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Oral Advocacy in the Appellate Courts

Last week I spent a morning listening to oral arguments at the Ninth Circuit Court of Appeals. I was struck by how some of the appellate advocates had the judges leaning forward, listening intently and fully engaged while others had a fumbling and awkward exchange with the judges.

A polished performance at oral argument can be the difference between winning and losing an appeal. When you begin an oral argument you don't know if the panel members have made up their minds or if they remain undecided. In an appeal, oral argument is your only chance to speak directly to the court and allay any concerns that the court may have about your case.

My morning at the Ninth Circuit reminded me of the year that I served as an appellate law clerk on the Ninth Circuit to the late Warren J. Ferguson. During court week, Judge Ferguson would have lunch with his law clerks each day after oral argument. At lunch, he shared his insights as to the components of an effective oral argument and his oral argument pet peeves. While I was listening in court last week, I was reminded of these conversations, and I made my own list of tips for the inexperienced appellate advocate.

Prepare, Prepare, Prepare

Prepare as if you are studying for a final exam. A critical component of oral argument is preparation. Lack of preparation cannot be disguised during an appellate argument.

In order to prepare, I read all of the briefs, review the record, and re-read the key cases. I then draft my argument and a list of difficult questions and my response. I also write a closing statement. My closing statement is usually two or three sentences that summarize why my client should win. Although I draft the argument, difficult questions and answers, and a closing statement, I do not intend to read them at oral argument. They are simply my method for organizing my thoughts.

Once I know the panel members, I review my key cases to see if any of the panel members authored any of the key cases. I also review the judicial profiles of the panel. Be aware that in some courts, such as the Ninth Circuit, you may not discover who is on your panel until a few days before the argument.

I will often ask my colleagues to do a moot court argument so that I can better anticipate potential areas for questioning and test the theme of my argument. It is important for the moot court to be a few days before the argument so that any weaknesses can be re-tooled well in advance of the oral argument.

Judge or Justice

Know whether the panel you are addressing are judges or justices and address them appropriately. In the federal appellate courts, the panel is composed of judges. In the California state appellate courts, the panel is composed of justices.

Left or Right

Know where to sit. Nothing can destroy your confidence than to have opposing counsel, or worse yet, one of the panel members, tell you that you are sitting on the wrong side of the podium. In the Ninth Circuit, there is no wrong side. However, in the California Courts of Appeal the appellant normally sits to the left of the podium and the respondent normally sits to the right of the podium (if you are looking at the bench from counsel table). Of course, if you arrive at court and are confused as to where to sit you should ask the court clerk when you check in.

No Pens Please

Let go of the security blanket. Most lawyers do not argue regularly in the appellate courts and thus, there may be a level of discomfort at oral argument. While observing oral argument at the Ninth Circuit last week, I noticed that nine of the ten lawyers who argued held a pen in their hand and gestured with the pen in their hand for emphasis of the important points.

This was one of Judge Ferguson's pet peeves. It is rude and annoying to shake your pen in the faces of the panel members in order to make a point.

You Are Not Being Frisked

Pay attention to your posture and body language. While arguing, many of the lawyers stood at the podium with a very wide stance that resembled someone being frisked by a police officer. In addition, their hands were clenched on either side of the podium as if they were holding on for dear life. This posture is defensive and undignified. In addition, standing in this manner makes your suit jacket look very ruffled.

It is more effective to stand at the podium with a natural stance standing back far enough so that you can use your hands effectively to gesture appropriately with your argument.

No Arguing

Pay attention to both the tone and volume of your voice. Although it is called oral argument, there is no excuse for arguing with the panel or ever interrupting a panel member. Moreover, there is no excuse for raising your voice. If your argument is not persuasive in a conversational tone, surely it will be no more persuasive when you shout.

In addition, when you raise your voice it causes your audience to disengage and lean back in their seats.

Answer the Question

Answer the panel's questions immediately and directly. In a good oral argument, the panel is engaged and asking questions while the advocates are responding to the questions. There is a volley back and forth of questions and answers. In many arguments, however, the panel often asks questions that are not answered. I have witnessed two common reasons that the question does not get answered. The advocate responds, "I will address that later in my argument" or "We addressed that in our briefs." Such non-responsive answers can be very frustrating to judges. They view the argument as their time to clear up any misconceptions and to gain a better understanding of the case.

Every question by a panel member should be looked at as an opportunity to satisfy any doubts that the court may have about your case. It should not be taken as a rude interruption in your well planned argument or a lack of familiarity with your briefs. Use the opportunity to the fullest advantage by immediately addressing each question by a panel member. While you address the question you may be able to reinforce your theme and your theory of the case.

Conclusion

A good oral argument can be fun and exciting. A bad oral argument can be painful and frustrating. My tips may be rather pedestrian, but I hope they are helpful for your next oral argument in the appellate courts.

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