Oral Argument on Motions

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It is far and away the most common form of oral advocacy, and often the most important. Nonetheless, it has received the least amount of systematic thought or study. Jury advocacy and appellate advocacy garner the glamor and the law school courses. Oral argument before a trial court and without a jury, which occurs much more frequently than jury or appellate arguments (even in these days of law clerks and briefs), is the blue-collar, day-in-day-out thing lawyers do routinely—and sometimes not very well.

A morning at the motions calendar is convincing proof that the quality of nonjury oral argument is often bad—indeed, it is often appallingly bad. And the problem is not restricted to inexperienced and unsophisticated lawyers. A federal district court judge told me that he once suffered through an "argument" where a lawyer from a blue-chip New York law firm simply read his brief. The judge, a gentleman, did not comment on this spectacle since the lawyer's client was present.

Of course, there are similarities between jury advocacy, appellate advocacy, and nonjury oral advocacy. Most poor nonjury arguments no doubt occur when the lawyer ignores these similarities. Effective nonjury argument, however, involves its own discipline of preparation and execution.

Perhaps the first item to consider when preparing for oral argument is to figure out the calendar and how to get on it. Local practices vary considerably, even in the presence of "uniform rules." Some courts do not hear oral argument on any motions; some hear argument on every motion. Some automatically schedule the hearing; some require a written or oral request directed to somebody at the courthouse. Some have a

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motion day; some utilize a Rule Nisi or "Show Cause" order. While this advice may seem elementary, I have seen lawyers accustomed to "automatic" calendars wait for months before discovering that the particular circuit in which their case is filed requires a request that the motion be placed on a motion calendar.

When the case is scheduled, you need to determine how much time will be allowed for argument. It is disconcerting to prepare for an hour-long argument and to find out at the hearing that the judge will allow 10 minutes.

Naturally, before the hearing you will also want to size up the judge (and opposing counsel, if it's early in the case). The reason for sizing up the judge is to predict how the hearing will be conducted and the judge's reaction to your argument (let's face it, there are some arguments you just can't make before some judges). Is the judge patient or impatient? Does the judge ask questions? Does the judge always begin by saying, "Tell me something that's not in your brief?" Does the judge seem to favor defendants? In the final analysis, most judges will do what they believe the law and justice compel them to do, but every judge has idiosyncrasies that assist or hinder the judge's understanding of the result demanded in a particular case.

Know Your Judge

The source for discovering the procedural peculiarities of a particular court can be local rules (amazingly rare and often unreliable), the clerk of court, local counsel, the judge's calendar clerk, law clerk, or secretary, or, sometimes, the judge himself. Other lawyers are the primary source of information about the judge. In federal court, reported decisions of the judge can sometimes be located. If the motion is critical and the client can stand the expense, it may be worthwhile to attend a hearing to get an idea about the judge.

Associating local counsel should be considered whenever you appear in an unfamiliar court—even a court within your own state—particularly if opposing counsel is also "local." Local counsel will, of course, be knowledgeable about the judge and the local customs and practices of the bar. Just as important, local counsel can fulfill the traditional role of helping to blunt local prejudice. Some judges, like some juries, are biased against outsiders (and it is human nature to be somewhat suspicious of strangers). Do not take it for granted that in this age of highways, faxes, and uniform rules, a lawyer from out of town—particularly a big city—will always get a fair shake if the particular court is a little too "cozy."

Personal preparation for oral argument varies with the complexity of the motion. Of course, at a minimum, the subject motion, affidavits, and briefs will be reviewed, as well as the authorities relied upon by the parties (and you will have copies of your authorities available in case either

you or the judge needs them during oral argument). But, regardless of how minor the motion seems, a lawyer also needs to have some familiarity with the entire case. At oral argument, frequently a judge will ask a question, or opposing counsel will raise an issue, about some aspect of the case that does not seem directly related to the motion at hand. On those occasions, it is embarrassing not to know your case.

Should you prepare a proposed order? Although much can be said against the practice, it is becoming more common and has some practical utility. It has obvious attractions to the court, and if opposing counsel prepares an order, you will clearly want to do the same (although most judges will allow time to submit a proposed order in response). If a proposed order is read by the judge or the law clerk, it can act as yet another brief in support of your position. A difficulty with proposed orders occurs when there are multiple grounds on which the motion can be granted or denied or alternative rulings, in which case, counsel and the court can end up with several proposed orders.

Perhaps the most important aspect of preparation for argument is based on your assumptions about your audience, the judge. You must assume a "cold bench," i.e., that the judge will know absolutely nothing about your case or your motion (which is usually the state of affairs). Also, you must not take it for granted that the judge will know even the most elementary legal principles. Nobody, even a judge, knows everything, and the human brain has the remarkable capacity both to draw a blank and to remember something exactly backwards.

The most common mistake lawyers make in oral argument, from a rhetorical point of view, is to leap into the middle of the case. You have probably lived with the case for months, deposed and interviewed witnesses, drafted pleadings, and become absorbed with the details of the case. On the other hand, if the judge ever knew anything about your case, he's probably forgotten it because in the meantime he's heard hundreds of others. Also, many judges figure that if they study a file in advance of a hearing, the hearing inevitably will be continued for cause. Consequently, the lawyer's assumption must be that the judge is a stranger to the case who will have to grasp its salient points within a matter of minutes. Your task is to be prepared to educate the judge so that he can comprehend the justice of your case.

When I was writing this, I asked several prominent lawyers and judges what advice they would give about oral argument on motions. Interestingly, almost without exception, each made a different point. We can speculate about the causes of this diversity of opinion. It would be wrong to conclude, however, that the topic is incapable of rational analysis. Rather, argument on motions, like trial advocacy, involves numerous skills and the selective use of those skills in a *particular* case, on a *particular* motion, and before a *particular* judge.

The following, then, are some pointers for oral argument.

Always remember justice. As in any other legal argument, written or oral, you have an enormous advantage if you can convince your audience of the justice of your cause. Although "justice" and "the law" are not synonymous, they coincide more often than not. And justice depends on the facts of your case. Particularly when you are the movant, and have the ability to speak first, you have the opportunity to explain the facts in an honest but persuasive way with the goal of leaving the judge thinking, "I've got to help this poor wronged party." By the same token, if you are the respondent, you must anticipate making a factual response that shows the judge another side to the story. Never underestimate the capacity of a judge to follow the law, even if it results in injustice, but never forget that the judge will invariably respond favorably to the party who has the moral advantage. To paraphrase an old saying, justice isn't everything, but it's way ahead of what's in second place.

Don't make a jury argument. Although a judge, like a jury, wants to understand where justice lies in the case, a judge will rarely have a favorable reaction to an emotional or inflammatory appeal. In fact, the judge's usual reaction to such "jury argument" is to be professionally offended. A jury has an "enlightened conscience" to which an advocate can sometimes make an appeal; a judge's conscience is theoretically and usually subdued by the calm, cold light of the law (and the unblinking stare of the appellate courts). If the judge has the idea that you are asking for an emotional response, he may conclude that you are admitting that you cannot persuade him intellectually.

Educate the judge. As indicated above, a lawyer's general approach to oral argument must be to assume that the judge knows nothing about the case and very little about the relevant law. Education of the judge generally means proceeding logically from the simple to the complicated. Thus, within the first seconds of the argument, the judge should understand the nature of the case, the nature of motion, and whom you represent:

> Your honor, I represent Dr. John Smith, the defendant in this case. This is a medical malpractice action, and we are here today on our motion for summary judgment. Let me briefly tell the court about this case.

The most understandable explanation of the facts is generally chronological.

Use visual aids. We are now in the third age of the law. First came the Age of Oral Communication, then the Age of Writing. Now it's the Age of Multimedia. Judges, like juries, are attracted to a visual enhancement of an argument. If a chart is displayed during argument, it is astonishing how many times the judge's eyes will wander to it. A visual aid can be a chart containing an outline of the argument, a chronology,

or a poster containing a blowup of the contractual provision or statute in issue—in short, anything that may educate or assist the court or just help keep the judge's attention.

Anticipate any prejudice to the motion. There are some motions that judges naturally hate, for one reason or another. Discovery dispute motions are a classic example. You may be sinned against greatly, but you can anticipate that the judge's initial reaction to the motion is, "Why are they bothering me with this?" Judges also seem to dislike opposition to motions that appears to be based on hyper-technicalities or appears to be unduly obstructive of the "truth seeking process." If you expect this attitude, address it early by recognizing it and showing a necessity for the motion or by showing your opposition:

> Your honor, we bring this motion reluctantly. The parties have conferred in good faith and have resolved many of our disputes. But still we disagree on a couple of issues on which we need the court's guidance.

Or:

> Your honor, under ordinary circumstances we would readily agree to a request for extension of time. This, however, is an unusual case. . . .

Should opposing arguments be anticipated? In briefs, it is usually a bad tactic to anticipate the other side's arguments. As a movant in oral argument, however, it often is a very good tactic. With modern briefing requirements, you usually know what the other side's points are in advance of the hearing. Addressing these points in your argument to some extent deflates the opponent's argument. It also addresses the natural curiosity of the judge as to what the other side is going to say and how you are going to answer (likewise, a judge who has read opposing counsel's brief may be curious about your response). Finally, it permits you to phrase the other side's point your own way. Of course, if you are the respondent, you should anticipate the anticipation and be prepared to tell the court why opposing counsel distorted your argument.

Do you cover every point? Appellate judges routinely advise that on oral argument lawyers make the mistake of attempting to cover too many legal points. As a practical matter, in a trial court it takes rare courage to rely on your brief and omit a point on oral argument, particularly since the judge may rule from the bench. In an appellate court, you are at least sure that your briefs have been or will be read. Also, you certainly don't want to give the impression that you are abandoning a point. However, the issues that you emphasize are naturally dependent on the relative strength of your arguments. If you have several points, some of which are very strong, and some of which are highly debatable, it makes sense to concentrate on the strong points. Many arguments are

sidetracked by a fascinating yet ultimately counterproductive exploration of marginal issues. Some judges cannot resist the allure of exploring issues on which both sides have good arguments, which only diverts attention from the issues where you have the clear advantage.

Don't read your argument. Enough said about this.

How do you read law to the court? Reading a case law quotation to the judge can be effective, but it can be confusing. If a part of an appellate case is read aloud, one often can distinctly sense a pothole in the argument. The case was not meant to be read aloud, especially in part, and there is usually a disorientation in the listener concerning the context of the quotation. If you must read a juicy holding to the judge, furnish a copy of the case so that he can read along with you, and give the judge an intelligible oral summary of the facts in the case.

In general, furnishing the judge with copies of relevant cases is a good tactic. It may save the judge some work (especially if you have foreign authority), and it may help to ensure that the cases are actually read. Finally, from a psychological point of view, furnishing copies of cases shows strength and confidence.

Animate the law. On one level, your unspoken attitude to the judge is, "You and I speak the same language; we both understand the majestic principles of the law and its common sense; let us reason together." Judges know that the law is not sterile technicalities. Judges see themselves as down-to-earth, practical, and wise. There is usually some reasonable, practical, and even moral underpinning for a legal principle that will relate nicely to your case and resonate with the judge.

> Your honor, the law provides that a person is not responsible for torts of an independent contractor. If I hire somebody to do a job and don't tell him how to do it, or even have a right to tell him how to do it, then I shouldn't be held liable for what he does.

Answer questions. If the judge asks a question, answer it, and answer it directly. If a lawyer avoids answering a question, the judge gets an answer nonetheless, and it is bad. You can always say "yes" or "no" and then explain. If you believe that you must address other matters before answering the questions, tell the judge, "Your honor, I will give you a direct answer to your question. I believe that I need to tell the court. . . ."

Questions are your friend—ask any lawyer who's had to argue before a silent judge (especially one who keeps looking at his watch). A question shows interest: it may reflect what's bothering the judge, a stumbling block in his mind, or even his preliminary conclusion. A response to a question, even a rhetorical one, is arguably the best opportunity to persuade the court.

Tread carefully with the court. It may seem unbelievable that any lawyer would need to be advised not to insult the judge, but lawyers

unthinkingly do so with astonishing frequency. The most common offense is to suggest that the judge is arbitrary, irrelevant, or not following the law. (The worst scene I ever saw between a judge and a lawyer occurred when the lawyer said, "You ought to let this in evidence, because you've let in all their irrelevant evidence.") If you offend the judge, make an appropriate, immediate, and humble apology: Your ego must yield to the client's case. If you must correct a misstatement by the judge, do so deferentially. For example, in a recent case a judge inexplicably was unaware of certain venue requirements in a state constitution. (Remember the admonition about assuming that the judge knows the law?) The lawyer corrected the judge in a very gentle and respectful fashion: "Your honor is correct that under certain circumstances you can bring a lawsuit in the county where the injury occurred, but in this case. . . ."

Listen when the judge is on your side. A judge often will indicate, more or less directly, that he's persuaded by your argument. Strange as it may seem, sometimes lawyers don't listen. The lawyer, eager to make all his points or to expose opposing counsel as a moron, continues to argue. The lawyer has forgotten that his audience is the judge, not opposing counsel. Unnecessary argument is counterproductive; the less said, the fewer the opportunities to talk yourself out of a victory.

Beware of the rephrasing of your position. Sometimes a judge will rephrase your position. Be alert. This is dangerous, especially when you are making a statement in the nature of a stipulation. If the judge says, "So what you're saying is . . . ," or "So your position is . . . ," it may be prudent to state your own position again ("I think your honor and I are saying the same thing; what we say is . . ."). And if there is any question in your mind on a point of law or fact, don't agree. ("I'm sorry, your honor, I'm not certain on that point.") Many a lawyer, months after an argument, has been dismayed to find an unintended admission in the transcript of an oral argument on a motion. Of course, care must always be taken in expressing factual or legal positions—remember that an estoppel can arise, even on points of law, if you take a position in court and prevail.

Display the proper attitude to opposing counsel. It is an undeniable fact: You must be more pleasant to a lawyer at oral argument than you are in your brief. Some of the things you can call a lawyer in a brief (for example, frivolous or disingenuous) you usually cannot say to his face. Most judges aspire to a high sense of professionalism, and presume that parties and counsel are acting in good faith unless convincingly proven otherwise. As a result, judges are attracted to professional courtesy. Suppose that opposing counsel misstates a fact. You lose nothing and gain a lot by saying, "I'm sure that opposing counsel inadvertently misstated that. . . ." First, it is professional (the mistake truly may have been unintentional). Second, it corrects the error and points out the misstate-

ment. Third, the judge still can come to the conclusion that the misstatement was deliberate.

Always display credibility. The single most important personal attribute of a lawyer in a presentation before any tribunal (judge or jury) is credibility. Every appearance before a judge inevitably affects every case the lawyer or his firm has or will have before that judge. Judges have notoriously long memories about lawyers, and have been known to talk to other judges about untrustworthy lawyers. Credibility means being accurate on both the law and the facts. It means prompt and immediate correction of any misstatement of law or fact, no matter how trivial. It means a concession of law or fact, where necessary. Finally, it means eschewing extravagant positions.

A final piece of advice. When an argument goes well, you tell yourself that you are a genius. When an argument goes poorly, you often conclude that either you or the judge is incredibly stupid (forgetting that some cases are just plain losers regardless of the advocate). As for yourself, sometimes feeling stupid is a pretty good thing. As for the judge, remember the advice of Rupert Brown, an old, wise, and now deceased Georgia lawyer:

> A lawyer has an absolute right to cuss out a judge for an adverse ruling, provided (a) that it is done within three days of the ruling, (b) out of the presence of the judge, and (c) so that it doesn't get back to [him or her].