2006

How To Make The Losing Oral Argument

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Introduction

A few years ago, *The Arkansas Lawyer* was kind enough to publish an essay I wrote about brief-writing,[1] and I've finally gotten around to completing this, its long-contemplated companion piece. My thesis in the original essay was to promote the laudable goal of judicial economy by identifying ways to write the losing brief-in other words, save everybody a lot of time by pursuing strategies to ensure that your opponents win the appeal. I have a similar thesis here, although if you have gotten far enough along in the process to reach oral argument, you must not have done things sufficiently wrong in the brief-writing stage.

I know-sometimes it can be hard to avoid winning. Have you ever heard the medical profession's unbeatable advice for avoiding cardiovascular disease? "Pick the right parents." That's a lot like the advice for winning appeals that Arkansas Supreme Court Clerk Les Steen gave my students a few years ago: "Represent the appellee." But even appellees can lose, particularly if their lawyers follow one or more of the half-dozen "rules" set out below.

Rule 1: Prepare poorly.

Being well prepared for the argument could backfire on you-you might win. Therefore, streamline argument preparation by limiting it to a quick skim of your own briefs a few hours (or minutes) before the oral argument is scheduled. Refreshing yourself on the brief is particularly useful if you view oral argument merely as an opportunity to verbally showcase the things you wrote.[2] Rather than make an easy-to-glance-at outline of your essential points, fully write out the text of your argument so you can read that script to the Court. With twenty minutes to fill, however, better make sure that script runs to several pages.

Don't rehearse-but if you think you ought to, just do it in your head. And don't let any of your colleagues tempt you into a moot court argument with them playing the role of judges. They might succeed in anticipating the kinds of questions your panel will have, and then you'd have to think about the answers.

Rule 2: Bungle Your Delivery.

Let's start with first impressions. Wear the kind of clothing or jewelry that will attract the Court's attention-you know what I'm talking about. For you younger lawyers who are up on fashion, don't forget your tongue studs. And don't just stand there. Bob up and down, shift your weight from hip to hip, tangle one foot around the other, twist your ring or watchband, wave a pen-or better, jab with it. All of this motion will succeed in making the judges look at something besides your face, where they might otherwise expect convincing words to come from your mouth.

Bring a big stack of papers-including copies of all your cases and annotated statutes-to the lectern. If you work it right, you will find opportunities to pause and rummage through the stack at various points during your argument.

Keep your head down and don't look at any members of the Court. This is really important, because if you accidentally make eye contact, you risk getting a question. Don't stop talking when a judge tries to interpose a question. Keep going until the judge is forced to say something like, "Excuse me, counsel, but I'd like to ask a question here."

If you catch yourself misspeaking or tripping over a word, call attention to your mistake by saying, "Excuse me, I meant to say X," or just go back to the beginning or your sentence and try the whole thing again. This technique is doubly effective because it not only calls attention to your lack of fluency, it also uses up additional seconds of your allotted minutes for argument.

Work yourself into a passionate frenzy and shout out your arguments. Not your style? Okay, then, mutter.

Rule 3: Misuse Authorities.

Appellate judges have come to expect that lawyers will cite their prior opinions in support of new arguments on appeal. As a losing lawyer, however, you need to be careful how you use authorities, if you use them at all. You could, for instance, misrepresent their content, getting the details-maybe even the holdings-utterly wrong. But that would mean you had to actually say something about them. And your ethics will be questioned.

Here's another idea. Simply offer the names of cases in support of your points, but neither learn nor note any details about them. That way, if the Court asks you something about the case you've just cited, you can honestly answer that you don't know.

Alternatively, you can argue authorities that do not appear in either side's brief. After all, if the Court has no advance notice of the cases mentioned in oral argument, it won't be able to tell whether you've represented them accurately or not. A twist on this technique is to emphasize cases from other jurisdictions, particularly if there is existing Arkansas precedent on the issue. Surely the judges will want to know what the courts are doing about this issue out in Wyoming.

Rule 4: Mishandle Questions.

Some say that the point of oral argument is to find out what's bothering the judges about the case and to answer their concerns. Doing that would require you to actually listen to their questions and attempt to respond. Losing lawyers have discovered some effective techniques for avoiding that outcome.

For instance, start talking before the judge finishes asking the question. You may

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distract the judge from the issue she had in mind or otherwise succeed in highlighting something she doesn't care about. Or stall by throwing the Court's questions back at them. Or ask the judge to repeat the question. Twice.

If a member of the Court tries to pin you down with a "yes-no" question, don't start by responding "yes" or "no." Instead, start with your reasoning and gradually lead up to your affirmative or negative response-or go off on a different tangent altogether.

Occasionally one of the judges may seem to be giving you an aggressively hard time (such as repeating a question that you're trying hard to avoid answering). Go ahead and tell the judge that the question is not relevant to your case. (You might also remind him that it's been a long time since he practiced law.) And if a judge poses a hypothetical to test the limits of the rule you're proposing the Court should adopt or extend, tell the Court that those are not the facts of your case.

Treat every question as a hostile one. You may succeed in persuading a judge who was inclined to rule in your favor to switch her vote. Remember, however, that at the Arkansas Supreme Court, you only need four out of the seven to rule against you.

Are you remembering to talk fast and avoid making eye contact? This is time-tested technique that can result in fewer questions, as the judges can't get your attention to break in and ask anything. Now I know that some of you are slow talkers. If that's you, go ahead and talk slow-just don't pause too often to breathe. If the judges do manage to break into your monologue with a question, don't give a direct answer. For example, if the Court asks you something about the evidence, answer by describing a case. These detours tend to deter judges from pursuing what otherwise might be a persuasive point.

Rule 5: Be Nonresponsive.

Whether you represent the appellant or the appellee, you have the opportunity to speak after the other guy, whether in response or rebuttal. Some lawyers have been known to pay attention to the other side's argument and to address its specifics when they get up to the lectern. Don't do that. If you accidentally hear a question asked of appellant's counsel, do your best to ignore her response. You wouldn't want to exploit the other side's weaknesses; you've got enough of your own to worry about. If you feel you must actually make some responsive points as appellee or on rebuttal, however, start by repeating what your opponent said before you get around to making your own assertions.

If you represent the appellant, reserve a big chunk of your twenty minutes for rebuttal. This gets you off the hook quicker for the main argument, and when your time comes for rebuttal, you can instead ask the Court if it has any questions. If you're lucky, there won't be any (possibly because the Court has already decided to affirm) and you can quickly sit down again. If you decide to try a rebuttal, however, be sure to repeat the same things you said in your argument in chief. And use exactly the same words. Introduce sentences with phrases like "As I said earlier," "Again, " or "To reiterate."

Rule 6: Find Things to Do While Waiting Your Turn to Speak.

You're going to have as much as twenty minutes to wait before you get up to give your response, if you represent the appellee, or your rebuttal, if your client is the appellant. That's a lot of time to kill. Here are a few options for using it: Re-organize the stack of papers that travels with you to the lectern. Prowl through your brief case. Drum your fingers. Look at your watch and yawn. Take out a pen and edit your script. If you bring Post-Its with you, you can stick some on every page with notes to yourself (e.g., reminder to check the date of that deposition in Searcy, list of items to pick up at the grocery store on the way home). If you're lucky enough to have a pitcher of ice water at counsel table, pour yourself some and munch the ice. Bring another lawyer with you and exchange comments during your opponent's argument. Make faces when your opponent says something that hurts your case.

Conclusion

It is not necessary to do all the things outlined above to reach your goal of making the losing argument. A judicious mix of three or four of them might be all it takes. Nor have I set out all the ways you can make a perfectly ineffective oral argument. The appellate judges of this state could probably add a few more tips to those I've outlined above. They've been there, seen and heard that.

The appellate courts of Arkansas are efficient, but you can contribute to their expedient handling of your appeal. Help accelerate the appellate process. Make the losing oral argument.■

1. Coleen M. Barger, How to Write the Losing Brief, *The Arkansas Lawyer 10* (Spring 1996).
2. This technique is even more effective if your brief followed the advice of my other essay.

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