The DO NOTS of Oral Argument

Anyone attending a CLE program involving appellate judges, or speaking to appellate judges about their pet peeves, will inevitably hear the same list of complaints. Yet if a person sits in almost any appellate courtroom long enough, she will see a lawyer doing exactly what the judges say bothers them most. Did the lawyers not listen to that panel, webinar, informal chat, one may ask. The answer may be – they did not.

There is a real "preaching to the choir," aspect to much of the professional education about appellate advocacy. The judges are often talking not to trial lawyers but rather to attorneys who regularly appear in appellate courts: those who claim to be – or aspire to be – appellate "specialists." For many reasons – some economic, some procedural – the attorneys who actually end up handling appeals, however, are trial lawyers. Their focus is the drudgery of discovery and, hopefully, the elation of a courtroom victory. When that victory comes under attack, or an unexpected loss needs to be reversed, these attorneys come face to face with an appeal. Rather than involve another lawyer with appellate experience, they decide to do the appeal themselves. The attorney may have some experience writing briefs on motions to dismiss or summary judgment, which at least bear some resemblance to appellate briefing requirements. But appellate oral argument is unlike anything they face at the trial level. Arguing a point to a single judge, herself focused on moving the case along, is not a true comparison – and arguing to a jury is a completely different skill set. For those who venture out from the drab trial courts to argue in imposing appellate edifices, the best advice may be what NOT to do.

1. Remember, This Is Not An Argument To A Jury

An appellate bench may be hot, throwing questions like big league fastballs as soon as the lawyer stands up, or ice cold, pensively staring as the lawyer presents an argument at length

while waiting for the questions to start. The court may wish a recitation of the facts to distinguish this case from the other six or ten argued that day, or a judge may greet the advocate with "we are familiar with the facts, counsel, so please get on with your argument." Whatever these local differences, the fact remains that the audience the lawyer seeks to persuade is made up of other lawyers, some with far more experience, not of everyday citizens who populate a jury.

Glossing over this critical fact, many attorneys who are highly successful in trials seem to believe that the same type of impassioned plea made below will be as effective on appeal. It will not. While passion is understandable, and even acceptable in the proper case, a panel of judges is far less likely to be swayed. Unlike most jurors, they have heard all that before. Thus, appellate judges will be concerned – perhaps even offended – that a lawyer would think they would abandon their duty to the law and succumb to emotion. More than one experienced jurist has expressed surprise that a lawyer who won a multi-million dollar verdict below did not understand the need to alter her approach in this very different setting. This is oral argument –no place for an emotional closing.

2. <u>The Judges Get To Pick The Issues – And the Order</u>

Merely preparing a more logical, less emotional, speech will not suffice, however. Frequently, an attorney steps to the podium with a well-written explanation of what she or he sees as the critical issues on appeal, arranged in a compelling order to build to a successful conclusion. Then the first question is on a completely different aspect of the case. A judge casually observes, "I understand your jurisdictional point but I am concerned with …," the issue that the attorney placed last (or, more bone-chilling, did not believe merited any time at all).

The worst thing that an advocate can say at this juncture is, "I will get to that issue later, your honor," but first let me address . . ." The judge does not want to hear that. Depending on

the court, the judge may try to gently prod the lawyer onto the topic requested. Other judges will simple not tolerate ignoring the issue they raised and forcefully continue to demand it be addressed now. Experienced appellate advocates understand that oral argument is a dialogue, not a presentation, so they welcome an exchange on any topic. Yet many attorneys, even if they do not utter the dreaded phrase above, doggedly persist in following their outline, ignoring the clear message that the judge or panel wants to talk about something else.

A judge's questions often indicate what is bothering her or him about a case. This is an opportunity to deal with their concern and, hopefully, convince the judge – and perhaps others on the panel – to adopt the attorney's position. A refusal to engage on the topics that the judge feels are important is at best irritating, and at worst may give the impression (rightly or wrongly) that the lawyer has no answer to the question the judge cares about.

Trial attorneys, who practice developing and presenting evidence to move a jury in a certain direction, may resist surrendering control of the debate. In the appellate realm, however, the judges select the path to, and the ground on which, the contest takes place. An attorney must meet the judges on that ground. Sticking to a pre-selected script forfeits the chance to persuade and, before a determined judge, will create a clash that inevitably the attorney cannot win.

3. Just Answer The Question

If not engaging on the topic the judge wants to discuss is irritating, refusing to answer her questions is much worse. Any case on appeal has weaknesses on both sides. If the issues were totally one-sided, the loser would not take the appeal, or would settle long before oral argument. Many inexperienced appellate lawyers, however, hear a question on their weak point and immediately try to avoid answering it – like a candidate at a political debate. Afraid the answer will reveal a fatal weakness, the attorney bobs and weaves. The judge, trying to get an answer to

resolve his or her uncertainty, responds by repeating questions that tend to focus ever more narrowly on the point most damaging to the lawyer.

Some attorneys try to deflect, claiming, "Well that is not this case your honor," or attempt to explain at length how the nuances involved would not allow committing to one answer. These scenarios all too often end with a judge intoning, "It is a simple question counsel, yes or no." If a judge wants an answer, he can ultimately force one. Even if the attorney finally comes up with a good answer, the attempts at evasion may well have lost that judge, regardless.

The best, even if sometimes painful, approach is to give the direct answer right away followed by an explanation. The judge may not agree, but at least the dispute is now over the substance of the question, not the recalcitrance of the lawyer.

Appellate advocates know the weaknesses in their case. An important part of preparation for oral argument is identifying those tough questions and developing persuasive answers to them. A confident, prepared attorney is far more likely to persuade a doubtful judge than an advocate who tries to duck the questions.

4. <u>Never Interrupt</u>

What mothers and grade school teachers say is true; let the other person finish before speaking. This rule, of more than politeness, did not become passé upon graduation from law school. Yet the problem persists, and not just in appellate courts. Trial judges hate when attorneys interrupt them as well. The problem is compounded, however, when there are multiple judges together on a panel, where they may even interrupt each other (in the U.S. Supreme Court for example). Regardless, the attorney must be careful to let the judge finish her question before speaking. This also ensures that the attorney listens to the whole question, and does not begin to answer what he thinks is the question.

Interrupting a judge not only is bad manners, but also may reveal implicit bias. Much has been written on this issue in recent years and the issue manifests itself in this context as well, depending on the race, gender, national origin or other trait of the judges on the panel. (Another reason to check before the argument, if at all possible, who is on the panel). Recently, a senior appellate judge explained that he noticed a distinct sexual bias in oral argument – women judges were interrupted much more frequently than their male counterparts. Following the simple rule of never interrupting any judge will avoid implicit bias as well.

5. <u>Know The Record</u>

One of the major costs, both financial and personal, in preparing for oral argument is the time spent reviewing the record. Any shortcuts in this area, however, can have significant negative effects. Initially, this may seem to be an issue only when the attorney handling the appeal is different from the ones who tried the case. Attorneys and their clients may assume that, because the attorney tried the case, she or he must know what happened. However, it is not that simple. The delays between the end of trial and oral argument on appeal can be extensive – months or in some cases years. Even an attorney who tried the case will forget details over that long a period. Similarly, if the particular jurisdiction has extensive delay between the completion of briefing and argument, an attorney who diligently reviewed the record during briefing may have forgotten things.

That said, an attorney who did not try the case has a special responsibility to be fully conversant with the record. There is nothing so discouraging – and devastating – as an attorney at oral argument responding to a question about the record: "I don't know your honor – I didn't try the case." Never say that.

Judges make a considerable effort to learn the critical facts of an appeal. They rightly expect advocates to do the same and, in areas in which the record may be unclear, to provide

guidance. Attorneys who tell a judge they do not know something that occurred at trial demonstrate not only incompetent performance but also disrespect for the court. The judges are trying to understand this case, along with the others heard that day. The attorney (except in rare circumstances) has only one case and should have total control of everything in the record. To come to court without complete knowledge of the record is to risk insult to the court – and disaster to the client.

There is nothing revolutionary about this list. Other appellate attorneys and judges could add more items (such as do not refer to a judge by the wrong name – or the wrong gender). Yet, almost all would agree with these five. For the less experienced attorney facing oral argument, there are many sources suggesting how to do a good one. However, the most useful tool maybe examples such as these (or others that can be viewed on a visit to an appellate courtroom) of what not to do.

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