FIVE ORAL ARGUMENT TIPS–FOR JUDGES

Many articles have been written for lawyers about how to perform better at oral argument. Recommendations include everything from how to dress to how to handle difficult questions. But judges also are capable of performing well, or badly, at oral argument. Because they are viewed more often as consumers of oral argument, or perhaps as an audience, little attention has been paid to their very active role in how well oral argument accomplishes its purposes. Instead of viewing judges as a passive audience, perhaps we should view them as partners with the lawyers in a joint endeavor–partners who share responsibility for its success. What follows, then, are tips for helping judges do a better job with oral argument.

1. ARETHA FRANKLIN HAD A POINT

Respect is critical to the overall success of oral argument. But respect is a two way street. We all seem to understand pretty well that lawyers owe a duty of respect to all judges whether or not an individual judge has earned it. While most judges believe they have earned this respect, they tend to agree with the proposition that, if another judge asks a stupid question, lawyers are obligated not to roll their eyes or say something sarcastic. The duty to show respect is not owed to a judge individually; it is owed to the institution of judges. We show judges respect because of the important place they occupy in a formal system–a system that commands our respect and that doesn't function very well without it.

But lawyers are not serfs or peons in that system. They also occupy an important place in it. Disrespecting them also causes the whole system to function less effectively. Just as with judges, the duty of showing respect is not owed to lawyers as individuals; it is owed to them as vital participants in the administration of justice. Because the duty is not owed individually, it is not forfeited by a lawyer's individual failings. A stupid answer does not justify eye rolling or sarcasm any more than a stupid question. Such conduct denigrates the whole enterprise. In other words, we don't respect lawyers because they have earned it (although they may); we respect them because they are lawyers.

It is also fair to add that much of the disrespect that flows from judges to lawyers comes from a poor understanding of what the practice of law is like. In a real life practice, perfection can be an elusive goal and the pressure to get the job completed can be tremendous. While this is no excuse for mediocrity, it does put minor errors in context. It is probably no accident that the former practitioners on

the bench tend to be those who seldom show the lawyers disrespect.

With this in mind, it violates a fundamental rule of oral advocacy for a judge to extract a promise from a lawyer not to bill his client for his time that day, or to suggest the lawyer is stupid, or to imply that his only motivations are financial, or to infer that his stated purpose for a particular trial tactic merely cloaks an illegitimate purpose. This sort of behavior may satisfy some primal urge to punish the lawyer in front of the judge that day, but it does a grave disservice to the institution of law.

2. ISN'T YOUR CASE A LOSER?

The difficult work of writing an opinion after oral argument is made a lot easier of one of the lawyers will just admit his or her client should lose. But most lawyers don't come to oral argument prepared to do that. It's not unusual to see a judge who has decided that a particular case is a loser, and who is trying to get the lawyer to agree. This tends to be not only pointless but also aggravating to both sides. In almost every instance, the lawyer is duty bound not to stand in front of the judge and throw away the whole case.

This is different than seeking concessions. A good lawyer will understand when to hold, and when to fold, on a particular point. Seeking concessions is an important part of what a judge should be doing at oral argument. But these concessions are not case-killing. There is a difference between getting a lawyer to agree that one of several arguments is not a winner, and getting a lawyer to agree to concede total defeat.

It well may be that at some point, the judge will have decided that one side is going to lose. There may even be occasions where it is appropriate to say so. But in almost all cases, it is inappropriate to try and get the lawyer to agree.

3. THE BUTCH CASSIDY PROBLEM

Cassidy's relentless pursuers prompted him, at several points in the movie, to ask: "Who are those guys?" But there is a law of diminishing returns for this kind of relentlessness at oral argument. Judges often have a "right" answer they are seeking to a particular question. Being lawyers at heart, they pay attention to minor differences between the answer they are given and the answer they want. They want to nail it down tight.

Such relentlessness is different than the point made above about not seeking an admission of total defeat. There is nothing wrong with a couple of initial stabs at getting just the right answer. But with lawyers, as with witnesses at trial, there

comes a time to accept that the answer you've been getting is the same answer you're going to keep getting, and move on. All the brow-beating in the world is not going to change the tune; right or wrong, the not-quite-right answer is the only one you're going to get.

With judges on panels, this fits in with the issue of proportionality. One of the most common problems with panel arguments is that far too much time is spent on minor issues. No rational allocation of minutes would devote the amount of time that frequently gets spent on a single issue at oral argument. But the judge, like a hound dog with a scent in his nose, just can't seem to stop. Because the judges are not directly accountable to each other, this problem has no simple solution. Perhaps some pre-argument discussion of which issues deserve the most attention would help. Ultimately, each judge has to try and be aware of how the time is being spent, and try not to spend too much of it chasing down the perfect answer or the impossible concession.

4. HOW YOUR QUESTION IS LIKE A PIECE OF WEDDING CAKE

Judges often think out loud in framing a question. The result is a long, multi-faceted question that makes sense to the judges because they are supplementing what they are saying with what they are thinking. But for the lawyers these questions can be almost impossible to answer. For one thing, the listener is stuck with only what the judge said, not what the judge was thinking. Even just taking the spoken words at face value, such free-range questions tend to be very challenging and just too much to swallow. Like a slice of wedding cake, it may seem fun to shove the whole thing in the poor guy's mouth, but if you are that guy it's not as fun as it looks.

It would be helpful if, when faced with such a question, the lawyer had the right to ask for it to be read back. These questions would probably decrease if judges were forced to hear them repeated out loud before they were answered. But because this modest proposal probably won't see the light of day, there needs to be another way to warn the questioner that he or she is about to launch one of these blimps. How about this: inhale before asking a question, like a marksman getting ready to shoot. If you can't get your question off in one breath, it's too long. Try to break it up.

The same is true with lawyers' and judges' most common speech impediment: the parenthetical clause. Lawyers view speaking out loud as a sort of chess game in which they are always trying to think several moves ahead. The result is that their minds are often several sentences ahead of the words that are coming out of their mouths. This means that the speaker has thought of an

exception or qualification to what he or she just said, and this now gets interjected into the middle of the sentence. (The other results of this tendency, by the way, are hyper-precise diction and maddeningly artificial speech.) These parentheticals can start piling up on each other, making it impossible to follow the line of thought in such a shopping cart of a sentence. The best advice I give new lawyers is worth remembering for the rest of us: Force yourself to take a sentence from start to finish without a single interruption. Don't let yourself (unless you have a really important reason, which happens far less often than you think) use parentheticals.

5. THAT VACANT LOOK MEANS SOMETHING DUMB HAS HAPPENED–BUT IT'S NOT WHAT YOU THINK

Occasionally, you may get a vacant look at the conclusion of your question, followed by a lawyer's stumbling attempts to craft an answer. It's possible that your arrow has flown right to the heart of the matter, and the lawyer is dumbfounded and hardly able to speak. But a dollop of humility will also create the possibility of another answer: your question doesn't make any sense.

Some judges may be smart enough never to have had this experience. But for the rest of us the vacant look is a signal to investigate what has happened. Particularly in arcane areas of law, or areas loaded with jargon and acronyms, it is possible to ask a question that has a sensible core, but is cloaked in the wrong lingo. It is possible, in other words, to ask a question that makes perfect sense to you, but is meaningless or confusing to the practitioner.

The sky won't fall if the judge, faced with that vacant look, simply asks if the question makes sense. Getting the lawyer to restate what he or she thinks is being asked often reveals the problem, and allows the judge and the lawyer to get to the heart of the issue.

CONCLUSION

As between the judge and the lawyer, oral argument is not adversarial. It can be tense; there can be a lot at stake; there are pitfalls for the lawyer that can do harm to the case. But fundamentally it is a form of partnership. This partnership works better if judges show respect to the lawyers and have enough humility to be critical of their own performance.

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