be done in each chambers.

In thinking about how we who presumptively are with each other for life cooperate in this way, I am reminded of something Calvin Trillin wrote many years ago in one of his pieces about his beloved wife Alice. They knew how many things there were in the world to worry about—such as hotspots presenting foreign-policy or national-security concerns—and that the burden could be eased if shared. So they shared the burden. Thus, Calvin recounted, one year when Cyprus was a spot of trouble, Alice gave him Cyprus for his birthday: she assumed responsibility for worrying about it so he didn’t have to. In many cases in which a colleague takes on the opinion-writing job, I feel I’ve been given the case for my birthday—the freedom not to worry about it with the full intensity needed to do all the work required for a ready-for-primetime decision. The burden of later reviewing a draft opinion that a colleague has written with great care is real but far, far less.

E

I will now draw a few lessons for appellate advocacy that may be a little more concrete. I will discuss briefing and then oral argument, and I will be quite selective. In particular, I leave for the audience the exercise of exploring what lessons are to be drawn from the institutional desire to agree, except that I note the obvious imperative for counsel to think about narrow rather than broad grounds of decision, grounds around which judges will most likely coalesce.

1. As to briefing, I will soon say that clarity is the cardinal virtue, but there is first a requirement so basic that we take it for granted: intellectual integrity. Make your representations both affirmatively accurate and not misleading by omission. And this cannot be a sometime thing: if a judge thinks you’ve been shady about one matter, the adverse effect on your credibility about other matters is hard to contain.

That general human truth has a particular force in our forum, because we are counting on you. We believe that you do, or should, know more about your case than we do when we start reading your brief, even if it isn’t the first thing we are reading in your appeal. We believe that you have, or should have, spent more time working with the relevant legal sources than we have. We are therefore positively relying on your accurate presentation of the record and relevant law. And we think you know that. So when the expectation of intellectually responsible help is not met, the disappointment is often acute.
I understand that the line between a factual representation and an argument, and between what evidence actually says and what inferences may be urged based on evidence, can be indistinct. I understand, too, that space limits exert a pressure toward condensation, which risks blurring distinctions. Nevertheless: these lines are real and important, and it should be part of your job to steer clear of even being perceived as crossing them. One indirect indication of the importance of that foundational aspect of your job is the fact that many of us are eagerly looking forward to the prevalence of hyperlinked citations in briefs, which we hope will induce further scrupulousness about citations, to the record and to legal authorities. Always bear in mind: even if there is a range of norms as to intellectual integrity in the legal realm, don’t think it won’t be noticed if you choose to operate under the less truth-focused norms in that range.

Now my major point about what I’ve come to appreciate about briefing more than I did when in practice. The guiding principle in briefing, I think, should be: clarity above all. I find it useful, moreover, to think of clarity in a two-part way: you should strive for clarity not just about what you’re saying, but also about why you’re saying it, the latter referring to where it fits in the logical structure of an argument for overturning or upholding a clearly identified ruling that is under review.

One way to understand why this is so important is to think of what happens when I have to read a paragraph twice or more, either to understand what point is being made or to understand what part it plays in something I am being asked to decide. At some point, it is hard to do anything but dismiss the paragraph on grounds of incomprehensibility. But before that point, I am likely to think: maybe I am missing something that is there for the seeing if only I look hard enough, so I and my clerks have to work harder. But with that reaction immediately comes this thought: there are maybe 14 other cases on the same court-week calendar waiting for my attention, amidst my other work, and the lawyers who didn’t put in the extra work to make their point readily understandable are hogging the precious resource of time and attention, to the detriment of other cases. This isn’t just a burden to me; it is unfair to other litigants. Not a reaction you want to induce.

What should you be clear about? Everything we need in order to get to the point at which we can confidently decide the case. That includes the record; hence the obligation to write every sentence with intellectual integrity. And for a court like ours, in which an unusually large number of cases involve specialized facts outside the ken of ordinary educated lawyers, you have a special obligation to help us understand simply what the facts are—that is, in patent cases to understand the technology. This is a substantial task distinct from, though obviously related to, the task of arguing about the legal significance of the facts. Here, too, a kind of “pickling” is in order, though the brine is not legal. Explaining anything involves starting from where your
audience starts and working from there, so you must develop a sense of what
the various members of your audience (judges, clerks) can be counted on al-
ready to know about the technology, and what constitutes a comprehensible
explanation from that starting point to what is at issue. The challenge is great:
the best teachers dedicate themselves to learning and perfecting how to do
it; and many expert practitioners in a technical field cannot do it. But you
should know how hungrily we devour a clear but non-patronizing explana-
tion of what, law aside, is going on in the case. And especially if you are the
appellant, with the burden of persuading us to disturb the judgment before
us, you have little choice but to rise to the challenge of teaching the facts.
Importantly, that process, on your part, typically involves listening to your
experts but also translating what they say for ears and eyes that are probably
more like yours than theirs.

On the legal-argument side, part of being clear is not beginning your
argument as if you and we were in the middle of a conversation. We haven’t
been in your litigation for the months or years you have been. We need the
fundamentals, procedural and substantive. The procedural aspect is both es-
sential and simple: clearly identify what judgments and rulings are before us,
and tell us precisely what you want us to do—reverse, affirm, vacate—and
on what grounds.

Substantively, there is far more room for you to exercise judgment about
presentation, but I offer these two pieces of advice. The first is that your Table
of Contents—where the argument headings and subheadings are laid out
together—should immediately convey the logical architecture of your argu-
ment. For lack of time, and familiarity of the point, I will not elaborate on the
reasons. But I will say: treat sound architecture as essential, and devote some
of your hardest thinking to it. You should know that the Table of Contents
is what I, and many other judges, read first, precisely because what we see
there about your logic plays such a large role in how we approach your case.

My second piece of advice picks up on what I described as the hierarchies
of law-prescribing authorities. You should, preferably early in the brief, give
us the true fundamentals. By fundamentals, I mean the actual prescribed
law or governing text, such as the statute or the contract provision. Quote
the language, give us the legal context, and address its interpretation as text.
You should know just how often this becomes the driving force in how to
decide a case.

Also tell us, perhaps very briefly, about relevant Supreme Court cases,
and represent them accurately. You should do that if only because Supreme
Court authority, even when not directly on point, may well be relevant to our
resolving uncertainties about the application of our own precedents, which
will frequently be the center of your attention.

That fact reflects something I have already mentioned, applied to our own
precedents: the force of a particular precedent is often a matter for judgment,
because the “rules of precedent” are not algorithms. So where there is any
doubt about a point that actually matters, you should present precedents
as more than string citations. Use words of description to distinguish what
was actually decided from what was stated or explained. Doing so requires,
among other things, paying attention to how your research is done. Com-
puter word-search research, with all its advantages, has a downside: it is easy
to find strings of words in some judicial opinion that sound awfully helpful,
and then to quote those words, or just cite them, without reading the case
and understanding what force the words are really entitled to. The temptation
to take that shortcut is very great; be on special guard against it. Fortunately,
there are resources for understanding context: before giving us Lexis and
Westlaw, God gave us Wright & Miller.

What I’ve said so far, I think, does not require especially difficult judgment
calls to get right, though it requires more time, which translates into higher
costs. What requires more difficult judgment calls is an idea of increasing
importance to me: clarity is more important than simplicity where there is a
choice. You should not make a point simpler than the truth permits.

This notion presents real challenges, especially given the time constraints
I have described. Simple formulations are legitimately part of an effective
presentation, and they are valuable to your readers to the extent they give
them ways to hold in memory ideas that help organize a more complex body
of material. On the other hand, a simple formulation often oversimplifies,
distracting the reader into pondering the ways it is inaccurate, and when it
sounds like, well, a sound-bite, it often conveys on its face that an appeal is
being made to something other than reason. One of the things that char-
acterize the courts is our striving for an ideal captured by something David
Strauss said long ago, with well-justified admiration, of the Solicitor General’s
office: “reason rules here.” Many judges will react badly to your implicitly
asking, through the use of sound-bite language, that the case be decided by
emotional reaction, not reason.

You also will risk an adverse reaction from many judges if you breach a
norm that is a corollary of the commitment to reason, when the commitment
is made by judges also committed to being impartial. This norm is the norm
of civil, substance-focused, respectful discourse. You assume a great risk if,
when you address the arguments of your adversary or the reasoning of the
tribunal we are reviewing, your presentation, whether written or oral, is snarky,
disrespectful, dismissive, contemptuous, name-calling, motive-questioning,
ad hominem. Maybe we will react lightly, thinking, “that was way harsh.”
But don’t bet on it. Remember the forum you are in. Most of us resist apply-
ing either an integrity or civility discount to the members of our profession
performing their jobs as advocates. And because we so deeply conceive of
our mission in “reason rules” terms, when we see snark or similar rhetoric
in court, whether live or on paper, when your language gets too combative,
we are liable to think either or both of two things: one, that you cannot win through calm reason, or you’d be letting the merits carry your argument; two, that you are actually urging us, as judges, to become partisans, for your client and against your client’s adversary, and decide the case on a basis other than coolly reasoned examination of its merits. You don’t want to generate either of those thoughts.

2. My final topic is oral argument. Two seemingly opposite observations have long struck me and others as true of oral argument. On one hand, it is intense, demanding, and potentially dramatic, and it certainly feels important. On the other hand, it is unrealistic to expect it to make a difference in outcome often.

The first needs no explanation if you’ve done, or even seen, an oral argument. The second I’ll explain just this way: Oral argument is unlikely to make a difference in outcome frequently in a system in which judges prepare thoroughly in advance, respect rules requiring presentation of important matter in the briefs, try to place their decision on what reason tells them about the materials objectively viewable in the record and not much on the emotional dynamics of live person-to-person argument, and know in advance that they must cast a semi-final vote on the case immediately after the oral argument. In such a system, though there are many close cases, a truly result-changing oral presentation of preserved matter should be the exception, not the rule.

So what is the role of oral argument? One, I think, is a matter of systemic importance, not case-specific importance. The idea is this: it is important that as a matter of course we hold arguments and press lawyers on what they have presented in their briefs—because without the prospect of having to stand up and defend one’s brief orally, one may be tempted to put things in the brief one otherwise wouldn’t. The prospect of oral argument makes the briefs better.

But oral argument is also important at the case-specific level in a non-trivial number of cases. We come into the argument with a pretty strong, but not rigid, idea of how to decide the case. We may be uncertain about the bottom line or the breadth of ruling or rationale. We may have questions about specific facts we haven’t answered for ourselves from the paper record. We may have questions about how things work in general on matters relevant to evaluating how, or how broadly, to decide the case. We will ask, and the answers can matter, in small ways or, sometimes, large.

In all of these ways, oral argument is the opportunity for you to address what is in our minds in the minutes before we are about to vote. You should therefore be hungry for any information from the panel about what is on our minds, not look at us with annoyance when a question interrupts your speech. And you should have prepared so well that you have anticipated the concern, understand it from our perspective, and know how to try to address it from that perspective. If you have prepared well enough in that way, or prepared so perfectly before you wrote your brief that you’ve left us with no
questions to ask, then your oral argument is like a battle according to Sun Tzu: over before it begins.

The lesson for how to conduct yourself at oral argument is simple: your overriding job is to be responsive. Now, we try to understand that, before you say something responsive to a question, you may engage in a little bit of throat-clearing buying of time; that questions may be ill-formed or need clarification; that you may initially misunderstand the question. But what you should be trying to do is to understand and address each question in the terms you can tell are in the mind of the judge who asked it. If you don’t even try, you are not likely to meet the judge’s concerns, concerns prominent enough in the moments before initial decision that the judge thought them worth voicing. And even if you don’t succeed, the attempt goes a long way. Like Holmes’s dog, we humans regularly infer intent. And if you aren’t really even trying to be responsive, we may infer that you must yourself have decided that your argument cannot result in your winning if it is assessed in non-partisan terms. Not a good message to communicate.

A related way of making the point about oral argument is meant to be provocative, but seems useful, especially for your discussions with your client ahead of time. It is this: think of the oral argument as the court’s time, not your client’s time. It is the eve of decision for us. That means we have a pretty solid framework for thinking about the case already in our heads. There are loose ends, which can unravel the whole fabric if you mishandle them, but it is those loose ends we are thinking about. So you want the opportunity to be responsive, and you want to be responsive in terms that fit our mindset at oral argument.

If you start singing an aria for your client, or spitting fire at your client’s adversary or at your opposing counsel, you will likely get nowhere. Worse, if you’re doing that, and not making a substantive argument addressed to the issues from the judges’ non-partisan perspective, many appellate judges will assume that you do not think that you have a chance of winning your case. Do you really want to communicate that message unless you have to, that is, unless you really don’t think you can win and the only thing you can usefully do is give your client the feeling of having a champion, a salve for the predicted loss?

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I will end with this. Appellate advocacy is a subject I enjoy discussing, perhaps at undue length even when I’m being selective. I enjoy discussing it now because excellence in advocacy is so important to our own sound decision-making, that is, to the appellate process that is an important part of our judicial system and of our Nation’s commitment to the rule of law. For that reason, every day I and my colleagues on the bench are grateful to you advocates for your striving for excellence in your advocacy. But I enjoy
discussing advocacy for an additional reason as well: doing so brings me back to my days as an appellate advocate. I remember that the advocacy, both written and oral, was a serious, intense business, for my clients, for me, and for my colleagues. And I also remember this: because of the challenges, the clients, and the colleagues, it was great fun.

Thank you.