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HORTON ON ORAL ARGUMENT

Oral argument in state and federal appellate courts in the United States is remarkably similar: in each court the judges are thoroughly familiar with the file before argument, in each court the judges interject questions, in each court a preliminary vote is taken immediately after argument, and in each court the time is often up before you have finished your presentation. So the techniques for a proper oral argument are the same in virtually all appellate courts on my side of the pond.

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 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, some courts routinely allow oral argument of 30 minutes (the U.S. Supreme Court is an example), while other courts routinely allow only 5, 10 or 12 minutes (the Second Circuit is an example) or none at all in many cases (other circuits).

Today, the whole appeal process revolves around the brief. Oral argument still plays an important role when it is permitted, 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 the 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 also have in front of them, such as the record, an appendix or a brief, and ask the judges 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 the less important issues. (You will undermine your credibility if you state 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 the weaker issues by for a few seconds gives the judges an opportunity to send you a signal if one 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 simple pause will encourage questions.
6. If you are the appellee, there is an 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. Hold up a crucial exhibit, which hopefully the court can look at in your appendix. I held up a blowup in the U.S. Supreme Court for my argument in an eminent domain case, *Kelo v. New London*, to good effect, although this was risky. I got permission ahead of time from the clerk.
9. 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.
10. 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.

These ten 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. (Some excellent advocates use no notes at all. I don't know how they do it.)

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 better 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 judges, you need to know how to answer them. Try saying just "yes, Your Honor" or "no, Your Honor." Such an answer will astonish the judges, who last heard that answer in 2010. 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 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: "[Pause] . . . I don't know; I didn't anticipate that 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. (But the latter is better than the former.)

Giving the right answers to questions is 5% inspiration and 95% preparation. Some people are just naturally inspired to come up with profound and witty responses 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 you can find something quickly at oral argument; you must look at all the exhibits; you must read the appellate record and 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.

Then have one or more mooting sessions. Have three or four lawyers play the role of appellate judges. At least one should have nothing to do with the case. Some moots are very formal; some are not. Do whatever you are comfortable with, but definitely have at least one moot. Try videotaping a moot and see how awful you are.

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 a partner. Spread everything on the counsel table that you might need at oral argument. Do this for 15 seconds if necessary, even if the chief justice is glowering at you. 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 a partner who also knows the record cold makes the job easier. The partner 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.

If you and your partner are sharing the oral argument, make sure you know your partner's subject cold and vice-versa. Share arguments rarely.

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 a tangent, mention some tangents for the opponent to go off on.

Know your client. By all means encourage the client to come the oral argument, but no faces, please. The judges notice such things and will know which side the offender is on. And no sending of notes to you.

Know the courtroom. If there are books of cases available to the lawyers, check them out. You may need to get one during the argument. And check out the technology that may be available during argument.

Know the judges. Never argue an appeal without hearing the judges in action. Some judges ask lots of questions; some ever hardly say anything. Some judges ask questions only when they are genuinely confused or uncertain; other like to grill lawyers on academic questions. Some ask a question before you have answered another judge's question. (In that event, keep the unanswered question in mind.) 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 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, look at the other judges while answering his question. 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. Condor 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). And know the definition of "record." The meaning and application of the "clear error" and "general verdict" rules vary from court to court as well. 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.

Find out what the court thinks about decisions from other courts. The U.S. Supreme Court rarely cares what any other court thinks. Many appellate courts care little what trial courts think (except for the case on review). Opinions by some previous justices on the same court are held in high regard; others are a reason to go the other way. Find out who is which.

There may be buttons or the like to keep track of your time. Presiding judges have different attitudes about going over your time. Chief Justice Rehnquist expected the lawyer to stop midsentence; Chief Justice Roberts, a former appellate lawyer, does not. Check it out. In any event, glance at your time to make sure you don't have only 30 seconds for that crucial second issue.

The appellant should always reserve a few 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.