Thoughts from the Bench

How to be at your best in appellate oral argument

By Mary Jane Bowes

Whether we sit in Pittsburgh, Harrisburg or Philadelphia, oral argument is the highlight of an appellate judge's job. That is when the cases come alive for us and we get to see, hear and interact with the attorneys who represent the parties. While the substance of the argument is the heavy artillery of oral advocacy, the total experience can sometimes add to or detract from the presentation of your case. During a recent oral-argument session I took note of the performance and demeanor of some of the attorneys who appeared before the panel. The following observations and comments may provide some insight into the mind of an appellate-court judge during oral argument.

Voice

The historic Supreme Court courtrooms in Pittsburgh and the Capitol are large, ornate and difficult to heat and cool. Large HVAC equipment is employed in an effort to maintain a comfortable temperature but often to the detriment of the acoustics. Since the appellate judges are elevated on the bench, the attorneys must make a concentrated effort to project their voices up to them. The whole point of the argument is to be heard. If the air conditioning is on, raise your voice. "Use your outside voice" is advice that has been directed at more than one advocate.

Don't make the judges strain to hear you. Speak clearly. The microphone is your friend. Use it! Adjust it to the level of your mouth and speak into it. Don't sway back and forth so they only hear every other

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word. As Jerry Maguire said, "Help us to help you!" It is distracting to your argument if we need to interrupt and ask you to speak louder, more clearly or into the microphone.

Presence at the Podium

It goes without saying that an attorney should appear suitably attired, but that is not the end of how he or she should appear. An attorney's presence at the podium should connote a high level of professionalism and confidence. Having said that, judges generally recognize that oral argument before an appellate court can be an intimidating experience. In my opening remarks I invite the advocates to inform the court if they are making their first argument before it. That way we can welcome them to the bar and try to put them at ease throughout the argument.

Although dealing with nerves may be an uncontrollable part of the process, other are distinctly within your control. Don't make oral argument with gum in your mouth. When the case is called, counsel for appellant should approach the podium but should permit opposing counsel sufficient time to get settled in his or her seat before beginning.

Then wait until you have the attention of the judges before addressing the court. The presiding judge may be checking with the court crier about the argument schedule, whether new cases are being added to the expedited list, if counsel for the next case has not checked in, whether some cases have been submitted through a last-minute telephone call or even just getting lunch orders sorted out. Once the presiding judge turns his or her attention to you, you may begin. Remember that the presiding judge controls the clock, so have a note on the top of your material to remind yourself to ask for rebuttal time before you begin your argument.

Adjust the microphone (per above), introduce yourself, acknowledge opposing counsel, smile and begin.

During the argument make a concerted effort to control your movement. Swaying or walking back and forth is distracting to the judges (see above), and gesturing should be kept to a minimum. During the recent oral-argument session one advocate continually pointed at opposing counsel with great antipathy. It was so hostile that counsel was finally requested to stop pointing at her opponent. Her effort to control her gestures adversely affected her ability to argue since she had to focus on controlling her hand movements instead of her words.

While opposing counsel is arguing it is distracting to the judges and highly unprofessional to be shaking one's head. It is like a silent objection, and there are no objections in oral argument. Don't do it. Let the strength of your words refute your opponent's position. Otherwise you risk being rebuked by the judges.

Recently one smart attorney brought a bottle of water to the podium. Rather than trying to pour a small glass of water from one of the pitchers with the screw-off tops, she easily took a discrete sip while a question was being posed. You shouldn't have to worry about spilling water all over the counsel table when trying to get a drink. Oral argument is stressful enough.

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Argument

It is generally good advice not to bring a tremendous amount of material to the podium. Sometimes attorneys come to the counsel table laden with heavy briefcases full of trial material. For the most part this is not necessary. Oral argument goes fast and you really do not have time to rustle through voluminous paperwork to find something. Other attorneys come to the podium with nothing. Not a single scrap of paper. Now that's confidence! But I don't think that is necessarily advisable. Bring the briefs and the outline of your argument. Sometimes judges ask a question about or refer to the briefs. You want to be able to direct them to the exact place in your brief when you make your best point.

Of course the rules of appellate procedure dictate that the trial court opinion should be appended to the appellant's brief. The trial court opinion is often the starting point of the judge's questioning since, as an error-correcting court, we are often limited in our review of the trial-court decision. If appellant fails to include it in his or her brief, appellee should do so. Why not? You won below. It has to be in your favor. Reproduced records are not on the bench, so don't refer the judges to a document there. However, briefs are on the bench, so if you have a key document, expert report, insurance policy provision or master report that you want to refer to during argument, append it to your brief. That way you know it will be on the bench.

If a judge asks a question that you cannot answer, request an opportunity to submit a short post-argument memo on that point or legal precedent. If the judge is really interested in an answer, he or she may grant you permission to do so. If not, nothing is lost in the request.

Appellant should limit argument to his or her strongest two or three issues. You simply will not have time to address 12 points in a standard argument. (Note to self: Don't raise 12 issues on appeal!) Appellee should respond to appellant's argument and explain why appellant's position is incorrect and the trial court position should be upheld.

Appellant should always ask for rebuttal, even one minute, just in case it is needed. It is good to get in the last word (ask your spouse). Counsel should have a conclusion sentence memorized to summarize his or her position and to request the desired relief. That way, even if you feel as if your entire argument was hijacked or derailed, at least you end on a positive, polished note.

At the conclusion of argument it is always heartening to see counsel shake hands. It is a mark of civility that all too often is missing from the practice of law. It tells the judges that these counsel are professional in their dealings with each other and it creates the presumption that they were professional in the trial of their case and in their dealings with the trial court. More important, it reminds all of us that we are unified in the pursuit of something bigger than any one of us, and that is the pursuit of justice. ⚖

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