XI. Tips on Appellate Argument

Words are the tools of appellate advocacy. The ability to express the client's position beyond the brief and bring it into the courtroom is paramount. Generally, success in oral argument is predicated on preparation, because preparation allows counsel to be comfortable with their contentions and arguments, and thus be able to answer the most difficult or penetrating questions from the bench.[573]

A. Master the Facts

While the importance of oral argument is questionable, judges look for something more interesting than a repetition of the brief to change their preconceptions of the case. Therefore, counsel can best prepare for oral argument by mastering the facts and reading the record until it is ingrained in his or her mind.

It is imperative to have a complete understanding of the facts of the case, and to be able to recalibrate the facts if a judge jumbles them. Nothing is more undermining to an oral argument than an inability to be able to deal with the facts of the case in response to a question. As a starting point, it is important to establish an outline of what facts the court needs to rule in favor of counsel's client. Counsel must know what to say before standing up, and care must be taken to present the argument in a logical and organized manner. The court can, however, still throw a curveball to interrupt the flow of the argument, and often it will.

B. Predicting Questions

The primary purpose of oral argument is to answer the court's questions. In appellate argument, counsel must be prepared to deal with any question the bench may pose. Questions may be numerous, or they may be few and far between.

573 Of course, courts can choose to decide an appeal without allowing oral argument. Fed. R. Bankr. P. 8012(3).

Dealing with questions competently requires counsel to develop the following two skills: (1) the ability to predict the questions and (2) the flexibility to deal with such questions. Predicting questions involves identifying any difficulties the court may have in understanding or accepting counsel's contentions. By predicting such questions prior to argument, counsel will be able to reply persuasively to such questions. Counsel should seek assistance of other practitioners (especially those who have appeared in front of the specific court and judge(s)) to help formulate such questions.

In trying to predict questions from the bench, keep foremost in mind the familiar, commonsense concerns of the court: What is the case about? What holding would best serve counsel's clients? What rationale would justify the court's decision? How would the proposed outcome work, as a practical matter? Why should the court rule in the client's favor? Is there a policy argument to be made? What values and interests would be advanced by a favorable decision? Who would be negatively impacted by the court's ruling? How would it change current practices? Does the case need to be remanded to the bankruptcy court? What will the ruling mean in future cases? What are the limits of the proposed ruling? Does the court have the authority to grant the relief requested? Is there any adverse precedent that must be overcome?

Finally, remember that flexibility is indispensable to advocacy. Counsel must be able to shape their arguments in light of suggestions or questions from the bench. Thus, an argument should have some elasticity in the event that the court proposes alternative outcomes or resolutions.

C. The Argument

Once parties have announced their appearances, counsel traditionally begins the argument by stating, "May it please the court" or similar words, and then states the nature of the action.

The good advocate will make use of a structured introduction. This will tell the court:

- the remedy counsel seeks;

- the main issues underlying counsel's submission; and
- what counsel will seek to establish in relation to those issues.

Appellants should be prepared to recite a short statement of facts, although the court may ask counsel to dispense with that if it is generally familiar with the nature of the case and the disposition below. In addition, a roadmap of issues that you will address is helpful to the court and will assist counsel in returning to the argument after a question. If a brief raises many issues, oral argument requires triage. Hit the highlights and the most important issues. Appellees will want to highlight facts that set up their issue or any disagreement with points made by the appellant.

D. Tips on Speaking

1. Style

Speaking style and body language can have a significant impact on counsel's presentation to the court. Although some counsel choose to write out their entire argument word for word, counsel should avoid reading from a script. Rather, they should speak from notes or an outline. Counsel should make eye contact with the judges, address them by name when answering questions if possible, and speak at a normal conversational pace. In addition, they should pay attention to body language and keep a good posture, one that welcomes questions.

Remember that judges only have a couple of minutes to understand a case that counsel has been involved with and/or has been preparing for months. Speak distinctly and avoid the use of common fillers, such as "you know," "um" or "er." They are distracting at best, and hinder the clarity of the argument at worst. Tape-record or videotape practice sessions to determine whether "fillers" are used. If necessary, practice until you eliminate them. Finally, do not yell at the court or speak in such a small voice that the court cannot hear you clearly. Try to make the experience as conversational as possible, but do not be afraid to take a moment to collect your thoughts. Filling the silence is not the goal; making a cogent and articulate argument is.

2. Answering Questions or Opposing Arguments

Judges may interject questions to clarify, contradict or ask for more information or argument on a particular topic or issue. Counsel *must* be flexible. The appellee, in addition to presenting prepared remarks and answering questions, must also respond to the contentions made by opposing counsel and to questions proposed by the court during the preceding discussion with opposing counsel. The ability to deal with questions and think quickly on one's feet is an important aspect of appellate argument. Look forward to questions as providing an opportunity to persuade the court. Remember, however, that disagreement with one's opponent is not the end of an appeal. Counsel may point out flaws in the lower court's ruling, but should take care not to offend or attack the judge that issued that ruling.

Ultimately, appellate judges want the right result, and if a question indicates that a judge may have misread a case, overlooked a statute on point or is not aware of the latest authority, counsel should inform the appellate court of this in a respectful manner.

It is important to invite, rather than avoid, questions from the bench. Questioning from the court generally indicates what the judges consider important, and often the direction in which they may be leaning. Counsel should immediately answer questions when presented by the court, rather than promise to address them later. If counsel needs time to consider the question, it is appropriate to ask the judge to clarify or repeat the question. Do not interrupt the judge, however: In other words, stop talking while the court is talking to you. Listen to the court, and do not review notes while the judge is making an inquiry; the result of inattention is that counsel may answer a question very different from the one asked.

Most importantly, do not try to evade the question. Answer questions honestly and fully, no matter how potentially damaging they may prove to be.

3. Humor

Counsel should avoid the use of humor. Humor frequently runs the risk of being misunderstood as familiarity or a lack of respect. Humor from the bench, on the

other hand, is a different matter. While appellate judges may offer a humorous observation or question, attorneys should refrain from introducing jocular commentary and anecdotal stories.

4. Pauses

It is possible that counsel will be asked a question to which they cannot then provide an immediate answer. As noted above, it does no harm to take a moment to compose a response. Pauses for thought are more appreciated than fumbling to answer the question. Moreover, if counsel truly cannot answer the question, he or she should ask the court for an opportunity to file a supplemental brief to respond to the question. "Creating" an answer for the court weakens counsel's integrity, and the appellate court will know that counsel is being less than truthful.

E. Making Arguments

Counsel should not personally attack opposing counsel. Rather, arguments should be "de-personalized." Also, avoid the use of personalized language, such as "I believe" or "It is my opinion." The court does not want to walk in your shoes.

F. Preparation for the Oral Argument

Counsel, no matter how familiar with the case, the law or even the court, should practice their oral arguments. Even the most experienced appellate attorneys can benefit from at least one moot court before the actual argument, preferably in front of people who have read the briefs and are themselves experienced attorneys. If possible, try to practice in front of an audience that is unfamiliar with the more detailed facts and law in the case. This will assist in the educational component of presenting your case to the court. Especially if your case is at the district or court of appeals levels, the judges are not bankruptcy lawyers; thus, more explanation of the law and how it relates to the particular facts may be necessary. If counsel can tape-record or videotape the moot court, all the better; it will allow for a later, careful pre-hearing review of the mannerisms of the counsel making the argument, in addition to the benefits of a rehearsal.

G. Conclusion

Preparation and flexibility are the keystones to good appellate argument. Keep arguments and submissions clear and orderly. Remember that the goal is not to engage in ostentatious debate, but to persuade the court to rule in favor of the client.