

On Litigation Skills - Oral Argument

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Most litigators look forward to oral argument because we love the sound of our own voices. But we need to be disciplined and thoughtful to be effective, so here are a few tips.

- *Be prepared.* Start by outlining all of your arguments with citations to the record and the case law. If there are many cases that may have to be discussed, prepare a chart with short descriptions of each case, including the underlying facts, the holdings and the important similarities with and distinctions from your case. Don't wait until the last minute to do this basic preparation. Leave plenty of time to ruminate and add new points, and keep reviewing your materials until you know them backwards and forwards. Then organize all of your materials in a notebook or folder so that you can access them as the need arises, without fumbling or delay.
- *Seek input from others.* It's easy to get stuck in your own frame of reference and fail to understand how someone else may look at your case. To avoid the "unknown unknowns," as Donald Rumsfeld would put it, ask one or more colleagues to "moot court" you by asking questions that may come at the hearing. And take every opportunity to talk through your arguments with anyone that will listen so that you can sharpen your points and avoid surprises.
- *Be in the moment.* The point of all this preparation is to be comfortable, alert and instinctive once the hearing starts. To use a metaphor I've used before in this column, preparation for a hearing is the art of building a cage that you can go wild in. If you are well prepared, you will know what you can and can't say so you will be able to trust your instincts once the hearing starts.
- *Be concise.* Too many lawyers feel that they have to make every point that they have ever thought of, but don't tax the court's patience. Come up with a short introduction that makes your most persuasive points in less than half a dozen sentences. Then memorize this opening so you can deliver it without notes.
- *Listen.* Most litigators are much better at talking than listening, but listening is the only way to learn what the judge or arbitrator is thinking. Make sure that you pay attention to every clue about what matters to your decision maker. And never interrupt or show any impatience when he or she is speaking. Listening to your opponent is also crucial because you may hear an admission or omission that you can use.
- *Answer the court's questions.* I'm often surprised by lawyers who treat the court's questions as annoying distractions to be brushed aside so that they can get back to what they want to say. What matters is what the court thinks, and the court's questions are the best indication of that. Be respectful and thoughtful as you listen and ask for clarification if you are not sure what the question is. Then answer the question as directly and concisely as possible.
- *Maintain your credibility.* With the benefit of your colleagues, identify in advance the points that you may have to concede. Your credibility and confidence are crucial, so don't undermine them by making weak arguments or distorting the facts or case law. Candid admission will help convince the court that you can be trusted.
- *Don't bang your head against the wall.* The court may surprise you by dismissing out of hand one of your favorite arguments. You can try to rescue the point by reframing or rephrasing it, but don't put your credibility at risk by going down fighting. Have some back-up arguments ready so you will have more than one way to win.
- *Be gracious.* No matter how contentious your relationship with your opposing counsel be, don't show that at the podium. Being sarcastic or snarky is a sure way to turn off judges and arbitrators, and no judge will want to hear the long history of your grievances against opposing counsel (and their equally lengthy response). And don't just be gracious to opposing counsel. Treat everyone in the courtroom, including the court clerk and reporter, with the utmost respect.
- *Don't rush.* Like many other lawyers, I've always tended to talk too fast so I have to consciously remind myself to slow down. Give the court time to absorb what you are saying and to interrupt you easily with questions. And your transcript will be much more accurate if you don't overwhelm the court reporter.

- *Silence can be golden.* Pausing for a beat or two is a great way to emphasize a point. In addition, pauses are very effective if the court's attention is wandering. Judges and arbitrators will usually look up from whatever they are doing if you suddenly stop talking.

It's time to give someone else a chance at the bully pulpit that I've occupied for close to 20 years, so this will be my last column for the *ABTL Report*. I've enjoyed the opportunity to speak my mind. Thanks for listening.