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EFFECTIVE APPELLATE ADVOCACY BEFORE THE FEDERAL CIRCUIT: A FORMER LAW CLERK'S PERSPECTIVE

Rachel Clark Hughey*

I first learned to appreciate the difference between effective and ineffective appellate advocacy while clerking for the Federal Circuit. In the hundreds of cases in which I read and analyzed briefs and observed oral argument during my year as a clerk, I saw lawyers who were well-prepared and effective and lawyers who were not. Indeed, I came to realize that the ineffective attorneys often made the same mistakes,¹ and that their mistakes would have been easy to remedy had the lawyers only realized they were making them.

To that end, this article reviews some of the common mistakes that attorneys make before the Federal Circuit and

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The opinions expressed in this article are solely my own. I would nonetheless like to express my gratitude to Judge Schall, who provided me with the opportunity to work as his law clerk, and Judge Raymond Clevenger, who was kind enough to provide me with his *Ten Commandments for Appellate Briefing* and *Ten Commandments for Oral Argument*. I would also like to thank all those who provided me with feedback on this article, especially the following former Federal Circuit clerks: William Burgess, Laura Lydigsen, Jill Ho, Joshua Bleet, and Chad Pannell.

Writing this article gives me the opportunity to state that the most gratifying aspect of the clerkship was being a small part of the judicial system, while the most enjoyable feature of being a clerk was getting to know the judges and their law clerks and staff. *Cf.* e.g. Howard T. Markey, J., U.S. Ct. of App. for the Fed. Cir., *Thirteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 166 F.R.D. 515, 562 (1995) (“I’m often asked, since I retired, what I enjoyed most in serving as a judge. The answer comes quickly—working with quick-witted young law clerks.”).

1. As Judge Smith once said, “I went down to the local courthouse to see some of the famous lawyers in town try cases and I was appalled at what they did. . . . I immediately decided that if those guys can be trial lawyers, I can be a trial lawyer.” Edward S. Smith, J. U.S. Ct. of App. for the Fed. Cir., *Remarks, The Third Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 108 F.R.D. 465, 568 (1985).

provides some guidelines for appellate advocates who wish to avoid them. When possible, I make specific references to public statements of Federal Circuit judges that support these guidelines and practice tips.

To the extent that it is relevant to effective appellate advocacy, this article provides background on the Federal Circuit's decisionmaking process, and it also provides concrete suggestions for briefing and oral argument. Some of this advice is unique to the Federal Circuit, but much of it will also be relevant to advocacy before any other court.

I. THE FEDERAL CIRCUIT'S DECISIONMAKING PROCESS

The Federal Circuit's internal operating procedures are available online,² and Chief Judge Markey outlined the court's inner workings years ago in a piece that is still useful today.³ Any lawyer involved in a case before the Federal Circuit should consider consulting these two resources at the outset. Advocates should consider the following information a supplement to these important sources.

After a Federal Circuit appeal is fully briefed, the clerk's office randomly assigns the case a three-judge panel and then distributes the briefs and other case materials to the panel about one month before the oral argument.⁴ The judges read the briefs and review the record and relevant law (and have their clerks do

2. See United States Court of Appeals for the Federal Circuit, *Internal Operating Procedures*, http://www.cafc.uscourts.gov/index.php?option=com_content&view=article&id=192&Itemid=104 (accessed Nov. 11, 2010; copy of initial page on file with Journal of Appellate Practice and Process).

3. See Howard T. Markey, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, First Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 100 F.R.D. 499, 501-05 (1983).

4. Fed. Cir. IOP 3; see also Raymond C. Clevenger, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Sixteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 193 F.R.D. 263, 290 (1999) (noting that he receives briefs "almost exactly four weeks before oral argument"). This assignment-and-distribution process starts each month when the chief judge provides the clerk's office with a list of judges who are available for each day of an argument session. Fed. Cir. IOP 3. The clerk's office then randomly generates three-judge panels for the month. *Id.* After the clerk's office screens the cases to make sure that they are calendar ready (i.e. all briefs and the appendix have been filed), it randomly assigns cases to the panels. *Id.* Cases are generally calendared approximately six weeks after the final brief and appendix are filed. *Id.*

the same) prior to the oral argument.⁵

The Federal Circuit differs from some other circuits because it is the court's general policy to allow oral argument in many, if not most, of its cases.⁶ Counsel typically have fifteen minutes per side in argued cases. The appellant goes first and is allowed to reserve some of that time for rebuttal. The judges, with their clerks' assistance, may prepare questions in advance of the oral argument, but some of the judges' questions may also be prompted by the statements made during the oral argument. After the oral argument, the judges hold a conference to vote on the outcome of the case (starting first with a "straw" vote) and whether to employ a precedential opinion, a nonprecedential opinion, or a judgment of affirmance without opinion under Rule 36.⁷ The presiding judge then decides which judge is going to write the opinion.⁸

The assigned judge writes the opinion, reviewing the briefs and sometimes the recording of the oral argument.⁹ The clerks generally assist with some aspect of the preparation of the written decision. The judge then circulates the opinion to the other two members of the panel with a vote sheet, on which the other members of the panel can either agree with the opinion as

5. Fed. Cir. IOP 3; *see also* Giles S. Rich, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Sixteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 193 F.R.D. 263, 280 (1999) (noting that most conferring between judges about pending cases is conducted in writing).

6. Fed. Cir. IOP 7 (indicating a policy in favor of oral argument: "it is the court's policy to allow oral argument unless: (a) The appeal is frivolous; or (b) The dispositive issue or set of issues recently has been authoritatively decided; or (c) The facts and legal arguments are presented adequately in the briefs and record, and the decisional process would not be aided significantly by oral argument"); Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. Rev. 567, 568 (1999) ("In some federal circuits the brief is all the court will receive in a high percentage of appeals. The Fourth, Tenth and Eleventh Circuits, for example, dispense with oral argument in about seventy percent of their cases.").

7. Fed. Cir. IOP 8.1; Rich, *supra* n. 5, at 280 (pointing out that "if there are going to be any discussions, it's not the court sitting down and discussing, it's going to be the three judges on the panel").

8. Fed. Cir. IOP 8.2.

9. Pauline Newman, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Fourth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 112 F.R.D. 439, 572 ("I will, in fact, often listen to the tapes of oral argument in the course of considering the opinion thereafter.").

written, make comments, or write further opinions.¹⁰ After a precedential decision is approved by the panel, it circulates to the entire court for approximately two weeks, during which other judges can make comments, and then it is reviewed by the court's central legal staff for consistency with the court's body of law before it issues.¹¹ If the opinion is non-precedential, it circulates only to the panel before issuing.¹² A Rule 36 affirmance does not circulate to the rest of the court and generally issues within a few days of the oral argument.¹³

II. THE BRIEFS

I try to decide how I'm going to vote before I come into the courtroom.

—Judge Michel¹⁴

Without a strong appellate brief, it is going to be hard to win your case. As discussed above, the judges receive the briefs well before the oral argument, so they have time to review the facts and relevant law and make a preliminary decision before a single attorney speaks. Chief Judge Michel has said that in a majority of cases he makes a decision based on the briefs that is not altered during oral argument or during the panel discussion:

10. Fed. Cir. IOP 10; Rich, *supra* n. 5, at 280. One of the non-authoring judges could also decide to write a concurrence or dissent. Fed. Cir. IOP 10; Rich, *supra* n. 5, at 280. Once that opinion is finished, the other panel member can decide whether to join the original opinion or the separate concurrence or dissent. Fed. Cir. IOP 10(8) (noting that nothing in the court's procedures is intended to impede a judge's right to write separately); Rich, *supra* n. 5, at 280 (describing initial circulation of draft opinion and possibility of another judge's writing a separate opinion). Once the opinion is complete, it circulates to the entire court for all of the judges to review. Randall R. Rader, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Sixteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 193 F.R.D. 263, 297 (1999). Other judges on the court might raise questions about the proposed opinion, ask for clarification, or make comments for rewording. *Id.*

11. Fed. Cir. IOP 10.5; Rader, *supra* n. 10, at 297.

12. Fed. Cir. IOP 10.5; Alvin A. Schall, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Sixteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 193 F.R.D. 263, 298 (1999).

13. Schall, *supra* n. 12, at 298.

14. Paul R. Michel, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 128 F.R.D. 409, 535 (1989).

First, in 80% of all appeals, I reach a firm inclination just from reading the briefs. Second, in 80% of those appeals, oral argument fails to “flip” me. And third, whether or not I had a view before argument, in 80% of all appeals my conference vote remains unchanged by the panel opinion.¹⁵

Thus, the brief is extremely important in any appeal, and you should take care to provide the court with the best appeal brief possible.

A. Brief Structure

The best persuader . . . is your brief.

—Judge Michel¹⁶

The first point that I would make about brief writing is that it is extremely important to be clear in your brief.

—Judge Schall¹⁷

A brief should be clear, honest, and consistent, provide a basis for the court’s jurisdiction, and list the standard of review and carefully apply it. It should also accurately cite cases in support of the legal position, have an explicit theory of the case, use clear logic, and make appropriate concessions of law and

15. Paul R. Michel, *Advocacy in the Federal Circuit*, ALI-ABA Course of Study, C961 ALI-ABA 5 (Chicago, Ill., Sept. 29, 1994) at Westlaw p. 3 (available in ALI-ABA library on Westlaw.com); see also Michel, *supra* n. 14, at 536–37 (stating that in about eighty percent of the cases he makes a “reasoned decision” based on the briefs and that in a majority of cases he sticks with this tentative decision after hearing oral argument); Paul R. Michel, *Effective Appellate Advocacy*, 24 Litig. 19, 21 (Summer 1998) (“In about 80 percent of all appeals, I reach a firm inclination just from reading the briefs. In 80 percent of those appeals, oral argument fails to ‘flip’ me. And whatever view I had before argument, in 80 percent of all appeals, my conference vote the day of the oral argument remains unchanged as the opinion is prepared.”); Ginsburg, *supra* n. 6, at 567 (“As between briefing and argument, there is near-universal agreement among federal appellate judges that the brief is more important—certainly it is more enduring.”).

16. Michel, *Advocacy in the Federal Circuit*, *supra* n. 15, at Westlaw p. 3.

17. Alvin A. Schall, J., U.S. Ct. of App. For the Fed. Cir., *Remarks, Eleventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 153 F.R.D. 177, 195 (1993); see also *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (quoting *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991): “Judges are not like pigs, hunting for truffles buried in briefs.”).

fact.¹⁸ The best way to write an appeal brief is to use short, simple, and direct sentences in the active voice.¹⁹ Do not repeat yourself, do not ignore findings of fact, do not avoid adverse precedent, and do not dwell on obvious law or facts.²⁰ To make sure your brief is easy to understand, solicit feedback from other readers—particularly readers not familiar with your subject matter, including non-lawyers.²¹

Federal Circuit Rule 28(a) sets forth the different sections that an appeal brief should contain: (1) table of contents; (2) table of authorities; (3) statement of related cases; (4) jurisdictional statement; (5) statement of the issues; (6) statement of the case; (7) statement of the facts; (8) summary of the argument; (9) argument; and (10) conclusion and statement of relief sought.²² As discussed below, each of these sections provides you with the opportunity to persuade the court on your position.

18. Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23 (setting out a list of suggestions). There are several excellent resources for attorneys writing Federal Circuit appeal briefs. See e.g. Mark Simon Davies, *Patent Appeals: The Elements of Effective Advocacy in the Federal Circuit* (Oxford U. Press 2008); Bryan A. Garner, *The Winning Brief* (2d ed. Oxford U. Press 1999); William Strunk, Jr., & E. B. White, *The Elements of Style* (4th ed. Longman 1999).

19. Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23.

20. Paul R. Michel, *Remarks, Thirteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 166 F.R.D. 515, 555 (1995) (“And it seems to me that most advocates spend too much time restating a whole lot of well-settled law or discussing in excruciating detail a whole lot of non-dispositive facts.”); see also Michel, *Effective Appellate Advocacy*, *supra* note 15, at 23.

21. Clevenger, *Ten Commandments for Appellate Briefing*, *supra* n. * (Commandment 10).

22. Fed. Cir. R. 28(a). The court’s website also contains a list of the most common reasons for its rejection of briefs. See United States Court of Appeals for the Federal Circuit, *Top Ten Reasons Why Briefs Are Rejected*, <http://www.cafc.uscourts.gov/top-ten-reasons-why-briefs-are-rejected.html> (accessed Apr. 8, 2010; copy on file with Journal of Appellate Practice and Process).

1. Table of Contents, Table of Authorities, and Jurisdictional Statement

I think I actually find the “Table of Contents” a more helpful road map than the “Questions Presented” to begin to get a handle on what’s truly at work in the case.

—Judge Michel²³

When I open the briefs . . . the first thing I look at is the list of cases cited. The fields of law in which we operate are not great in number, and after a few years on the bench you become familiar with the precedent so you know what kind of case it is by seeing what kind of cases are cited.

—Judge Clevenger²⁴

A good table of contents (including the headings and subheadings in the facts and argument sections) is very helpful to the court, as it sets forth the issues in the brief in a clear and concise fashion.²⁵ For this reason, you should use detailed—but no longer than a sentence—headings and subheadings in both your facts section and your argument section.²⁶ Likewise, the table of authorities alerts the court about the kind of issues that are presented in the case.²⁷ In the jurisdictional statement you should always make sure that your case is final or otherwise appealable.²⁸

23. Paul R. Michel, C. J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Sixteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 193 F.R.D. 263, 276 (1999).

24. Clevenger, *supra* n. 4, at 279.

25. Michel, *supra* n. 23, at 276; *see also* Rich, *supra* n. 5, at 274 (“I have managed through speeches and propaganda and so forth to persuade the bar to write a ‘Table of Contents’ in a brief, which is really an outline of the brief.”).

26. Paul R. Michel, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Eleventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 153 F.R.D. 177, 199 (1993) (“Ways that I find particularly helpful are where there are headings that clearly state the contentions and show the heart of the case and capture the attention of the Judge and convince the Judge that this is not an easy case; this is a close case. This is a case that deserves the most searching appellate scrutiny possible.”).

27. Clevenger, *supra* n. 4, at 279.

28. Note also that a lack of jurisdiction is not something that a party can “fix.” Either the court has jurisdiction or it does not. *Intl. Elec. Tech. Corp. v. Hughes Aircraft*, 476 F.3d

2. Statement of the Issues

*I hardly glance at the “Question Presented”, to be candid. . . .
The “Question Presented” typically don’t help me that much as a
judge.*

—Judge Bryson²⁹

*I can’t remember ever sitting on a case that was decided by the
ninth or tenth “Question Presented”, and in part that may be
because I can’t ever remember having read that far into the
“Question Presented.”*

—Judge Plager³⁰

The statement of the issues, also called the question presented, is rarely helpful to the court as presented in the average appeal brief because attorneys present too many issues and the issues are too long and too argumentative.³¹ An effective

1329, 1331 (Fed. Cir. 2007) (dismissing for lack of jurisdiction and warning that “[t]he court takes umbrage at parties who have not carefully screened their cases to ascertain whether or not a judgment is final”); *see also* Alan D. Lourie, Speech, *A View From The Court* (Williamsburg, Va., Va. St. Bar Intell. Prop. Sec. Program, Sept. 27, 2008) at 9 (“[M]ake sure your case is final before you bring it to us.”) (available at <http://www.ca9.uscourts.gov> (Highlight “Announcements”; click on “Archive”; click on “2008 (43 articles)”; click “Next”; click “Circuit Judge Lourie’s Speech Given at the Virginia State Bar Intellectual Property Program on September 27, 2008,” click link)).

29. William C. Bryson, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Sixteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 193 F.R.D. 263, 276–77 (1999).

30. S. Jay Plager, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Sixteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 193 F.R.D. 263, 277 (1999).

31. Bryson, *supra* n. 29, at 277 (“The one thing, however, that I would avoid in a “Question Presented” is very tendentious questions such as ‘was the appellant denied a fair trial when the district court time after time repeatedly and unfairly ruled against the appellant on every substantive motion.’ That sort of ‘Question Presented’ is not helpful. But other than that, if you just state basically what the case is about and what the issue before the court is, that is enough as far as I’m concerned.”); Plager, *supra* n. 30, at 277 (“I think the earlier Bryson view reflects my view of the usefulness of the ‘Question Presented’. . . . And my own view is that if you have two or three shots at the trial forum in your questions and you can’t hit it, then the rest of your shots really aren’t very useful.”); Neil E. Graham, *Federal Circuit Judges Present Tips, Pet Peeves, On Effective Appellate Advocacy*, 71 Pat. Trademark & Copyright J. 92, 92 (BNA 2005) (noting that Judge Friedman pointed out that “[w]hen an attorney has eight different arguments, and argues that the lower court committed 14 different errors, the judge can be overwhelmed,” and that “[i]f an argument is lost in a morass of detail, it may be overlooked”).

question presented is short (a sentence or two), but presents the theory of the case and sufficient fact and law to support that theory.³²

3. *Statement of Facts*

It is so essential that you make your facts clear and understandable. And I think the most effective facts are ones that are non-argumentative. Give a statement of facts with the citations to the record, and most appropriately, if possible, the findings by a court below and not be argumentative.

—Judge Schall³³

In your facts section, tell a story and give the court the relevant background. When the court is finished reading your facts section it should already be on your side.³⁴ You should not make your facts section argumentative or cite law in it.³⁵ It

32. Michel, *supra* n. 23, at 276 (“First, I think that the most important thing is to try to understand what the best definition might be of the ‘Question Presented’. The definition that I would favor is: the question, the answer to which is going to decide the issue or perhaps the whole case, and very often that’s one layer or two down below the ostensible issue such as whether a certain device infringes a particular patent. Secondly, I think that to be effective the question has to be stated in a way that includes something of a factual element, something of a legal element, and something of a derived conclusion from the facts and the law. In terms of length, obviously if it’s very long, it tends to lose impact. If it’s too short or too abstract, it again falls short of being fully effective. I think the optimal statement of a ‘Question Presented’ makes clear what your theory of the case is, or at least your theory as to how you should prevail on the particular issue. And I think that it’s also important for the ‘Question Presented’ to have some tight correlation to the decision-making by the tribunal below. We require you, as you know, to include the opinion of the court below in the appellant’s brief, the blue brief. I think it’s a very important part of the materials that we work from. Some of us read it very carefully and try to match up what the judge below or the tribunal below decided, and how they decided it with the ‘Question Presented’ or the contentions on appeal that appear in the ‘Table of Contents.’”). In *The Winning Brief*, Bryan Garner suggests that an issue presented should be seventy-five words or less and that it should state the law, facts that tie to the law, and a conclusion. Garner, *supra* n. 18 (Tips 10–12). He also presents several good examples. *Id.*

33. Alvin A. Schall, J., U.S. Ct. of App. For the Fed. Cir., *Remarks, Thirteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 166 F.R.D. 515, 555 (1995).

34. Michel, *supra* n. 23, at 281 (“Well, I want to dissent from the premise that the ‘Argument Section’ is the most important for persuasion in the brief. I might suggest that the ‘Fact Section’ can be more important and also more persuasive. In the ideal brief, by the time I finish reading the ‘Fact Section’, I should already be on your side.”).

35. Clevenger, *Ten Commandments for Appellate Briefing*, *supra* n. * (Commandment 2).

should be clear, understandable, and filled with cites to the record that pinpoint the facts relevant to the issues on appeal.³⁶ The court will not be able to decide in your client's favor if you do not provide factual support for your arguments.³⁷ As a clerk, I generally found one side's brief more informative and honest than the other side's and would refer back to that brief when I had questions on the facts. You should strive to write the brief that the court and clerks will refer back to for an understanding of the facts and for citations to the record (which they will verify, of course). Make sure to discuss the prior tribunal's opinion, as that is what the court is reviewing.³⁸ And be sure to refer to it as "the district court" or "the trial court" and not "the lower court" or "the judge below."³⁹

4. Summary of the Argument

[T]he "Summary of Argument", in my judgment, is essentially important because it tells you what the case is all about.

—Judge Clevenger⁴⁰

The summary of the argument should be used as a concise way to assist the court in its understanding of the issues.⁴¹ Tell the court what went wrong, whether it was an error of law, a

36. Schall, *supra* n. 33, at 555.

37. See *Engdahl v. Dept. of Navy*, 900 F.2d 1572, 1576–77 (Fed. Cir. 1990) (noting that the appellant failed to provide citations to the record in support of his claims).

38. Paul R. Michel, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Fifteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 180 F.R.D. 467, 606 (1997) ("And it always surprises me how many briefs I read, not only in trade cases but in almost all areas, where neither side even mentions the opinion of the trial judge. It is treated as if it is not important; for advocates it was not there. For us, it is the baseline of our review—the first thing we read. If there was an error, show me where in her opinion. Show me what page and what line.").

39. Fed. Cir. IOP 11(9).

40. Clevenger, *supra* n. 4, at 279.

41. Michel, *supra* n. 20, at 555 ("But the road map to the forest, for my money, is in the summary of the argument. And a good summary argument in the appellant's brief is telling me what the case is all about in a hurry. I wish that more briefs spent more time focusing on the quality of the summary of the argument."); Clevenger, *supra* n. 4, at 279 ("I read both 'Summaries of Argument' and then read the opinion below. At that stage of the game I know whether I have a hard case on my hands or an easy case, and to me the function of a 'Summary of Argument' is simply to let the judge get a hold of the case very, very quickly.").

misunderstanding of the facts, or both.⁴² It is the attorney's job to present a logical argument on appeal; it is not the court's job to find a reason to rule for the attorney.

5. *The Argument Section*

[I]n the 'Argument Section', I often find a great deal of chaff and not very much wheat. . . . I often wonder why the 'Argument Section' doesn't concentrate more intensely on the places where the appeal really pivots.

—Judge Michel⁴³

The argument section should present the court with the legal and factual reasons you should win. Because the judge will almost always review the briefs when writing the opinion, a good brief should be a resource for the judge by providing citations to case law and the record.⁴⁴ As a clerk, I found the best briefs were the ones that were written almost like judicial opinions; the court could practically cut and paste the accurate, concise, and non-argumentative legal and factual discussions into the opinion.

Address adverse legal authority in your argument section and explain why you still prevail.⁴⁵ Judge Michel recommends, “Confront applicable adverse authority expressly and early. The opponent probably will cite it, and our law clerks surely will find it.”⁴⁶ Avoid long string cites of cases or block quotes⁴⁷—

42. Helen W. Nies, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Third Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 108 F.R.D. 465, 571 (1985) (“You have to tell us what went wrong. You lost. If the case was so good, why did you lose? Was there an error of law? Was there a misunderstanding of the facts? Tell us what went wrong.”).

43. Michel, *supra* n. 23, at 281–82.

44. Rader, *supra* n. 10, at 282 (“You might take a look at your briefs in terms of what aid they will be to the court in its drafting of its dispositive opinions. It’s then that I think those briefs often have most meaning and get most careful attention.”).

45. Michel, *supra* n. 26, at 198 (“With respect to candor, I find it enormously persuasive when in a brief and also on her or his feet when an advocate directly confronts the strongest case authority against their contentions, against their position, directly comments on the toughest facts that have been found—let’s assume properly found—against them, but then argues why despite that authority, despite those findings, they should prevail and spells that out.”).

46. Michel, *Effective Appellate Advocacy*, *supra* note 15, at 23.

instead, explain why the cases support your position. Keep in mind that you are less likely to win your appeal if you are arguing for a very broad change in the law, so if possible give the court an easy way to get to the result that you are asking for.⁴⁸ An argument that is not fully developed or is only raised in a footnote may be considered waived.⁴⁹ You should avoid making substantive arguments or stating facts in footnotes. If a point is worth making, it is worth making in the text.⁵⁰ And do not exceed the record on appeal or argue your evidence instead of the fact finder's conclusions⁵¹—you cannot raise arguments for the first time on appeal.⁵²

47. *Id.*; Clevenger, *Ten Commandments for Appellate Briefing*, *supra* n. * (Commandment 3: “We want to know why you think a case supports your proposition, and you have to explain why.”); Graham, *supra* n. 31, at 92 (“Discuss the really important authorities fully,” Judge Michel said, even if that means not discussing other less important cases at all.”).

48. Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23 (“Do not ask us to overrule, ignore, or modify binding precedent to reach your result.”).

49. See e.g. *Monsanto Co. v. Scruggs*, 459 F.3d 1328, 1341 (Fed. Cir. 2006) (“Here, Scruggs failed to develop its arguments and attempted to make arguments by incorporation in its brief. These arguments are therefore deemed waived.”).

50. Clevenger, *Ten Commandments for Appellate Briefing*, *supra* n. * (Commandment 7: “Judges do not like footnotes” (emphasis omitted)); Schall, *supra* note 12, at 284 (“Number one, don’t overdo it. You don’t want to be constantly jumping back and forth from the main text to the bottom of the pages. And secondly, footnotes should be reserved, I think, for nonsubstantive matters. You don’t want to have a major important point in a footnote.”); Bryson, *supra* n. 29, at 285 (“[B]y and large, I think minimizing the number of footnotes is a good tactic.”). If you must use footnotes, double-space them to make them easier to read. Graham, *supra* n. 31, at 92 (quoting Judge Lourie, who once said that one of his pet peeves was “textual single-spaced footnotes that go on for two or three pages”).

51. Michel, *Advocacy in the Federal Circuit*, *supra* n. 15, at Westlaw p. 15 (stating that one of his “major frustrations” is attorneys “arguing their evidence instead of the findings”).

52. See *Fresenius USA, Inc. v. Baxter Intl., Inc.*, 92 U.S.P.Q.2d 1163, 1169 (Fed. Cir. 2009) (“If a party fails to raise an argument before the trial court, or presents only a skeletal or undeveloped argument to the trial court, we may deem that argument waived on appeal, and we do so here.”); *Rentrop v. Spectranetics Corp.*, 550 F.3d 1112, 1117 (Fed. Cir. 2008) (“With a few notable exceptions, such as some jurisdictional matters, appellate courts do not consider a party’s new theories, lodged first on appeal. If a litigant seeks to show error in a trial court’s overlooking an argument, it must first present that argument to the trial court. In short, this court does not ‘review’ that which was not presented to the district court.”); see also *Pentax Corp. v. Lewellyn Robison*, 135 F.3d 760, 762 (Fed. Cir. 1998) (“Just as this court will not address issues raised for the first time on appeal or issues not presented on appeal, we decline to address the government’s new theory raised for the first time in its petition for rehearing.”); Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23 (noting that the appellate advocate should not “attempt to retry the case on appeal”).

Proofread your brief for citation mistakes, spelling mistakes, and other editing issues.⁵³ Also, use Bluebook form for the citations in your brief, as the Bluebook sets forth the standard method of citation and assures that all of the information necessary to verify a citation is available to the court.⁵⁴ When the clerks and the judges see a brief with obvious spelling and citation mistakes, they may assume that the attorney is sloppy and view other portions of the brief with suspicion.

6. *The Conclusion*

We once in a while get something that I call the mystery brief where you really don't know until you get to the end just what the points are.

—Judge Newman⁵⁵

Make sure to tell the court at some point—preferably as soon as possible but at least in the conclusion—precisely what it is that you want. (We occasionally saw a brief with no clear remedy sought.) It is not enough to say, “I was wronged, fix it.” Explain whether you want the Federal Circuit to affirm, reverse, affirm-in-part and reverse-in-part, vacate, and/or remand.

7. *Reply Briefs and Cross-Appeals*

A reply brief should be short, punchy, and incisive.

—Judge Friedman⁵⁶

[D]on't file a cross-appeal only to make another argument for affirming the judgment.

—Judge Lourie⁵⁷

53. Newman, *supra* n. 9, at 571 (“Look out for spelling and punctuation mistakes; mistakes in citations are really quite annoying.”); Clevenger, *Ten Commandments for Appellate Briefing*, *supra* n. * (Commandment 10: “proof read” for “goofs”).

54. See Fed. Cir. I.O.P. 11(1).

55. Newman, *supra* n. 9, at 571.

56. Daniel M. Friedman, *Winning on Appeal*, 9 Litig. 15, 18 (Spring 1983).

57. Lourie, *supra* n. 28, at 10 (“[W]e will unhappily suspect that the culprit is just trying to get added briefing space and argument time, which doesn’t enhance our impression of the competence or integrity of counsel making this improper cross-appeal.”).

The reply brief should not merely repeat the opening brief; nor should it be used to make new arguments.⁵⁸ Instead, a reply brief should respond to the arguments made in the appellee's brief.⁵⁹ Chief Judge Markey cited an example of poor briefing in a frivolous appeal, noting that "in one case the appellant cited 57 cases, the appellee cited 74 different cases, never mentioning one of appellant's 57, and appellant came back in the reply brief with 43 more, never mentioning one of appellee's 74."⁶⁰ The appellant should not leave an argument made by the appellee unanswered in its reply brief.⁶¹

A respondent should not file a cross-appeal merely to get the last word—the judges are both familiar with and made impatient by this tactic.⁶² As the Practice Notes to the Federal Circuit Rules recognize, "counsel should be prepared to defend

58. See *Titan Tire Corp. v. Case New Holland Inc.*, 566 F.3d 1372, 1385 (Fed. Cir. 2009) (citing *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312 (Fed. Cir. 2006) and holding argument waived when appellant "failed to raise the question properly by not including it as an issue on appeal in its opening brief"); *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990) (indicating that "an issue not raised by an appellant in its opening brief . . . is waived").

59. See Fed. R. App. P. 28(c) (providing that "[t]he appellant may file a brief in reply to the appellee's brief"); *Princess Cruises, Inc. v. U.S.*, 397 F.3d 1358, 1361 (Fed. Cir. 2005) ("We note a troubling trend for the counsel of cross-appellants to disregard the rule limiting their reply brief to issues concerning the cross-appeal."); see also Graham, *supra* n. 31, at 92 (quoting Judge Michel as criticizing briefs that are "ships passing in the night").

60. Howard T. Markey, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, The Third Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 108 F.R.D. 465, 481 (1985).

61. Clevenger, *Ten Commandments for Oral Argument*, *supra* n. * (Commandment 6: "If you are the appellant, never leave an argument by the appellee unanswered in your reply brief. Unanswered arguments may be taken as conceded against you." (emphasis omitted)). Judge Clevenger also suggests counsel for appellant should know the weaknesses in her case, and should consider settling after receiving a powerful brief from the cross-appellant. Clevenger, *Ten Commandments for Appellate Briefing*, *supra* n. * (Commandment 9: "If the appellee draws some blood in the red brief, give serious thought to settling your case.").

62. Lourie, *supra* n. 28, at 10 (cautioning counsel against filing "a cross-appeal only to make another argument for affirming the judgment," noting that such a filing "is not properly a cross-appeal," and indicating that the judges "won't read a fourth brief and won't let an improper cross-appellant have a second chance for argument").

the filing of a cross-appeal and the propriety of arguments presented in the fourth brief at oral argument.”⁶³

B. Keep Briefs Short

The shorter the brief, the more effective it will be.

—Judge Friedman⁶⁴

The second point about brief writing is be as concise as possible.

—Judge Schall⁶⁵

A shorter brief is a more effective brief. When I was clerking, almost every opening brief in a patent case approached the word limit,⁶⁶ which seemed to me to indicate that attorneys sometimes forget that their case is not the only appeal before the court.⁶⁷ As Judge Plager has explained, the court sees a large volume of paper every month:

On average, a judge will have 25 (plus-or-minus) new cases assigned each month. Each case is typically 125 printed pages on typewritten double-spaced pages, whichever it is; 50 for the appellant, 50 for the respondent, 25 for the reply brief. Without even reading a single outside case or even

63. Fed. Cir. R. 28.1, practice notes (“A party may file a cross-appeal only when it seeks to modify or overturn the judgment of a trial tribunal. Although a party may present additional arguments in support of the judgment as an appellee, counsel are cautioned against improperly designating an appeal as a cross-appeal when they merely present arguments in support of the judgment. *See Bailey v. Dart Container Corp.*, 292 F.3d 1360 (Fed. Cir. 2002). Further, counsel are cautioned, in cases involving a proper cross-appeal, to limit the fourth brief to the issues presented by the cross-appeal.”).

64. Friedman, *supra* n. 56, at 18.

65. Schall, *supra* n. 17, at 196.

66. *See generally* Fed. R. App. P. 32(a)(7)(A) (setting word limits for briefs).

67. Giles Sutherland Rich, *My Favorite Things*, 35 IDEA 1 (1994) (“Let me here point out something lawyers never seem to think about. They seem to think that courts are just there to handle their cases. The rules limit main briefs for each party to 50 pages and a reply brief to 25. If lawyers use the limit as they usually do, that is 125 pages per case. Let us ignore the 12 submitted cases and multiply the 16 argued cases by 125. That is an even 2,000 pages I am expected to read in about three weeks, during which time I am also getting petitions for rehearing in decided cases from lawyers insisting our decisions were dead wrong, other judges’ opinions to review, and legal literature I am supposed to keep up with. And lawyers frequently have the nerve to ask permission to file 10 or 20 extra pages in their briefs because their cases are ‘complicated’! What do they think judges’ lives are? If you file a short brief, you get brownie points.”).

looking at the record, you're talking about something in the neighborhood of 3,000 to 3,500 typewritten or printed pages per month of material to read.⁶⁸

For this reason, it is not necessary to reach the word limit—in fact, it is better not to.⁶⁹ An overworked judge will appreciate and understand a concise brief more than a long and convoluted brief. Judge Clevenger has warned that parties should not feel compelled to use their allotted word limit.⁷⁰ And forget about filing a motion for an extended brief. As Federal Circuit Rule 28(c) recognizes, “The court looks with disfavor upon a motion to file an extended brief and grants it only for extraordinary reasons.”⁷¹

68. Plager, *supra* n. 30, at 280 (“That just gives you a little feel for the total amount of ‘stuff’ that comes in month in and month out, and why things like the ‘Summary of Argument’, the ‘Table of Contents’, and other ways of trying to grasp the case without slugging through all of the stuff becomes very important to the judges.”); *see also* Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 19 (“Each appellate judge faces a heavy docket. In our court we each get 25 to 30 new appeals every month. That means at least 75 briefs plus 25 records to read.”); Smith, *supra* n. 1, at 566 (“Remember that the judges are reading an average of 5,000 or more pages of reading material a month, so that if you can present your case in written form so that it’s easy for them to read, easy to understand and, hopefully, easy to come to a conclusion that you should prevail, then the time is well spent.”); Ginsburg, *supra* n. 6, at 568 (advocating shorter briefs and warning that “eye fatigue, even irritability, sets in well before page fifty”).

69. Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23 (“Although our court allows up to 50 pages, a brief of half that length usually has more power.”); *see also* Michel, *supra* n. 23, at 282 (“So I find a tremendous amount of fog and confusion as I slog my way through page after page of argument. I’d make the suggestion that often ‘shorter is better.’”); Michel, *supra* n. 14, at 534 (“Briefs are often much too long and much too full of obvious boilerplate. . . . I think briefs could be shorter.”).

70. Clevenger, *Ten Commandments for Appellate Briefing*, *supra* n. * (Commandment 1: “Do not feel compelled to use all your allotted word limit. Judges smile at short, to the point briefs.”); *see also* Raymond C. Clevenger, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Thirteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 166 F.R.D. 515, 555 (1995) (“What is important to keep in mind, I think, and I think it is hard, and was hard for me when I was in practice, to think that the court would find anyone’s case quite as interesting as mine, the one that I took up. Each of us has on average about 30 cases a month that we have to process, cases that are for argument, not for argument, things that come up on motions that you have to pay attention to. And so if there are 30 days in the month, that is one day per case, assuming that all we did was read briefs, which is not the case. And so you can derive from those numbers that lots of cases have to be consumed very quickly on the briefs.”).

71. Fed. Cir. R. 28(c).

C. Limit the Issues You Appeal

Briefs presenting more than two or three issues may be viewed with suspicion. . . . A long succession of marginal points may suggest there is no strong point.

—Judge Michel⁷²

Limit the issues. Having more than three issues in a brief suggests to us that you don't have a strong appeal.

—Judge Lourie⁷³

When deciding which issues to appeal, limit your appeal to arguments that really matter. Every additional issue that you appeal decreases the chance that you will win on any issue, as it may suggest that you do not have a strong appeal.⁷⁴ The Federal Circuit judges (and clerks) are suspicious of appeals that raise many different issues and suggest that the district court erred in numerous ways. Frankly, the court just does not believe that the district court made five or more mistakes, and you will have a difficult time finding an opinion from the Federal Circuit reversing on that many issues. You are unlikely to succeed on your weak arguments, and they may distract the court and

72. Michel, *Advocacy in the Federal Circuit*, *supra* n. 15, at Westlaw p. 4.

73. Lourie, *supra* n. 28, at 10.

74. Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 22 (“A long succession of marginal points may suggest there is no strong point.”); Howard J. Bashman, *How Appealing, How Appealing’s 20 Questions, 20 Questions for Circuit Judge William Curtis Bryson of the U.S. Court of Appeals for the Federal Circuit*, http://howappealing.law.com/20q/2003_09_01_20q-appellateblog_archive.html#106247524514644693 http://howappealing.law.com/20q/2003_09_01_20q-appellateblog_archive.html#106247524514644693 (Sept. 2, 2003) (accessed Nov. 18, 2010; copy on file with Journal of Appellate Practice and Process) (stating that “you must recognize that you pay a price for every additional argument you put into a brief; you need to be confident that the benefit to your prospects for success is worth that price”); *see also* Alex Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. Rev. 325, 326-27 (1992) (suggesting that if you are an attorney who wants to lose an appeal, you should “bury your winning argument among nine or ten losers” and if your goal is to lose an appeal, you should “tell the judges right up front that you have a rotten case” and “write a fat brief”); Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 25 Temple L.Q. 115, 119 (1951) (“[E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.”); *see generally* J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: The “Ethical” Issue of Issue Selection*, 80 Denver U. L. Rev. 155, 155 (2002).

discredit your stronger arguments.⁷⁵ Judge Friedman advises: “Do not make every argument possible. A poor argument is easily demolished. Its very presence suggests weakness, on the theory that the lawyer’s case cannot be good if he is forced to rely upon unsound contentions.”⁷⁶ You also have a limited amount of space in your appeal brief, and if you appeal a dozen issues, you have less space in which to address your most important issues.⁷⁷ Judge Newman has warned that attorneys should avoid the “shotgun approach” and they should limit themselves to their best points.⁷⁸

The Federal Circuit reviews many issues from the district court with great deference, as an appeal is not a chance to retry your case.⁷⁹ As Judge Markey recognized, the Federal Circuit is not a trial court and it does not “start over as though nothing happened before you came to us.”⁸⁰ If possible, limit your

75. Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 19 (“If we face an avalanche of unnecessary information—too many issues, facts and authorities—we may miss the ones that matter. Thus, you must be selective. Limit yourself to the crucial points.”).

76. Friedman, *supra* n. 56, at 17; *see also State Indus., Inc. v. Mor-Flo Indus., Inc.*, 948 F.2d 1573, 1578–79 (Fed. Cir. 1991) (“Logically, appellants face greater difficulty in presenting an arguable ‘basis for reversal in law or fact’ required for an appeal to be nonfrivolous . . . in an appeal in which great deference must be given to the trial court than in one in which our review is, for example, *de novo*. Given the difficulty of showing reversible error in discretionary rulings, counsel should be particularly cautious about filing an appeal which challenges them.”) (citation omitted).

77. *See U.S. v. Levy*, 741 F.2d 915, 924 (7th Cir. 1984) (“[W]e observe that the shotgun inclusion of issues may be the basis of hitting the target with something but still runs the risk of obscuring the significant issues by dilution.”).

78. Newman, *supra* n. 9, at 570–71; *see also* Smith, *supra* n. 1, at 567 (“[G]ive your best shot to your best issue.”); Ginsburg, *supra* n. 6, at 568 (explaining that a “first-rate brief . . . resists making every possible argument”).

79. Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23 (“Do not attempt to retry the case on appeal.”); Newman, *supra* n. 9, at 571 (“Our job as an appellate tribunal is to correct mistakes, not to retry the case, not to reconsider the facts, not to redecide credibility.”); Nies, *supra* n. 42, at 571 (“[W]e are here not to try any cases.”); *see also Fromson v. W. Litho Plate & Supp. Co.*, 853 F.2d 1568, 1570 (Fed. Cir. 1988) (“This is the eighty-fourth case in which the court has been forced, *ad nauseam*, to remind counsel that it is a court of review.”), *overruled on other grounds, Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337 (Fed. Cir. 2004); *Preemption Devices, Inc. v. Minn. Min. & Mfg. Co.*, 732 F.2d 903, 905 (Fed. Cir. 1984) (“PDI raises on appeal each and every one of its five points and in its briefs asks us, in effect, to review the entire record and reach our own conclusions on each point—in its favor, of course. This is not our function as an appellate court.”) (citations omitted).

80. Howard T. Markey, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Second Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 104 F.R.D. 207, 212 (1984) (“We are not a trial court. We do not sit *de novo*. We don’t start

appeal to legal issues, or at least frame your arguments as legal arguments. As Judge Michel has proposed, when possible make your case about the standard that is better for you:

[J]ust as batters can “pull” hits, appellants can often “pull” issues toward a less deferential standard. As noted earlier, though an infringement ruling is reversible only for clear error, you may be able to show that it turns largely on claim construction, reversible for simple error. Or, when abuse of discretion nominally applies, you may be able to convince us that an underlying issue of fact actually controls, making review less deferential than would at first appear. Or, if an underlying issue of law controls, review becomes non-deferential.⁸¹

Keep in mind that if you have no basis to appeal, you should not appeal.⁸² As the Federal Circuit has warned, an appeal as to which “no basis for reversal in law or fact can be or is even arguably shown,” is frivolous as filed and sanctionable because it “unnecessarily wastes the limited resources of the court as well as those of the appellee, and therefore should never have been filed at all.”⁸³

over as though nothing happened before you came to us. If that were the case, we could of course save an awful lot of money by just closing down the district courts and have you all write us a letter and say ‘What do you think of this?’. I suppose the moral of that story is—win your case at the trial level; or, if that fails, be prepared to show that you lost below because of prejudicial, reversible error.”).

81. Michel, *Advocacy in the Federal Circuit*, *supra* n. 15, at Westlaw p. 3; *see also* Kozinski, *supra* n. 74, at 333 (“When a lawyer resorts to a jury argument on appeal, you can just see the judges sit back and give a big sigh of relief. We understand . . . that you know, and we know, and you know we know, that your case doesn’t amount to a hill of beans, so we can go back there in the conference room and flush it with an unpublished disposition.”).

82. Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23 (“If you cannot articulate a theory of reversible error based on precedent, you probably should not appeal.”).

83. *State Industries*, 948 F.2d at 1578–81 (sanctioning appellant under Federal Rule of Appellate Procedure Rule 38 and also stating that “[t]he fact that appellants have a statutory right to appeal does not of course mean that they can exercise that right without risking sanctions. . . . State had no business filing this appeal”) (italics in original). While sanctions are rare and should only be sought in limited circumstances, the Federal Circuit will sanction parties and attorneys advancing frivolous arguments. *See e.g. E-Pass Techs. Inc. v. 3Com Corp.*, 559 F.3d 1374 (Fed. Cir. 2009) (sanctioning appellant for a frivolous appeal as filed and argued under Fed. R. App. P. 38 when “[t]he tactics employed by [the appellant] in this appeal, including both the misrepresentations made and the failure to cogently identify any reversible error of the district court, far outweigh any non-frivolous argument that may be lurking in its briefs”).

D. Present Your Case Clearly

I think from my standpoint, at the risk of sounding like a broken record, to me one of the most important things is clarity, clarity, clarity. I sat earlier this year on a case and one of the members of the panel said this might as well be German, it was a very technical issue.

—Judge Schall⁸⁴

Now I find it terribly helpful where appellate advocates are very clear as to what their contention is.

—Judge Michel⁸⁵

It is very important to present your case clearly and simply. Not only do the Federal Circuit judges see a large volume of cases, they see a variety of different legal and technical issues.⁸⁶ If it is relevant, explain the technology. In patent cases when the technology mattered, the best briefs provided a succinct discussion of the relevant technology and pictures or diagrams that were labeled or color-coded. In cases with complex technology, the brief that is better at explaining the technology obtains an advantage because it is used as a reference by the judges and clerks. Judge Bryson urges lawyers to “walk us through some of the technologies, at least in two or three pages, the court will get a better education about your case and come to a much better sense of how the law applies to the facts that you have.”⁸⁷ Judge Schall agrees: “If you have a patent case make that accused device or patented invention understandable.”⁸⁸ If you used a tutorial of the technology before the district court or

84. Schall, *supra* n. 33, at 555.

85. Michel, *supra* n. 26, at 198.

86. The Federal Circuit has jurisdiction over a variety of cases, including final decisions from the United States Court of Federal Claims, the United States Court of International Trade, and the Merit Systems Protection Board, and decisions of the federal district courts dealing with patent issues. 28 U.S.C. § 1295 (available at <http://uscode.house.gov>).

87. Bryson, *supra* n. 29, at 288.

88. Schall, *supra* n. 33, at 555; *see also* Schall, *supra* n. 17, at 196 (“If you have a patent case, make it very clear how the object or the device that is the subject of the patent works.”); Smith, *supra* n. 1, at 569 (counseling attorneys to “keep it simple”).

the jury that might be helpful on appeal, point the court to it.⁸⁹ It is also appropriate to send the accused devices to the court if it will be helpful to the court's understanding of the case, and we did see that in a small number of cases.

Use charts, graphs, diagrams, pictures, bullet points, and the like to explain the technology or case issues.⁹⁰ As Judge Markey has stated, "Why not some color? Why not a cartoon? Why not a chart? Bar chart or diagram chart? . . . I know of no rule against that sort of thing, and if it helps communicate, that's the purpose. But we never see any of that."⁹¹ Judge Michel agrees: "I just want to put in a plug for diagrams, photographs, charts, and other graphic ways of communicating. Everything doesn't have to be communicated with long sentences. Some things are better done through graphs."⁹² Demonstratives used during oral argument are rarely effective—as discussed below—and their use requires advance permission from the court.⁹³ An easier route is to refer back to demonstratives used in the brief.

E. Maintain Decorum

I think if you have your arguments and you posit them honestly, you're much better off showing both your strengths and your

89. Rader, *supra* n. 10, at 284 ("[W]e occasionally have very complex new technologies featured in our cases, and I have wished that we would have in our appendix a brief article that would give me a tutorial on the technology. I've had to send my clerks out to try and find some brief explanation that will give me some understanding of the basic science. I know that that must have been given to the trial court. It must have received some kind of tutorial, and I wish that it would be part of our record in the form of some article.").

90. Clevenger, *Remarks, supra* n. 70, at 552 ("I think that any form of demonstrative evidence that is going to speed the process by which the court is going to understand what you are saying makes great sense. I mean, you know the adage a picture is worth a thousand words, sometimes these charts and other forms of demonstrative evidence are very, very useful. . . . And we are seeing an increasing use, at least I am, especially in patent cases, of technicolor inserts, photographs and things like that in the briefs that are very helpful, at least to me."); Michel, *supra* n. 20, at 552 ("It's very helpful if the brief includes a diagram or a photograph or some other graphic representation that's pertinent to the issues. Then you really have the time and opportunity to study it carefully and think about it and integrate it with the written word that is nearby in the brief.").

91. Howard T. Markey, J. U.S. Ct. of App. for the Fed. Cir., *Remarks, Advocacy Before the Federal Circuit, AIPLA Bulletin* 207 (Dec. 1990).

92. Michel, *supra* n. 23, at 288.

93. Fed. Cir. R. 34(c)(1), (2).

weaknesses. Be intellectually honest with the court because dishonesty is usually found out fairly quickly in any argument which comes up.

—Judge Gajarsa⁹⁴

And if you lose the trust of the court because you cropped a quote, or because you've told us something that we either knew at the time is stretched too far, or that we so determine when we get around to writing the opinion, that can be fatal. You may snatch defeat from the jaws of victory if you disserve your cause by your presentation.

—Judge Newman⁹⁵

If you have to misquote an authority or the trial tribunal, if you have to use ellipsis . . . in order to escape the thrust of a quote, trying to hide it, maybe you have a frivolous appeal.

— Judge Markey⁹⁶

Do not misstate the cases. If a legal issue matters, the judge (or the judge's clerks) will verify what you tell the court the case says on that point.⁹⁷ Judge Plager has warned that "cropping" or mis-citing cases "rarely goes unnoticed, and that's in part because our law clerks love nothing better than to point out to us that some advocate is misquoting the law or mis-citing the law to us, or misstating the facts."⁹⁸ Judge Friedman has warned

94. Arthur J. Gajarsa, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Sixteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 193 F.R.D. 263, 287 (1999).

95. Pauline Newman, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Sixteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 193 F.R.D. 263, 296 (1999).

96. Markey, *supra* n. 60, at 481.

97. *See e.g. State Industries*, 948 F.2d at 1580 (sanctioning an attorney who made arguments "based on half-truths and illogical deductions from misused legal authority"); *see also* Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23 (noting that that "[b]ad briefs generally make the same mistakes" in that they "tend to quote dicta as if they were holdings"); Jameson Lee, *Effective Brief Writing: An Administrative Patent Judge's Point of View*, 9 U. Balt. Intell. Prop. L.J. 191, 193 (2001) ("When fudging is relied on, it more likely indicates lack of merit of the position taken in the brief, than the existence of any indisputable conclusion.")

98. S. Jay Plager, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Ninth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 140 F.R.D. 57,

against quote cropping and misleading use of ellipsis because “the court isn’t going to have much faith in your arguments,” and “sooner or later someone else is going to point it out, that the statement is not fair and accurate.”⁹⁹

Likewise, do not misstate the record.¹⁰⁰ You will lose your credibility and potentially your appeal¹⁰¹ because, as Judge

88 (1991). Indeed, in *Paulik v. Rizkalla*, 796 F.2d 456 (Fed. Cir. 1986), for example, the court chastised counsel for such behavior: “This conduct by [appellee’s] counsel, involving flagrant misrepresentations of the record, was a gross violation of the high standards of professional conduct that we expect and demand of the members of our bar. There is no possible excuse for a lawyer distorting the record in the way that [appellee’s] counsel has done.” *Id.* at 460; see also e.g. *Porter v. Farmers Supply Serv., Inc.*, 790 F.2d 882, 887 (Fed. Cir. 1986) (awarding costs and attorneys fees because party distorted cited authority by omitting language from quotations).

99. Daniel M. Friedman, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Fourth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 112 F.R.D. 439, 565 (1987) (“If a lawyer is shown not to be accurate, he’s not candid, he’s distorting things, even the things that he’s accurately stated are likely to be rejected by the court.”); see also Daniel M. Friedman, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Ninth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 140 F.R.D. 57, 87–88 (1991) (“If you start with the assumptions that I do, that no lawyer should write something or say something in Court that is not accurate, there is a problem because every now and then something happens. A quotation is cropped. That’s the worst thing, leaving out a few words that change the sense of it, a case is mis-cited, that kind of thing. I hope that it’s not ever done consciously. I think it’s done because the lawyers are hectic. They don’t bother to look that carefully. They read it over; maybe some young person has given them this quotation; they don’t bother to check it, it reads great, and that’s what happens. And, of course, it’s self-defeating. Any lawyer who does that is just hurting his own case, because as soon as the Court sees what he’s done, they say, ‘Well, you can’t trust this fellow.’”); see also Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23 (“Do not mislead the panel about the content of the applicable law. Misquotation, mischaracterization, omission, and exaggeration usually are obvious and will diminish your credibility and your client’s prospects.”).

100. See e.g. *Mathis v. Spears*, 857 F.2d 749, 755, 761 (Fed. Cir. 1988) (criticizing appellant for its “reckless disregard for the truth” in misstating facts, holding that it relied on “record distortions, manufactured facts, and implausible and unsupportable legal arguments,” and concluding that appellee was entitled to costs and attorney fees incurred in resisting the frivolous portion of the appeal); Clevenger, *Ten Commandments for Appellate Briefing*, *supra* n. * (Commandment 5: “[N]ever cite a bit of the record that helps you[r] case when you know there is more in the record that undercuts the bit you cited.”).

101. *Romala Corp. v. U.S.*, 927 F.2d 1219, 1223–25 (Fed. Cir. 1991) (imposing sanctions on party and its attorney where some “arguments are based on misrepresentations and distortions of its opponent’s arguments and the Claims Court’s opinion”); *State Industries*, 948 F.2d at 1580 (“Because of State’s misrepresentation of the record and controlling law, and its patently illogical and irrelevant arguments, we adjudge its appeal to be not only frivolous as filed but also frivolous as argued.”). For a detailed (and anonymous) discussion of Federal Circuit decisions lambasting attorneys, see Larsen E. Whipshade and J. Cheever Loophole, *Responsible Advocacy and Responsible Opinions at the Federal Circuit*, 35 IDEA 331 (1995).

Bryson has pointed out, the judges “really do look at appendix citations, . . . and . . . really do read cases that the parties represent as strongly favoring their positions,” and when the judges “find that a party’s appendix cites or cases do not live up to their billing, it does enormous damage to that party’s credibility.”¹⁰² Judge Newman has warned that “fudging the facts or deliberate misstatements is not anything that can be tolerated or ought to be, whether it’s driven by a sensitivity to the stakes facing the client, or perhaps to the press of work, or a careless disregard.”¹⁰³ And she has threatened, “if you do appear for oral argument and there are such deficiencies in your brief, I’m afraid we may explain them to you at the start.”¹⁰⁴

Likewise, pejorative language has no place in a brief; nor does disparaging language about the opposing counsel, the opposing party, or the district judge.¹⁰⁵ Such tactics are ineffective, counterproductive, and do nothing to prove your case. Judge Michel suggests, “Critique the trial court’s rationale, but not its articulation. Minor misstatements of law are not sufficient grounds for reversal.”¹⁰⁶ And do not attack or disparage opposing counsel or the other party because it only hurts your case.¹⁰⁷ As Judge Markey suggested, “If you find it is

102. Bashman, *supra* n. 74 (indicating in addition that Judge Bryson went on to say that “[t]his happens a lot”).

103. Pauline Newman, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Ninth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 140 F.R.D. 57, 87 (1991); *see also* Newman, *supra* n. 9, at 573 (“But if you’ve written a brief with inapt citations, cropped quotations out of context, certainly your ethos will suffer.”).

104. Newman, *supra* n. 9, at 572.

105. *Snyder by Snyder v. Sec. of Health & Human Servs.*, 117 F.3d 545, 549 (Fed. Cir. 1997). Judge Michel has noted that “[b]ad briefs generally make the same mistakes” in that they tend to overuse adverbs, especially angry ones, and adjectives, especially pejorative ones, and accuse attorneys of misconduct. Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23; *see also* Kozinski, *supra* n. 74, at 328 (suggesting that an attorney who wants to lose an appeal should “create a diversion by attacking the district judge”); Ginsburg, *supra* n. 6, at 568 (“A top quality brief also scratches put downs and indignant remarks about one’s adversary or the first instance decisionmaker.”).

106. Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23.

107. Clevenger, *Ten Commandments for Appellate Briefing*, *supra* n. * (Commandment 8: “Leave the nasty language out. Calling your opponent names, using snide phrases, being self-righteous—none of that helps your case, and likely undercuts your stature.”); Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23 (“Make no personal attacks, and always be courteous, especially when provoked. We respond well to attorneys who attack errors, but not to those who attack persons.”); Bashman, *supra* n. 74 (quoting Judge Bryson: “Of course, I add my voice to the chorus of judges and advocates who have said that attacks on

necessary to attack opposing counsel, maybe you have a frivolous appeal.”¹⁰⁸ Of course the judges are right about all of this: The absolutely worst briefs I saw when I was clerking were the ones in which the attorneys resorted to attacking the prior tribunal, opposing party, or opposing counsel. And in extreme cases of such misbehavior, the court might feel obligated to reprimand counsel during oral argument or point out the behavior in its opinion.¹⁰⁹

III. ORAL ARGUMENTS

[Oral argument] really is your chance at prevailing, meeting the very heavy burden that you have if you're the appellant.

—Judge Newman¹¹⁰

The oral argument . . . gives me an opportunity to ask questions that I just can't get satisfaction from in the brief. Sometimes the briefs are coy about particular points. Sometimes they just

opposing counsel, including the stupid adverbial characterizations of the other side's position ('Appellant desperately contends . . .', etc.) do nothing to advance the brief writer's cause."); see also Leonard I. Garth, *How To Appeal To An Appellate Judge*, 21 Litig. 20, 67 (1994) ("[I]t always helps to keep us happy. What keeps us happy? By and large, we are the happiest when your brief conforms to the rules, when your arguments bear on the issues, when you refrain from *ad hominem* remarks about your adversary and his brief, and when your argument is cogent and clear so that we can understand your position."); Kozinski, *supra* n. 74, at 328 (suggesting that an attorney who wants to lose an appeal should "pick a fight with opposing counsel").

108. Markey, *supra* n. 60, at 481.

109. See e.g. *Pac-Tec, Inc. v. Amerace Corp.*, 903 F.2d 796, 804 (Fed. Cir. 1990) ("The assertions of bias are not only frivolous; they are brazen, blatant, and boorish."); *Preemption Devices, Inc. v. Minn. Min. & Mfg. Co.*, 732 F.2d 903, 907 (Fed. Cir. 1984) ("It is regrettable that we should have to remind counsel that attacking the judge as lacking in skill or understanding or legal competence, as has repeatedly been done in this case, is improper argument and wholly ineffective, if not counterproductive. It has no tendency to prove anything.").

110. Newman, *supra* n. 95, at 275 (continuing to expand on this point: "Now, we've been talking about the briefs, and you can't underestimate the importance of the briefs. That's your contact with the judge. That's the first thing that we see. That's where we form an opinion of what the case is all about. That's the basis on which we then listen to your argument at oral argument. And for the close cases, certainly when the judge's mind isn't quite made up, when it isn't quite clear whether you're on the right side or not, as Judge Rich put it, your opportunity at oral argument is to turn the tide in your favor.").

haven't worked through the implications of what is said at particular points.

—Judge Bryson¹¹¹

I think the purpose of the oral argument is for the court . . . to try to open up with you [a] dialog [and] to share with you our concerns about the weaknesses in the appellant's case and begin to deal with that.

—Judge Clevenger¹¹²

While the brief is very important, the oral argument still matters.¹¹³ In theory, you should have addressed your arguments sufficiently in your brief such that oral argument is not even necessary. In reality, the court still has some issues that it would like to resolve. Chief Judge Michel has explained, “In the other half of the appeals, the close cases where oral argument could influence my vote, it does so far more than 20% of the time.”¹¹⁴

111. William C. Bryson, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Fourteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 170 F.R.D. 534, 642 (1996); *see also* Graham, *supra* n. 31 (“Oral argument provides the ‘only opportunity for the court to confront competing propositions,’ Judge Bryson said. ‘It is our opportunity to test your propositions, not your opportunity to make a speech.’”).

112. Clevenger, *supra* n. 70, at 554.

113. Bryson, *supra* n. 111, at 642 (referring to oral argument as “enormously helpful,” acknowledging that judges hold “a wide-range of views” on its importance and that “[t]here are some judges who propose getting rid of oral argument on appeal,” but noting that he “would oppose that vehemently”).

114. Michel, *Advocacy in the Federal Circuit*, *supra* n. 15, at Westlaw p. 3 (“Oral argument, however, is also important to me. Although I reverse my own inclination in only one of five cases because of the oral argument, I am influenced by oral argument more often than that. You see, in perhaps half the cases it is clear from studying the briefs that affirmance is required. In the other half of the appeals, the close cases where oral argument could influence my vote, it does so far more than 20% of the time. Usually, however, it merely reinforces my inclination.”); *see also* Michel, *supra* n. 23, at 290 (“I think oral argument can be helpful. Sometimes the briefs are not so good, and in those cases the oral argument is particularly helpful because it may be the first time that the contentions on appeal really become clear. Oral argument is always useful as a double check, to make sure we haven’t misunderstood something or developed an incorrect sense of what happened below. I think oral argument is a good safety net, and, anyway, we really can’t weed out the cases and decide them any faster than we do now.”); Michel, *supra* n. 20, at 553 (“If I were in practice again, I would never waive oral argument, especially as appellant. It always has potential to be helpful. No brief can be good enough when you face the uphill burden of the appellant.”); Michel, *supra* n. 14, at 537 (“I think the oral argument is as vital as the briefs.”); *but see* Rich, *supra* n. 5, at 275 (“And it’s really a rare case where the oral

Judge Newman has also commented that the oral argument has sometimes changed her view of the case: “It happens often enough I find that my own preliminary view of the merits of the case will be changed on oral argument.”¹¹⁵

A. The Basics

So, if you have a position that is complicated and difficult, you’ve got to simplify it. In oral argument you’ve got to oversimplify it.

—Judge Friedman¹¹⁶

Judge Michel frequently says “What’s the error? Why start your argument telling us what the facts are? We’ve read the record. Just stand up and say ‘The error that was committed below is as follows.’” And we don’t hear very many arguments that start that way.

—Judge Clevenger¹¹⁷

I have indeed, perhaps we’ve all heard arguments so unclear that one really wonders if the advocate is deliberately fuzzing it up.

—Judge Newman¹¹⁸

Oral arguments are meant to clear up any misunderstandings the court might have about your argument, the cases, or the record. The court has read the briefs and formed an opinion of the case prior to the oral argument, so there is no need to summarize your case.¹¹⁹ Likewise, you do not have to

argument is going to change anybody’s mind. If you’re on the right side, you’ll win. If you’re on the wrong side, you won’t, and that’s about it.”).

115. Newman, *supra* n. 9, at 572; *see also* Schall, *supra* n. 17, at 293 (“Oral argument does make a difference. I can think of at least one case since I’ve been on the Court where my view was changed by what was said at oral argument.”).

116. Friedman, 1987 *Remarks*, *supra* n. 99, at 578.

117. Clevenger, *supra* n. 4, at 296.

118. Newman, *supra* n. 9, at 573.

119. Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 21 (“First, never spend time summarizing your case. Assume the judges have read the briefs and are prepared to ask questions. Assume that they grasp the issues and the facts and that they know the law.”); Michel, *supra* n. 14, at 535 (“[S]o many attorneys spend so much of their time in oral argument simply restating the basic framework of the case that has already been fully covered in the brief.”); Fed. Cir. R. 34, practice notes (“The members of the panel will

give a procedural background unless it is directly relevant to the appeal.¹²⁰

The basics of oral argument are simple: Make eye contact, speak slowly and clearly, and do not repeat yourself. Have a theme that provides a focus for the argument and use a roadmap of two to four points to help the court understand the direction of your argument, getting to your best argument first. The best oral arguments I saw were ones in which the attorney presented a proposed outline to discuss two or three issues before beginning the discussion.

While it is acceptable to refer to the judges by name, remember that the panel is speaking for the whole court. As a general matter, it is a bad idea to suggest that opinions written by different judges should have more weight or to try to exploit differences in panel composition. This is one of the main reasons the court does not give out panel designations in advance of the day of the oral argument.¹²¹ And if you are going to address the judges by name, make sure you know how to pronounce their names.¹²² (There are few things more wince-inducing than watching an attorney repeatedly refer to a judge while mispronouncing the judge's name. Litigants have a particularly difficult time pronouncing Judge Gajarsa's name. It is pronounced Guy-yar-zuh.)

have read the briefs before oral argument. Counsel should, therefore, emphasize the dispositive issue or issues.”).

120. Schall, *supra* n. 33, at 554 (“I still am surprised at the number of times when I see a lawyer in any kind of a case, you will see it in all the cases that we hear, get up and start giving a procedural history of a case and this type of thing. You simply don’t have time for that—get right into your points, particularly if you are the appellant.”).

121. Graham, *supra* n. 31, at 92 (noting that Judge Michel stated that the court discontinued announcing the members of Federal Circuit panels in advance of the oral arguments because “the experience of the judges was ‘very bad and very offensive,’ shifting attention from the arguments in the case to the ‘distracting sideshow’ of the panel’s composition” and that Judge Lourie explained that “panel opinions are not opinions of the panel but opinions of the court, and that practitioners should not be targeting individual judges or panels”).

122. Helen W. Nies, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Advocacy Before the Federal Circuit*, *AIPLA Bulletin* 204 (Dec. 1990) (“[O]f course, you must get the judge’s name right.”).

Do not read your argument—it is not a persuasive way of presenting your case.¹²³ The Federal Rules explicitly discourage it,¹²⁴ and Judge Michel has declared that he is “frustrated” by attorneys who read their argument at oral argument.¹²⁵ Instead, be flexible in your argument—if the court wants to talk about other issues, you must be able to move away from your plan.¹²⁶ Attorneys should not have a set speech or script, but should instead plan to answer the judges’ questions and use those questions to further discuss the issues in the case.¹²⁷ Sometimes the judges give the attorneys advice during the oral argument such as suggesting issues that should be addressed. If the judges tell you that you are on the wrong issue, listen to them.¹²⁸

Know the record and be able to cite to it (and not just your brief) and specific cases in support of your argument.¹²⁹ (The judges will have the appendix with them at the bench and will be able to refer to any pages you reference. The law clerks are listening to the oral arguments and will take notes when you reference a specific case or page in the record. And both the judges and the clerks will be able to listen to the oral argument

123. Judge Michel has stated that some of his “major frustrations” are from attorneys “reading their argument.” Michel, *Advocacy in the Federal Circuit*, *supra* n. 15, at Westlaw p. 5.

124. Fed. R. App. P. 34(c) (“Counsel must not read at length from briefs, records, or authorities.”).

125. Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23.

126. Friedman, 1987 *Remarks*, *supra* n. 99, at 565.

127. Schall, *supra* n. 33, at 553 (“If a judge gives you something that gives you a good opening for your side of the case, don’t just answer that question and then perfunctorily, if you will, return to your set script, but follow that line of argument.”); Schall, *supra* n. 17, at 197 (“[D]o not be chained to a script. For example, if in the course of oral argument one of the judge[s] on the panel asks a question that indicates he or she is concerned about a particular area in the case, do not just answer that question and then go back to your prepared line of argument. Address the area of concern that underlies the judge’s question. And this I will say is something that I have seen on more than one occasion since I have been on the court. A lawyer will answer the question but then not pick up the ball . . . on where the judge is coming from.”); Michel, *supra* n. 14, at 535 (“I would urge counsel to think of the argument, not as an argument not as a speech you’re presenting, but as a discussion in which you’re going to have a chance to answer the questions of the three panel members on what is bothering them.”); Ginsburg, *supra* n. 6, at 569 (“Questions should not be resented as intrusions into a well-planned lecture.”).

128. Ginsburg, *supra* n. 6, at 569 (“Other times, we try to cue counsel that an argument he or she is pursuing with gusto is a certain loser, so that precious time would be better spent on another point.”).

129. Friedman, *supra* n. 56, at 18 (“The advocate must be completely conversant with the record.”).

when the judge is deciding the case and writing the opinion.) Explain why case precedent applies to the facts of your case.¹³⁰ Judge Michel has commented, “It always amazes me how many arguments—of course it is not true in briefs—but how many arguments will run their full course without an attorney mentioning a single case.”¹³¹ In a patent case, you should also be able to explain the technology.¹³²

Time limits are like word limits: You should not feel compelled to hit them. If you have made your points and answered the panel’s questions, feel free to sit down.¹³³ This is especially true for the appellee, who has the advantage of defending the decision on appeal. While the appellant generally has more convincing to do, the appellee just needs to answer any questions the court has and respond to anything outrageous the appellant said that was not in its brief. As Judge Nies once said, “I have rarely heard too short an argument. A lot of people dig holes that they fall into by talking too much. You’d just be better off making your point and sitting down.”¹³⁴ And do not go over your time limit. If you are answering the judges’ questions after your time is up, you can ask them if you may continue to answer their questions.¹³⁵ But once they are done asking questions, immediately sit down.

130. Clevenger, *Ten Commandments for Oral Argument*, *supra* n. * (Commandment 9: “[T]ake care to explain why your facts, while not exactly the same as in the earlier case, still merit the rule of law in the other case. . . . Explain why that case supports your point.”).

131. Michel, *supra* n. 26, at 198.

132. Clevenger, *Ten Commandments for Oral Argument*, *supra* n. * (Commandment 7: “[B]e sure you have explained the science so any educated person could understand it. . . . Assume your brief will be read by someone unfamiliar with the science in your case.”).

133. Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 22 (counseling “do not feel you must use all the allotted time”).

134. Nies, *supra* n. 42, at 574.

135. Helen W. Nies, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Ninth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 140 F.R.D. 57, 67 (1991) (“One question: Has the Court considered increasing time for oral argument? The normal oral argument time that’s allotted in all of our cases is 10 or 15 minutes per side. In any complicated case where you believe there is a need for additional time, you may ask the Court, and we frequently grant additional time for both sides. So if the question is, ‘Can you get more time?’ The answer is, ‘Yes’ and, frequently, even at the argument. Those of you who come often know that where the judges spend a great deal of, quote, ‘your time’ putting questions to you, that they usually extend the time automatically so that you can make a particular point you wanted to make.”).

Practice your oral argument sometime in the weeks before your scheduled argument.¹³⁶ Recent oral arguments are available on the court's website, and Judge Clevenger recommends listening to several oral arguments to understand which judges ask what kinds of questions.¹³⁷

If you are the appellant, save time for your reply argument¹³⁸ but do not use it to make arguments you forgot to make in your opening argument.¹³⁹ As with your reply brief, your reply argument should be used to actually respond to the arguments made by opposing counsel. But do not feel the need to reply to all of the arguments opposing counsel makes. As Judge Friedman advocates, "Rebuttal should be short and vigorous; do not waste time with correcting minor errors or making peripheral points."¹⁴⁰ If you are the appellee and you are not cross-appealing, do not stand up after the reply argument. You do not get a sur-reply.¹⁴¹

136. Clevenger, *Ten Commandments for Oral Argument*, *supra* n. * (Commandment 4: "Anticipate in advance the questions you likely will get. . . . If you can afford it, moot court your argument and pick for your moot court judges some skeptical and tough questioners."); Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 22 (suggesting attorneys moot their arguments because "[f]ew advocates can frame effective answers on the spot").

137. Clevenger, *Ten Commandments for Oral Argument*, *supra* n. * (Commandment 1: "Listen to cases that present issues like those in your case, but listen to arguments in other fields, too. Be sure to listen to all the judges on the court."). The reader should note that oral arguments are available at <http://oralarguments.cafc.uscourts.gov> (accessed Nov. 23, 2010; copy of argument-search page on file with Journal of Appellate Practice and Process).

138. In my experience, attorneys generally reserved between two and four minutes for rebuttal. In many cases, if an attorney used up all rebuttal time responding to questions from the panel during the principal argument, the presiding judge chose to restore some or all of the reserved rebuttal time.

139. Smith, *supra* n. 1, at 569 ("[S]ome judges feel very strongly that if you get off on a subject that you've forgotten and that your opponent has not mentioned, they will hop all over you and then all of your good efforts are wasted, at least as far as impressions are concerned."); see also Lee, *supra* n. 97, at 197 ("In 1991, Circuit Judge Paul R. Michel of the Court of Appeals for the Federal Circuit gave a speech at the John Marshall Law School on appellate advocacy. His written remarks stated: 'Do not introduce a new subject during rebuttal. It is unfair to your opponent and it will make an unfavorable impression on the court.'").

140. Friedman, *supra* n. 56, at 60.

141. In a cross-appeal, the appellee does get a sur-reply to further address the issues raised in its opening argument.

B. The Oral “Argument”

I sort of try to see oral argument as an opportunity for the three judges and the counsel on each side to discuss the case together.

—Judge Newman¹⁴²

Do not argue—with the court or with opposing counsel. “Oral argument” is a misnomer. It is a formal discussion among informed attorneys.

—Judge Michel¹⁴³

An “oral argument” is not really an “argument” at all, but a conversation between the attorney and the court. The oral argument allows the court to ask questions of counsel, to share its concerns about the weaknesses of the case, and to resolve its doubts about the case.¹⁴⁴ And the oral argument is the attorney’s only chance to interact face-to-face with the court and to respond to the court’s questions. Attorneys should be conversational in the oral argument and should not argue as if to a jury.¹⁴⁵

142. Newman, *supra* n. 9, at 572.

143. Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23.

144. *Id.* at 22 (“What makes for the best oral arguments? Not ‘argument’ at all, but answers to questions that resolve in your client’s favor the doubts of the panel members.”); Friedman, *supra* n. 56, at 18 (explaining that the oral argument “is the only occasion that the court can question counsel, test his position to determine its strengths and weaknesses, and determine the implications and consequences of the arguments. It is the one chance the lawyer has to find out what is troubling the court and to assuage those doubts.”); *see also* Friedman, 1987 *Remarks*, *supra* n. 99, at 564 (“To me, the purpose of oral argument is twofold. One, it gives the judges the opportunity to ask questions that are troubling the judges. . . . But it’s also an opportunity for the lawyers. And too many lawyers don’t realize this. This is the only time you have to find out what about your case is bothering the court and to set the court straight.”).

145. Judge Schall has suggested that an attorney should establish a “conversational style” with the panel—“in other words being in an ongoing discourse with the panel instead of simply standing up, and perhaps in a somewhat rigid fashion giving a pre-set speech.” Schall, *supra* n. 33, at 553; *see also* Clevenger, *Ten Commandments for Oral Argument*, *supra* n. * (Commandment 8: “Oral argument in our court is a conversation with two parties, the lawyer and the judges. . . . [E]ngage the court in a respectful conversational manner.”); Friedman, *supra* n. 56, at 18 (“[A good oral argument] must focus upon the critical points in the case and expound them simply and effectively. A good oral argument should be a dialogue between the advocate and the court in which, through joint

C. Answer the Questions

The key thing to focus on . . . is answering questions.

—Judge Michel¹⁴⁶

I can't emphasize strongly enough the need to listen to the questions from the bench and to answer those questions.

—Judge Newman¹⁴⁷

I get a little angry with lawyers who won't answer questions, and who want to dance around and avoid the hard questions.

—Judge Clevenger¹⁴⁸

An attorney is at the oral argument to answer the judges' questions, so answer the court's questions directly, fully, and candidly.¹⁴⁹ As a clerk, I was surprised by the number of attorneys who were unwilling or unable to answer the judges' questions.¹⁵⁰ This is risky oral-argument behavior, because although parties rarely "win" an appeal at oral argument, if they cannot answer questions at oral argument, they can lose.¹⁵¹

exploration of the case, the court gains information about the critical facts and issues and insight into the policy judgments that must illuminate and shape the decision."); Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23 (explaining that he is "frustrated" by attorneys who at oral argument argue "as if to the jury").

146. Michel, *supra* n. 14, at 535.

147. Newman, *supra* n. 9, at 572.

148. Clevenger, *supra* n. 4, at 291.

149. Rader, *supra* n. 10, at 295 ("There is a certain elegance and time-tested tradition in the way our oral arguments have evolved. Quite simply, to allow the court to ask questions and the counsel to respond to them on the legal issues."); Nies, *supra* n. 42, at 573 ("I treat oral argument as a time for me to ask questions."); Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23 (counseling attorneys to "answer questions directly, fully, and candidly").

150. See Bashman, *supra* n. 74 (Judge Bryson stating "In particular, lawyers do not seem to prepare by examining their own positions critically. I frequently see lawyers react with surprise and annoyance when the judges begin to ask questions that suggest some skepticism about the lawyer's position.").

151. Friedman, *supra* n. 56, at 60 ("A case can be lost at oral argument if the lawyer is unable to give a satisfactory answer to a difficult question."); see also Ginsburg, *supra* n. 6, at 570 ("In over eighteen years on the bench, I have seen few victories snatched at oral argument from a total defeat the judges had anticipated on the basis of the briefs. But I have seen several potential winners become losers in whole or in part because of clarification elicited at argument.").

Chief Judge Michel has explained, "Oral arguments that 'win' cases do so because the counsel answers questions."¹⁵²

Some attorneys see the questions as interfering with their planned presentation, but the attorney is wasting the court's time and losing his or her case by refusing to answer the court's questions.¹⁵³ Judge Friedman has made useful suggestions:

[W]hen you're asked questions, answer them. Don't say, I'll get to that later, because there's a fair chance you won't get to it later. And even if you were planning to deal with a particular point later, if you're asked now, answer it now.¹⁵⁴

The best oral arguments I saw were ones in which the attorneys effectively answered all of the judge's questions; they were not the ones in which the attorneys gave the best speeches.

To make sure you are answering the judges' questions, listen to the questions and pause to think before answering them.¹⁵⁵ Effective answers are direct and specific so, if possible, first answer a question with a "yes" or a "no" and then provide a concise explanation.¹⁵⁶

The judges' questions often tell you the issues that they think are important, so listen to the questions and resolve the issue raised. Judge Schall has counseled, "In short, the point I am making is, it is very important not to only answer the judge's

152. Michel, *Advocacy in the Federal Circuit*, *supra* n. 15, at Westlaw p. 4.

153. Friedman, *supra* n. 56, at 60 ("Questions from the bench usually put the advocate to his hardest test. Many lawyers dislike questions, on the theory that they interfere with a prepared presentation. Lawyers should welcome questions. It is the one opportunity to find out what is troubling the judges, and to answer them."); *see* Ginsburg, *supra* n. 6, at 569 ("Oral argument, at its best, is an exchange of ideas about the case, a dialogue or discussion between court and counsel. Questions should not be resented as intrusions into a well-planned lecture."); Kozinski, *supra* n. 74, at 331 (suggesting that an attorney who wants to lose an oral argument should avoid answering the judges' questions).

154. Friedman, 1987 *Remarks*, *supra* n. 99, at 565.

155. Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23; *see also* Michel, *Advocacy in the Federal Circuit*, *supra* n. 15, at Westlaw p. 5 (stating that one of his "highest hopes for oral argument" is to see counsel "listening to all of the question and pausing to think before answering").

156. Judge Michel has stated that one of his "highest hopes for oral argument" is to see counsel "answering initially with 'Yes' or 'No' wherever possible." Michel, *Advocacy in the Federal Circuit*, *supra* n. 15, at Westlaw p. 5; *see also* Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23 (same); Graham, *supra* n. 31 ("Judge Bryson added that one of his pet peeves is the 'yes or no' question: 'We ask a lot of yes or no questions, but receive very few yes or no answers,' he said.").

questions in oral argument but to recognize and respond to what lies behind those questions.”¹⁵⁷

Do not dodge the questions. Intentionally evading the court’s questions serves no purpose.¹⁵⁸ The judges are giving you an opportunity to help them understand the issues they have with your case. Avoiding the question merely means avoiding the opportunity to resolve those conflicts. Judge Friedman has complained, “My pet peeve is lawyers who, when asked one question, answer another one.”¹⁵⁹ Judge Michel agrees: “Answer the question the Judge actually asks, not some other question, or not answer at all.”¹⁶⁰ If the only truthful answer you can give to a question is bad for your client, it is still better to answer that question directly than to dodge the question. If you dodge the question, the judges may assume that the answer is bad for your client and may ask several follow-up questions to drag the admission out of you.¹⁶¹ That situation is far more embarrassing and draws far more attention to the weakness in your case than the situation in which the advocate answers the question directly the first time it is asked. The way to deal with weaknesses in your case that might be exposed at argument is to practice and prepare an answer in advance, not to avoid questions when you are at the podium.

Sometimes one of the judges will throw a softball question—one that actually helps your case.¹⁶² Too many

157. Schall, *supra* n. 17, at 197.

158. Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23 (stating that he is frustrated by attorneys who evade the judges’ questions); Newman, *supra* n. 9, at 573 (“And although I’ve seen some very skillful evasions of questions by an advocate, I really don’t think that that helps at all.”).

159. Friedman, 1991 *Remarks*, *supra* n. 99, at 89; *see also* Friedman, 1987 *Remarks*, *supra* n. 99, at 565 (“[W]hen you’re asked a question, answer the question.”).

160. Michel, *supra* n. 14, at 536. Judge Michel has in fact warned that one of his “major frustrations” is with attorneys “evading our questions.” Michel, *Advocacy in the Federal Circuit*, *supra* n. 15, at Westlaw p. 5; *see also* Smith, *supra* n. 1, at 570 (“[W]hen a judge asks you a question, don’t dodge it”).

161. Those admissions may be used in the court’s opinion. *See e.g. Princo Corp. v. Intl. Trade Commn.*, 563 F.3d 1301, 1316 (Fed. Cir.) (“[A]t oral argument counsel for Philips was able to identify no efficiencies flowing from such an agreement.”), *vacated*, 583 F.3d 1380 (Fed. Cir. 2009); *TransCore LP v. Elec. Transaction Consultants Corp.*, 563 F.3d 1271, 1276 (Fed. Cir. 2009) (“[A]t oral argument, TransCore conceded that the TransCore-Mark IV settlement agreement does not include a restriction on sales.”).

162. As discussed above, the judges hold a straw vote after the oral argument. One judge might agree with you, but might also recognize during the oral argument that another judge

attorneys assume all questions are bad and immediately react that way. But the judges do ask softball questions, either because they are trying to persuade another member of the panel of the merit of your position, or just trying to clarify in their own minds the issue (or trying to help you because the oral argument is going badly).¹⁶³ If you listen to their questions, you might see the judges actually agree with you.

D. Prepare for and Answer Hypothetical Questions

Do not evade our questions, including hypothetical ones. They are opportunities, not traps, and we are just trying to understand your case, not trying to trick you.

—Judge Michel¹⁶⁴

I do find myself irked if someone is not answering a question, particularly the difficult hypothetical question, which is really a question being asked by a member of the court to test the parameters of the law as it would be applied to a particular set of facts not in the case before us.

—Judge Schall¹⁶⁵

Answer all of the questions, including the hypothetical questions. Judges frequently use their questions to understand not just the issues in your case, but the broader legal issues and implications of a potential decision.¹⁶⁶ Hypothetical questions

does not appear to agree. Asking a softball question allows that judge to help you persuade the other judge before the judges hold their straw vote.

163. Ginsburg, *supra* n. 6, at 569 (“Sometimes we ask questions with persuasion of our colleagues in mind, in an effort to assist counsel to strengthen a position.”).

164. Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23.

165. Schall, *supra* n. 12, at 293.

166. Newman, *supra* n. 95, at 275 (“I never ask a question that I know the answer to. One often hears comments from practitioners before us that some of the questions that the judges ask seem to be off the wall, seem to be peripheral to the main issues. I think that’s because we don’t ask the questions that we know the answers to. We ask the questions at the edges, the peripheral items that might turn the tide of the argument, the things that we don’t know the answers to, the things that were perhaps fuzzy in the briefs, and we want to understand whether they were fuzzy because you didn’t want to come right out and tell us the way it is, or whether it was fuzzy because the law is evolving and there were uncertainties that the court might be interested in.”); Clevenger, *supra* n. 4, at 291 (“As Judge Newman said earlier, the questions we ask sometimes seem to be either off the wall

allow the judges to explore the impact your position might have on other cases.¹⁶⁷ Judge Friedman has stated that the court uses hypothetical questions

to comprehend just how far the position you are arguing forces the court to go, because we don't like to sometimes start off on a slippery slope and find if we decide this case in your favor, two years from now, we're going to be forced by that precedent to reach a position that we don't want to take.¹⁶⁸

Judge Clevenger points out that judges ask hypothetical questions for good reasons, and counsel should not just answer by saying that the facts of the hypothetical differ from the current case.¹⁶⁹

To prepare for hypothetical questions, before you begin the oral argument (and preferably, before you write the brief) you should know what you want the rule to be generally, not just for your case.¹⁷⁰ That means you have to know the boundary of the

or the questions that trouble us. We're trying to feel around. If it's a hard case, we're trying to feel around the sides of the case to see what would happen if we were to decide in favor of the appellant and push the law forward, backwards or sideways. We're trying to get that feel. So I think every once in awhile I'm not as polite as I should be.”)

167. Michel, *Advocacy in the Federal Circuit*, *supra* n. 15, at Westlaw p. 15 (stating that his “highest hopes for oral argument” are to see counsel “responding fully to hypothetical questions”); Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23 (indicating that he hopes to see counsel respond fully to hypothetical questions); *see generally* Smith, *supra* n. 1, at 569 (“You’ll be prepared to answer hypothetical questions that you never imagined if you know all of the facts of your case and you have read everything that you need in order to support it according to the law.”); Ginsburg, *supra* n. 6, at 569 (“My colleague on both the D.C. Circuit and the Supreme court, Justice Antonin Scalia, finds particularly unsettling lawyers’ aversion to one category of question—the hypothetical question, meant to test the limits of an argument.”).

168. Friedman 1987 *Remarks*, *supra* n. 99, at 564.

169. Clevenger, *Ten Commandments for Oral Argument*, *supra* n. * (Commandment 2: “[J]udges ask hypothetical questions for good reasons.”); *see also* Bashman, *supra* n. 74 (Judge Bryson counseling “do not duck hypothetical questions—the line ‘that is not this case’ is almost as universally detested among appellate judges as the line ‘I didn’t try this case’”).

170. Clevenger, *Ten Commandments for Oral Argument*, *supra* n. * (Commandment 10) (“Recognize where your case fits along this continuum. Don’t try to make a capital case out of a fender bender.”); Bashman, *supra* n. 74 (Judge Bryson stating “I am surprised at how many lawyers, even experienced lawyers, are not prepared to deal with hypothetical questions. We do not ask those questions to torture lawyers, but because they are very useful tools for refining the legal principle on which the lawyer is relying—discovering what is essential to the lawyer’s position and what is window dressing. But many lawyers either won’t deal with them at all or stumble badly in trying to deal with them.”).

argument and be prepared to explain when the proposed rule will and will not apply. The best oral advocates are comfortable with hypothetical questions because before the oral argument they have considered the outer bounds of the rules they are proposing. The judges care about the practical effect of decisions, substantively, procedurally, and jurisdictionally. If the panel writes a precedential opinion in your case, future panels of the Federal Circuit and district courts across the country will be bound to follow the law set out in that opinion.

Many attorneys seem apprehensive about hypothetical questions because they worry that the judges are trying to trick them to admit that they lose.¹⁷¹ But be willing to admit that you lose under a certain hypothetical. The court is trying to understand the metes and bounds of the law. It may be the case that under a specific hypothetical, you do lose. These are often opportunities to point out a nuance in your argument or to explain to the court that your position is not as extreme as unreasonable as an affirmative answer to the hypothetical question might suggest. You should still be able to explain after answering the hypothetical why you win this case. As Judge Schall has counseled:

[A] lawyer earns points when he or she in response to a hypothetical question says, "Judge, if those were the facts of this case, I would lose," because that shows, number one, that the attorney is on top of the law, they know the law; and, number two, that they know the record and their case. That's the lawyer who is confident enough to get up and make that kind of a statement.¹⁷²

171. See Bashman, *supra* n. 74 (Judge Bryson explaining that "[h]ypothetical questions, of course, can be dangerous, as I discovered on several occasions when Justice Stevens, a renowned master of the hypothetical question, used them to expose weakness in my case. But that is a big part of what preparation is about: what hypothetical questions are the judges likely to ask, and what is my best answer, i.e., where do I draw the line between my case and the hypothetical cases that seem to call for a different legal answer from the one I am urging the court to adopt.").

172. Schall, *supra* n. 12, at 293.

E. Common Oral Argument Pitfalls

I agree with the maxim that in appeals that could go either way, more are lost in oral argument than are won.

—Judge Michel¹⁷³

Going into oral argument, somewhere in the 25% range of the cases are ones that I find difficult. And I find quite interestingly that during oral argument, half of those difficult cases become quite simple. And they usually become quite simple because one party loses the case on the oral argument.

—Judge Clevenger¹⁷⁴

And so when you have in 15 minutes the need to establish your credibility, something again that Judge Friedman emphasized and that I must reemphasize, at least if not to establish your credibility, do nothing to lose your credibility.

—Judge Newman¹⁷⁵

Be careful that you do not lose your appeal at the oral argument.¹⁷⁶ In addition to specific tips above, below are the six most common pitfalls that I have seen at oral arguments.

First, do not attempt to address all of the issues you raised in your brief—especially if you appealed too many issues. No matter how many issues you appeal, you should only address a few of them at the oral argument. You do not waive an issue merely by failing to address it during the oral argument. But you will waste your time if you attempt to cover too many issues.

173. Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 22; *see also* Michel, *supra* n. 14, at 536 (“[I]t is much easier to lose your case on oral argument than win it.”).

174. Clevenger, *Remarks*, *supra* n. 70, at 556.

175. Newman, *supra* n. 9, at 573.

176. Ginsburg, *supra* n. 6, at 570 (“In my view it is in most cases a hold-the-line operation. In over eighteen years on the bench, I have seen few victories snatched at oral argument from a total defeat the judges had anticipated on the basis of the briefs. But I have seen several potential winners become losers in whole or in part because of clarification elicited at argument.”).

Second, never interrupt or talk over the judges.¹⁷⁷ Attorneys frequently get so involved in their arguments that they fail to acknowledge the judges' questions or to allow the judges to finish asking questions.¹⁷⁸ Judge Michel has pointed out,

Judges don't like, anymore than other people, to be interrupted when they are asking a question. It happens much more often than you imagine. I think lots of times counsel don't even hear themselves interrupting or not listening carefully and really answering a different question.¹⁷⁹

This is one of the most common and easiest problems to resolve: The instant a judge begins to speak, stop talking.

Third, be honest with the panel and be prepared to address the weaknesses in your case.¹⁸⁰ Judge Bryson has noted that some attorneys "fail to grapple with the hard points in the case."¹⁸¹ When needed, it is sufficient to make concessions to avoid wasting time on issues that do not matter and to demonstrate the reasonableness of your position.¹⁸² Judge

177. Judge Michel has stated that one of his "major frustrations" is attorneys "interrupting judges." Michel, *Advocacy in the Federal Circuit*, *supra* n. 15, at Westlaw p. 5; *see also* Kozinski, *supra* n. 74, at 331–32 (suggesting that an attorney who wants to lose an appeal should interrupt the judges' questions).

178. Ginsburg, *supra* n. 6, at 569 ("More than occasionally, I have repeated a lawyer's name three times before he gives way to my inquiry. Despite his strong desire to continue orating, the lawyer should stop talking when the judge starts.").

179. Michel, *supra* n. 14, at 536; *see also* Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23 (stating that he is "frustrated" with attorneys who interrupt the judge's questions).

180. Michel, *supra* n. 26, at 198 ("If you can make the appellate panel trust you, then you will have a far greater chance of being persuasive.").

181. Bryson, *supra* n. 29, at 281 ("The second point on which I see people falling down in arguments frequently is that they fail to grapple with the hard points in the case. They pound on the points that they regard as the strong points, and they don't address or they don't say much about the weaknesses in their case. I would say to anyone framing an argument deal with the hard points in your case."). At the same time, you should not over-argue the weak points in your case. Clevenger, *Ten Commandments for Oral Argument*, *supra* n. * (Commandment 4).

182. Michel, *Advocacy in the Federal Circuit*, *supra* n. 15, at Westlaw p. 5 (stating that some of his "highest hopes for oral argument" are to see counsel "abandoning weaker issues" and "admitting the incontestable"); *see also* Ginsburg, *supra* n. 6, at 569 ("As Judge Wald has observed, a concession once in a while can enhance a lawyer's credibility.").

Michel advises, “Concede your own weakest points, then explain their insignificance. Your credibility will increase.”¹⁸³

Fourth, do not exceed the record on appeal.¹⁸⁴ This means that you should not refer to factual evidence that was not presented to the earlier tribunal. (If there is an important and uncontroversial fact that could not have been raised before the appeal, it is appropriate to seek judicial notice of that fact.¹⁸⁵) Judge Michel has said that one of his “major frustrations” is attorneys “exceeding the record” in their arguments.¹⁸⁶ Likewise, do not misstate the record. If a judge asks you “where is that in the record?” it might be because the judge knows it is not in the record.¹⁸⁷ Judge Clevenger has suggested “If you make some bold statement and get asked where in the record is the support and you cannot answer, you are in deep trouble.”¹⁸⁸

Fifth, avoid demonstratives, as they are rarely helpful. (I have never seen a traditional court demonstrative such as a chart or video used successfully.) The judges have suggested that demonstrative evidence can be helpful at oral argument, but such demonstratives are rarely used effectively and would be better placed in the briefs, as discussed above.¹⁸⁹ Judge Archer has warned that “it probably wastes your oral argument time to

183. Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23 (stating that he hopes to see counsel “abandon weaker contentions or at least leave them to the brief” and “admit the incontestable”). Likewise, Judge Michel hopes to see counsel “admit they simply do not know, rather than speculate.” *Id.* at 23.

184. Clevenger, *Ten Commandments for Oral Argument*, *supra* n. * (Commandment 3); *see also* Kozinski, *supra* n. 74, at 330 (“Familiarity with the record is probably the most important aspect of appellate advocacy.”).

185. *See* Fed. R. Evid. 201(b).

186. Michel, *Advocacy in the Federal Circuit*, *supra* n. 15, at Westlaw p. 5.

187. *Pac-Tec*, 903 F.2d at 803–04 (reproducing a section of the oral argument and stating that it “demonstrates a shockingly shabby performance of a counsel’s appellate role (wherein counsel is expected to know intimately the record)”).

188. Clevenger, *Ten Commandments for Oral Argument*, *supra* n. * (Commandment 3).

189. Clevenger, *Remarks*, *supra* n. 70, at 552 (“Sometimes they are just nonsensical and sort of an outrageous insult to the judges when someone takes the language of a claim in a patent case, for example, and prints it in very small print but on a great big board, and then puts it far removed from the bench and expects us to follow it. It does not make any sense to do that. The short of the matter is that most of the things that clients or that lawyers want to put in front of us by way of shortened form can be tucked in the briefs equally well.”); Michel, *supra* n. 20, at 552 (“I think it’s a technique that has tremendous potential, but I must say that I almost never find it helpful. . . . But most charts and photographs and other visual aids that have been used in oral arguments before panels on which I’ve sat have really been more of a distraction than a help.”).

try to keep referring and pointing to things on stand-up charts at oral argument, and it is much better if you can have those same things in the brief or in the appendix so that we can readily look at them.”¹⁹⁰

Finally, always maintain decorum, both when you are speaking to the court and when you are sitting at the counsel table.¹⁹¹

IV. CONCLUSION

Clerking for the Federal Circuit gave me a new appreciation for the importance of preparation in the briefing and arguing of an appeal. I had the opportunity as a clerk to watch some great appellate advocates, and I learned through that experience to recognize their most and least effective methods and strategies. With that background in mind, I try to follow the advice in this article every time I brief and argue a case on appeal, and I believe that following it will make any lawyer a more effective appellate advocate.



190. Glenn L. Archer, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Thirteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 166 F.R.D. 515, 552 (1995).

191. Smith, *supra* n. 1, at 569 (“Finally, some pet don’ts that I have. Incivility . . . I think you should be civil to your opponent. . . . Grimacing. I’m amazed at how many lawyers will either try to win the case by facial expressions during their opponent’s argument or put their client next to them who will constantly shake his head and snap his fingers and indicate ‘what a stupid and ridiculous lawyer.’”); Michel, *Effective Appellate Advocacy*, *supra* n. 15, at 23 (stating that he is “frustrated” with attorneys who “spew emotion” or “attribute improper motives to others”); Graham, *supra* n. 31 (indicating that Judge Prost stated that “combateness doesn’t work”).