

HORTON ON ORAL ARGUMENT

Oral argument before the appellate courts in the state and federal courts in the United States varies widely in its availability. In the U.S. Supreme Court and some state courts, such as the Connecticut Supreme Court, there are 30 minutes of oral argument per side in almost all appeals; in most federal appellate courts and some state courts, any oral argument at all is the exception rather than the rule; and in some state and federal courts, oral argument, when allowed, may be for only 5 to 20 minutes.

But when oral argument is allowed, the format throughout the United States is remarkably similar: in all courts briefs are filed well before the oral argument, in almost all courts there is no preliminary decision before oral argument, in most courts the judges are thoroughly familiar with the file before argument, in most courts the judges interject questions, in most courts a preliminary (and sometimes final) vote is taken immediately after argument, and in most courts the time tends to be up before you have finished your presentation. So the techniques for a proper oral argument are similar in all state and federal courts in the United States.

Proper technique flows from answering one basic question: What is the purpose of oral argument? In the nineteenth century, the whole appeal revolved around the oral argument. The brief, if there even was one, was often filed just before the oral argument. Since the appellate judges knew little or nothing about the case, oral argument lasted for hours as the lawyers read from the trial court record and explained the facts in detail.

Today the whole appeal revolves around the brief. Oral argument still plays an important role,

but it is a supporting role. Proper technique for oral argument thus means knowing how to play the supporting role rather than the starring one. So what is the purpose of oral argument? The purpose is to support the brief.

Since the judges have read the briefs before oral argument, they have their minds 50 to 75% made up when they come out on the bench for oral argument. If argument is to serve any significant purpose, you must quickly find out where the judges are confused or in doubt. You will find that out only if the judges ask questions. You will not find that out if you start with a recitation of the facts and launch into a speech. The judges already know the facts; a recitation is a waste of time. A speech belongs in the brief; at best it is a waste of time, at worst it suppresses questions.

The way to encourage questions is to state your name and then plunge into the midst of your most important issue. There are many ways to do this, and all are designed to encourage a colloquy with the judges:

1. Tell the judges what you think is the most important issue. Then pick up a document the judges have in front of them and ask them to refer to a critical sentence on a certain page. If it is from the trial judge's decision, you might then discuss a flaw in the reasoning. If it is from the opponent's brief, you might discuss an exaggeration or a miscitation. Focusing the judges' attention on part of a document they read the day before is almost guaranteed to get some sort of response unless the decision is preordained.

2. If the briefs give the impression that the parties are talking about two different cases, start the argument by discussing what the appeal is not about. Many times the confusion is about what

precise issues are before the court. Other times there is confusion about the scope of review, or what is and is not supported by the record. If the judges were confused by the briefs, such a start to the argument will encourage questions to clear up the confusion.

3. Tell the judges specifically what issues you do not intend to discuss in your argument. That way, a judge who wants to discuss one of those issues will be encouraged to say something at that point. If no questions are forthcoming, at least your credibility will be improved by being candid about what you think are not the most important issues. (You will undermine your credibility if you say the issues you do not argue are just as important as the ones you do. No one will believe that.) On the other hand, floating weak issues by for a few seconds gives the judges an opportunity to send you a signal if one of those issues is stronger than you thought.

4. Draw the judges' attention to the most important paragraph in the most important case on your most important issue. Usually this paragraph will be quoted somewhere in the briefs. If not, circulate the decision at the start of your argument (and tell the opposing lawyer ahead of time what you plan to do). Ideally one or more of the sitting judges will have participated in that decision. If so, remark on it.

5. Say anything at all and then pause. It is amazing how often a simply pause will encourage questions.

6. If you are the appellee, there is a very easy way to encourage questions: jump into the fray between the judges and the appellant. State that Judge X asked the appellant a particular question and that it was answered thus-and-so. Go on to show how the answer beat around the bush or was in

some other way unsatisfactory. Then state how you would answer it. That is almost guaranteed to get a response from Judge X. Be careful to avoid name-calling.

7. In answering a question from Judge Z, refer if possible to a prior colloquy with Judge Y. Judges listen to questions from other judges. If you satisfactorily responded to Judge Y on the same point, that may bolster your response to Judge Z. It may also encourage a friendly question or comment from Judge Y.

8. Refer to the most recent cases decided since the briefs were filed. If they are from the court that is deciding the appeal, the judges will be very familiar with them and will be interested in discussing their significance. The court and opposing counsel should be notified ahead of time that these cases will be referred to.

9. Be relaxed and conversational. This gives the impression that you want to talk with rather than to the judges. On the other hand, be yourself. If you have a formal style of speaking, don't change your style so much that you sound insincere or disrespectful.

These nine ways to encourage questions are only possible if you throw away three things: (a) all 3x5 cards; (b) all legal pads that have sentences on them; and (c) all legal pads that have more than two pages of notes.

If you have 40 3x5 cards, at 30 seconds Judge X will ask you something on card 36 and at 60 seconds Judge Y will ask you about card 18. You will be lost. Moreover, how can you sound enthusiastic about your case if your nose is in the lectern as you leaf through your cards?

If you have a legal pad with sentences on it, you will make a speech. When a question comes, you will be tempted to say, "I'm getting to that later." Disaster.

If you have a legal pad with more than two pages of notes on it, you do not know the record and briefs cold. If you do not know the case cold, you cannot possibly field unexpected questions quickly and surely. That is why a junior associate who has never argued an appeal but knows the case cold will do a better job than an experienced but ill-prepared senior partner. Senior partner syndrome is most apparent in answers such as, "It's in the brief," or "I don't know; I didn't try the case." After such an answer, be ready to duck if a judge has the urge to throw something at you.

Having followed this advice and gotten a barrage of questions from the judges, you need to know how to answer them. Try saying just "yes" or "no." Such an answer will astonish the judges, who last heard that answer in 1985. They will talk about it for days. The reason it is memorable is that it does not beat around the bush.

If your best case is distinguishable, it does no good to bob and weave when the inevitable question comes. Why not say "Yes, it is distinguishable, but the rule should be extended to this case for such and such reason." Candor is essential in successful advocacy. It is far better to understate than to exaggerate your case.

The corollary to having the candor to say "yes" is having the guts to say "no." Do not let the judges push you around. If you think you are right on something, do not concede it away just to stop a judge's hostile questions. The other judges may agree with you. In any event the hostile judge may simply be trying to test how far your argument goes.

Handling concessions is one of the most difficult oral tasks. Try to decide ahead of time how much you are willing to concede. Then you can do so promptly and confidently at the appropriate time. But what do you do about the request for an unanticipated concession? First of all, pause.

Sometimes the correct answer will come to you in a few seconds, in which case give it. Sometimes the correct answer will not come quickly, in which case the most candid answer is the best answer: "[Pause] . . . I don't know; I didn't anticipate the question. Can I think about it for a couple of minutes while I talk about something else?" It helps if you have a partner to do the thinking. In addition, you may in the meantime get a feel for what the other judges think about the question. Blurting out a hasty answer must be avoided, for conceding what you should not may be fatal to your case, and not conceding what you should may be fatal to your credibility.

Giving the right answers to questions is 5% inspiration and 95% perspiration. Some people just naturally are inspired to come up with profound and witty ripostes to difficult questions. But mostly the right answer comes from hard work. You cannot be on trial the day before an oral argument and expect to do a good job the next day. You must read the transcript from one end to the other and have tabs on it so that you can find something quickly at oral argument. You must look at all the exhibits; you must read the appellate record or joint appendix; you must read the briefs; and you must read every significant case that is cited. These things take time.

After reading everything in sight, you must decide what is likely to puzzle or intrigue the judges. Put yourself in their position: What questions would you ask yourself after reading the record and briefs? Another knowledgeable lawyer in your office should pester you with questions. Decide what is important and what is not. Decide what you can concede and what you cannot. Mark up the record and briefs for ready reference at oral argument. Make some notes of the most important points you want to make. Do not write very much down on paper.

Then sit back and philosophize to yourself for an hour or two. Where should the law be going

in this area? Why is this case important or trivial? Should this court be doing something differently from other courts? Try analogizing to other areas of the law. Do the analogies make sense? Try narrowing or broadening the cases on point. How far can you go? Try thinking your way down a slippery slope. Can you stop on the way down? Take an argument to its logical conclusion. Is it absurd?

Going into the clouds for awhile invariably gives you insights into your oral argument. It may suggest a new emphasis in the argument, or it may help to anticipate questions. Just sitting and thinking is something lawyers are not often seen doing. Your partners and secretary should be warned to stay away when you adopt the glassy look of pure thought.

Once you are fully prepared for oral argument, you should be able to make a confident and relaxed presentation that can adapt to wherever the judges want to go without losing sight of what the case is really about.

You should bring the following to oral argument: everything in the file plus another lawyer. Spread everything on the counsel table that you might need at oral argument. Do this even if the presiding judge is glowering at you for 15 seconds. That way, when there is a question about what happened at trial, you can pick up the transcript or an exhibit and give a precise and prompt answer. The important cases should be copied and spread out, so that a question about the facts of a case can be handled in the same way. Having another lawyer who also knows the record cold makes the job easier. The other lawyer can also help if you get into a jam (such as fielding an unexpected request for a concession). Once you are set up, plunge in with your argument. If you are the appellee, put a practically blank piece of paper in front of you, and start filling it up as the appellant or the judges

Speak.

Know your opponent. If the opponent is likely to be ill-prepared, put more emphasis on the details of the record. If the opponent easily goes off on tangent, mention some tangents to go off on.

Know the court and the judges. Never argue an appeal without hearing the judges in action. Some judges ask lots of questions; some hardly ever say anything. Some judges ask questions only when they are genuinely confused or uncertain; other like to grill lawyers on academic questions. Some are more prepared or quick-witted than others. Some hear better than other (so speak loudly). Some are more attentive. Some have a better sense of humor. Some are more swayed by oral argument. Usually you know a week or so in advance who is sitting. Inquire of the clerk.

A judge you must find out about ahead of time is the one who tends to ask lengthy questions that the other judges know are irrelevant. Such a judge is wasting your valuable time. Give an abrupt answer and move on. If that does not work, plead with the presiding judge to rescue you. Better to have one angry judge than to let your time run out. If the presiding judge is the problem, or if all the judges seem to be interested in the irrelevance, try being candid and saying you think with all due respect that they are on a tangent. Candor often works wonders.

A corollary to knowing the judges is knowing the rules and how they are applied. Courts differ on whether and to what extent you can refer to matters off the record (if in doubt do it not at all). Some courts are looser than others in the receptivity to issues not raised or not properly raised below. The situation also varies depending on who is sitting, so it pays to read some decisions of the judges before whom you will argue. Knowing where you stand procedurally will help you decide which issue should be the highlight of your oral argument.

The appellant should always reserve at least two to five minutes for rebuttal. Even if you do not use it, it will keep the appellee honest. But if there is nothing new to say, say nothing on rebuttal.

Saying nothing if you have nothing to say applies to the entire oral argument. Do not conclude your remarks with a final argument to the jury, or with a review of what you have already said. Do not use up all your time if you do not need it. When you have said what you have to say, stop.

Wesley W. Horton

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