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The Don'ts of Oral Argument

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WHAT DOES AND DOES NOT WORK IN APPELLATE PRACTICE: AN INSIDE VIEW FROM THE BENCH, THE BAR AND THE LAW CLERKS

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Effective appellate advocacy requires good oral argument as well as a good brief. The object of both is persuasion, which is accomplished by imparting factual and legal information to the court. An oft-told story concerns a British judge who purportedly said to a barrister during the course of oral argument: "I have been listening to you for half an hour and am none the wiser." The barrister supposedly replied: "I know that, my Lord, but I had hoped you would be better informed." I use this story in support of my thesis that persuasion of an appellate court cannot be accomplished in the absence of well-organized and properly presented information.

There have been many books and articles written about appellate argument.[1] John W. Davis, one of the most famous appellate advocates, wrote an article giving ten commandments for those who would argue appeals.[2] He did say in that article, however, that no one would listen to the discourse of a fisherman if he could hear from the fish. Indeed, some well-known "fish" have made known their views on the subject. Justice Jackson,[3] Justice Rehnquist,[4] Judge Kaufman,[5] and Judge Re,[6] just to name a

few, have written extensively about appellate argument. Much of what these authors have written has been confirmed by my own experience. I now have developed my own list of twenty-five specific don'ts for oral argument. In the hope that they will be of some use, I herewith present them to you, in no particular order of importance.

1. Don't pass up the opportunity to argue. I guess that we in the Second Circuit are the last to allow oral argument to anyone who requests it, including pro se litigants. It amazes me that people decline to argue in our court. No matter how often we say how important we consider oral argument, lawyers continue to ignore us. Believe me, it is important! It can win your case.

2. Don't try to argue more than two or three points. In our court, the average time allowed for argument is fifteen minutes. You can't possibly make more than a few good legal points in such a limited period of time. Remember that the argument should include the history of the case, the holding below, the challenges on appeal, a brief statement of the facts, and responses to the judges' questions, as well as the legal points you want to emphasize. With all this, it should be clear that you should make only your best arguments on the law and leave the rest to the brief.

3. Don't ask us to overrule the Supreme Court. We are very reluctant to do that. An attorney who appeared before us recently was discussing an obscure point of admiralty law. The

point had been settled in a Supreme Court decision some years before, but the lawyer insisted that the Supreme Court was wrong. I am afraid he got short shrift from us.

4. Don't spend a lot of time explaining our own recent decisions to us. You may presume that we are familiar with what we have written, at least recently. Our collective institutional memory sometimes needs refreshing, but extended explication is unnecessary. A convoluted discussion of precedent in the court in which you are arguing is a waste of everyone's valuable time.

5. Don't read your oral argument. It still seems strange to me that there are so many breaches of this rule. Although notes and outlines are to be encouraged, a full textual reading turns us off. I often have been tempted to ask a reader to hand up a copy of the warmed-up version of the brief he or she has been reading from. Recently, a lawyer read to us at such a rapid-fire rate that we asked no questions of him for fear that he would lose his place. Justice Rehnquist calls such a lawyer "Casey Jones" because of his similarity to the engineer on an express train.

6. Don't permit co-counsel to pass up notes or to tug on your clothing. This is something of a pet peeve of mine. I find it very distracting. Certainly, the attorney who is arguing is distracted. When the note is received, argument stops or slows down considerably as counsel peruses the missive. Then there is a shift in subject matter or emphasis. Most frequently, the note comes up after a question that counsel has trouble coping with.

The answer provided by co-counsel usually is as unsatisfactory as the original response.

7. Don't try to "wing" it. If you don't know the answer to a judge's question, offer to furnish a response in writing after oral argument. I have seen much grief come to those who responded with a guess. You really can paint yourself into a corner with a wrong answer. It's simply not necessary to create that kind of trouble for yourself.

8. Don't say "I'll get to that" in response to a question. Many attorneys who answer thus never fulfill their promises. Although this is a well-known rule, it is broken more frequently than one would expect. Just a few weeks ago, a leading New York City attorney, arguing an important corporate takeover case, responded to one of my questions by saying, "I'll get to that, your Honor." He never did.

9. Don't quote extensively from the record or from a case or statute. Extensive quotation is a great waste of time. We can read for ourselves. Paraphrase whenever possible. Quote only when it is absolutely essential to your argument.

10. Don't answer a question with a question. Sometimes a judge's inquiry needs clarification, and you shouldn't hesitate to ask for it. Otherwise, questions, even rhetorical ones, should be avoided. One of my senior colleagues put a question to a young lawyer during oral argument and received this reply: "Why do you ask that, your Honor?" That sort of reply is not well received. Of course, it is far better than the following

reply received by a judge in the Eighth Circuit: "You wouldn't want to know that, your Honor."

11. Don't give a page number of the brief or of the record in response to a judge's inquiry. Such a response causes the judge to root around in the papers and be distracted from the argument. Answer the question to the best of your ability and then refer to the appropriate page if necessary.

12. Don't cite in your brief any cases that you are unable to discuss on both the facts and the law at oral argument. During my days at the bar, I was always careful to reread every case cited in my brief just before oral argument. A judge easily loses confidence in your presentation when you are unable to discuss a case cited as authority for some proposition you are urging on the court.

13. Don't come to oral argument without shepardizing the citations contained in the brief and checking for current authority just before your presentation. A case we recently decided went off on a Supreme Court decision handed down between the filing of the brief and oral argument. Counsel adversely affected by the decision was unable to discuss it with us, much to his detriment. A brief trip to the Lexis or Westlaw machine prior to his appearance in our court could have saved him a lot of embarrassment.

14. Don't engage in prolonged discussion of basic legal principles. You may assume that judges generally are familiar with the notion that guilt in a criminal case must be proved

beyond a reasonable doubt. If you can pick up the legal discussion somewhere at the point of intermediate legal difficulty, I'm sure we'll be able to grasp it.

15. Don't underestimate the importance of the facts. An attorney arguing an appeal should be able to respond to any question a judge may have concerning the facts of the case. If the attorney did not present the case in the trial court, he or she must become familiar with every part of the record. The facts are every bit as important as the law, frequently more so, and I am very much put off by a lawyer who hasn't mastered them.

16. Don't get caught in the cross-fire. Sometimes two judges will use an attorney as a foil while they argue with each other. This is a very interesting phenomenon and one with which I was somewhat unfamiliar until becoming an appellate judge. One judge asks: "Isn't it true that ...?" After you answer, the other judge says: "Yes, but isn't it also true that ...?" Don't be deterred from holding to your position while the judges attempt to use you to persuade each other.

17. Don't undertake an emotional appeal to the court. It's surprising to me how many lawyers still try to boost their cases with a visceral approach. I suppose that judges get just as emotional as anybody else, but a lawyer who asks us whether we would like our grandmothers to be victimized by conduct such as that demonstrated in the case at bar is marked down as a sure loser. During the course of a very bad argument, an attorney

screamed, "I have a most unfortunate client!" All three of us nodded in agreement.

18. Don't discuss your pleasure at being in our court or disparage yourself or flatter the judges. It is most unnecessary and wasteful. One attorney started his argument by explaining that it was his first time in our court, although he had argued many appeals in state courts and in other circuits. He went on to describe the great honor that had befallen him by being retained to argue before us. He had been assigned only ten minutes for his entire argument and used most of it up with this type of airy persiflage. Moreover, as Justice Jackson said, there is no need to flatter judges because they have a high enough regard for themselves.

19. Don't use your rebuttal time unless it is absolutely necessary. It probably is a good idea to reserve some time for rebuttal when you represent an appellant. However, many attorneys don't use the time to rebut respondent's arguments. They merely repeat what they already have said. The same deficiency is characteristic of many reply briefs. Repetition always should be avoided.

20. Don't divide the oral argument. When more than one lawyer argues for one side, trouble often ensues. The custom in such a situation is for one attorney to argue one or more points and for the other attorney or attorneys on the same side to argue the other points. Unfortunately, the court often fails to honor the division. The result is utter confusion, with lawyers being

questioned on points with which they are unfamiliar. The representation of separate clients and separate interests, of course, presents a different situation.

21. Don't present an unstructured argument. Some attorneys appear for argument with no idea of how they intend to present their cases. I suppose that they hope we will take up their allotted time with questions from the bench. When no questions are forthcoming, they flounder around with no beginning, middle or end to their arguments. While one attorney was engaged in such an unstructured exercise, one of my senior colleagues passed me a note that said: "Isn't this god-awful?"

22. Don't speak in a monotone. You cannot catch the attention of judges with soporific speech. Earlier, I warned against emotional appeals. However, you must demonstrate some passion for your cause, and this usually is accomplished by modulations of speech. Effective use of voice can be most helpful in an oral presentation.

23. Don't allow distracting mannerisms to interfere with your oral argument. Playing with pencils, sticking hands in front of faces, pacing up and down in front of the podium, and tapping a pen on the microphone are just some of things that draw our attention from the arguments. These and similar distractions should be avoided.

24. Don't be unprepared. When I was a young lawyer, I read somewhere that Justice Frankfurter would ask questions about Roman law on oral argument. I lived in fear that some judge

would ask me about Roman law during the argument of one of my cases. While it generally is not necessary to have such arcane information at your fingertips, there is no substitute for a thorough preparation for oral argument. Many large law firms conduct moot arguments in-house. A law professor at the University of Minnesota Law School told me that she was retained from time to time to assist lawyers in preparing for oral argument. Some of the best oral arguments are given in law school moot court competitions. The reason, of course, is the frequency with which such arguments are rehearsed. Practice indeed makes perfect!

25. Don't forget the tenth commandment of John W. Davis, who argued in the Supreme Court on more occasions than any other lawyer of his generation: "When you are finished, sit down." One of the most discouraging things seen by an appellate judge is a lawyer who has finished his argument but insists on saying a few more words to fill his remaining time allotment. Sometimes those extra words merely are superfluous and annoying to the judges, and sometimes they actually are detrimental to the speaker's case.

FOOTNOTES

1. See, e.g., Wasby, The Functions and Importance of Appellate Oral Argument: Some Views of Lawyers and Federal Judges, 65 Judicature 340 (1982). See generally, L. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice 577 n.1 (6th ed. 1986).

2. Davis, The Argument of an Appeal, 26 A.B.A. J. 895 (1940, reprinted in Committees on Federal Courts & Continuing Educ., N.Y. State Bar Ass'n, Federal Court Practice 287 (1983).

3. Jackson, Some Suggestions for Effective Case Presentations, 37 A.B.A. J. 801 (1951), reprinted in The Supreme Court and Its Justices 254 (J. Choper ed. 1987).

4. W. Rehnquist, The Supreme Court 276-282 (1987).

5. Kaufman, Appellate Advocacy in the Federal Courts, 79 F.R.D. 165 (1977).

6. E. Re, Brief Writing and Oral Argument (5th ed. 1983).