

University of Ottawa Faculty of Law (Civil Law Section)

From the Selected Works of Hon. Gerald Lebovits

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Effective Oral Argument: 15 Points in 15 Minutes

Gerald Lebovits



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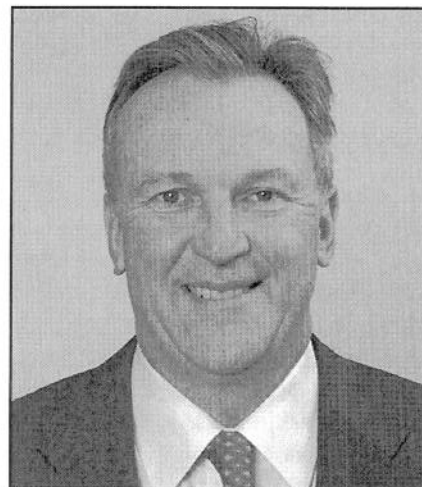
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THE PRESIDENT'S MESSAGE

My final "President's Message" must begin with the recap of our successful annual dinner at Marina del Rey on April 9, 2008, honoring Justices Paul Victor, Juanita Bing-Newton, Joseph Sullivan, and the new Clerk of the City of New York, the Honorable Hector Diaz. All spoke eloquently, humbly, and even humorously, particularly about each honoree's great contributions to the Bronx Courts. Over 600 guests, including Chief Administrative Judge Ann Pfau and First Department Presiding Justice Jonathan Lippman, were in attendance for this memorable evening. So many made this event a success, but kudos to perennial dinner champs, Lucille Barbato, Carlos Calderon, Harold Weisman, and Mike Ridge.



As we enjoyed the good company of so many of our friends and colleagues, the evening had a fitting end for me as I chauffeured the Honorable Bertram Katz and his wife to their home. It was almost thirty years ago that I first met Judge Katz, he a newly minted Judge and I a freshly hired Assistant District Attorney in Bronx County. As I've related to many of our young attorneys enjoying or even considering membership in our Bar Association, we are blessed with not only friendly people in the Bronx Bar but with many highly skilled lawyers and judges with whom we might bridge any divide at our Bar functions.

Of course, the sadness to relationships such as those we enjoy in the Bronx Bar occurs when one of our own is suddenly taken from us. The support shown in memory of the late Charlie Keeney resulted in nearly \$4,000.00 being raised for a suitable memorial to be unveiled in our Library this fall. Larry Piergrossi, Carlos Calderon, and Steve Baker have led the drive toward this satisfying response in Charlie's memory. We thank all of you for this and also for those of you who remember long-time Bronx Bar member and former Association President Robert Saltzman as he succumbed to ill health in April of this year.

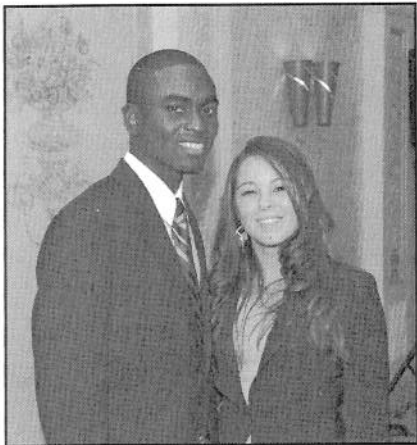
In the past year, I, as President, along with our Board of Directors, began to look beyond our periodic events and meetings toward our long term agenda. Our Leadership Council, in consultation with my friend and Fordham alumnus, the Honorable Denis Boyle, focused on the separation of the Civil and Criminal Bars with the opening of the new Bronx County Hall of Justice earlier this year. Thanks also to Marvin Raskin, Chris DiLorenzo, and newly elected Officer Mike Marinaccio for their leadership. On the Civil side, strides have been made on calendar delay through the efforts of Alan Friedberg, Bob Wolff, and Civil Court Committee Chair Bob Shaw. In this respect, I offer my personal thanks to Judge Pfau for her intervention on behalf of the needs of our Bar, and also for supporting the April visit and Court of Appeals session in the new courthouse. Our Matrimonial Committee, co-chaired by Veronica Mandel and Sergio Villaverde, also has been energetic and productive in addressing the needs of this vital part of our bar.

Our annual Law Day Program involving dozens of our members and Bronx Judges, provided insight as to the law and our judicial system to hundreds of

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Our Association is
deeply saddened by
the recent deaths of our
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ROBERT J. SALTZMAN



**EFFECTIVE ORAL ARGUMENT:
15 POINTS IN 15 MINUTES**

by Gerald Lebovits
Judge of the New York City
Civil Court, Housing Part,
New York County

The principles of a successful oral argument are the same whether the advocacy arises from a formal argument before a trial judge or before an appellate panel. The advocate's goal in either case is to win. To win is to persuade. Persuasion in oral argument comes from having a conversation with the court, from answering the judges' questions, and from offering the client's theme of the case in an informative and honest way by applying issue to law and fact.

Oral argument is exciting and nerve wracking. The stakes are high because oral argument counts, and not just in close cases. Well-written briefs count for more than oral argument in most cases. But oral argument counts for judges unfamiliar with the briefs or a law clerk's bench memorandum. Oral argument counts for judges who need help to shape the contours of the judicial opinion as it will eventually be rendered. Oral argument counts for judges who have not made up their minds pre-argument or who want support to change their colleagues' minds.

Oral argument counts because the advocate can use it to clarify the record, answer questions, and focus the court on the issues and argument that support the relief requested.

How much oral argument counts depends on the jurisdiction, on the particular judge or panel of judges, on the number and kind of cases the court will hear that day, on the amount of time allotted for argument, and on whether rebuttal is allowed and taken. An oft-repeated myth is that cases are lost but not won at oral argument. It is an illogical myth because if one side loses, the other wins.

Oral argument counts as winning argument when presented by a skilled, prepared practitioner. The skilled inform. They are flexible, ready on command to change their argument and adapt to the court's questions posed to them and their adversaries. They do not incite or insinuate. The prepared know the record, practice an important argument by mooted with colleagues, and prepare a short outline placed in a binder with cases, record exhibits, and key statutes. They do not wing it.

Many busy trial judges are cold. They are unfamiliar with the details of the case. New York and federal appellate courts are made up of hot benches. The judges and justices are ready for oral argument. They read the litigants' briefs in advance and study their law clerks' bench briefs.

Practitioners should get to the point and anticipate questions that will side-track a rehearsed presentation. Practitioners worry about having made a more effective argument after they left the courthouse than while in the courthouse. They should not worry unduly. Unless the judges tell you, “We disagree, but we’ll think about it”—a disheartening prediction appellate lawyers occasionally hear—the final opinion often bears little resemblance to the oral argument.

No practitioner should miss the opportunity to argue orally. To submit an appeal or a motion is to waive oral argument. Do not submit unless you represent the respondent or appellee and the appellant has submitted. The failure to argue means that you do not care. If you do not care, perhaps the judges will not care.

Cases are called according to the calendar, but the caring advocate will arrive at the beginning of the oral argument. That will enable the advocate to assess the court and avoid arriving late.

Most appellate arguments last 15 minutes, although they are longer or shorter depending on the court, the issue, or the presiding judge. Here are 15 pointers to guide the practitioner, from the novice to the seasoned.

(1) Say What You Want. Repeatedly stress the relief your client needs and seeks. The court cannot rule for your client if it does not know what your client wants. Nor can the court focus on an argument not put into context. Only the unfocused advocate discusses issue and fact without context. Never be afraid to say, often, “This court should remand for a new trial.” Or, “This court should dismiss the indictment.” Or, “This court should affirm Supreme Court’s grant of summary judgment.”

(2) Argue the Issues. A pro se litigant will begin and dwell on history, not all of it relevant. Thinking like a lawyer means dividing argument into issues, not communicating by narrative. Issue division leads to subdividing points by what will assure a grant of the relief requested if the court agrees with the client on the point. Ask yourself this: If the court agrees with this argument, will your client obtain the relief sought? If yes, that argument is a separate issue that the advocate should argue. Fact and law support the issue, but the advocate must argue the issue.

(3) Cut to the Chase. Clients want lawyers to throw in the kitchen sink. They want their lawyers to argue everything. But practitioners are not allotted the time to argue anything not critical, and judges do not have the interest to hear non-critical things anyway. Regardless what their clients tell them, practitioners must have the courage at oral argument to focus the court on two or three things at most. Practitioners should then discuss in detail those two or three issues.

(4) Focus on the Prize. Discuss only important things in your moments before the court. Your brief speaks for itself on the details and on the less critical issues. Do not argue issues not in your brief or your adversary’s brief. Do not raise in oral argument anything overly controversial, lest your argument excite opposition. Do not misstate the record or the law. The judges will tune out if you are caught, and they will hold it against you for a long time. Avoid hyperbole and characterization modifiers. Except, perhaps, in a serious criminal case, making a conclusory plea for “justice” will leave the judges unmoved. Do not overstate. The key to persuasion is understatement. Concede (but only if you must). Conceding enhances credibility. If you do not understand the judge’s question, ask for clarification. Do not guess, and thus risk guessing incorrectly.

(5) Organize by Importance. Threshold issues like statute of limitations go first. The important issues go next. The advocate should rank by importance the two or three issues to be argued. “Importance” is defined as what has the greatest likelihood of success. The most important argument goes before the second, and so on. If two arguments are equally important, the advocate should lead with the issue that offers the larger relief. In a criminal appeal, dismissing the indictment goes before securing a retrial; securing a retrial goes before reducing the sentence.

(6) Develop Theme. A good theme is what grabs a smart high school senior. It is not what such-and-such case said about so-and-so. Those things are legalisms that provide authority for a legal rule but do not justify adopting or retaining that rule. A good theme appeals to right and wrong. It is about what moves honest people to be fair and just. If you have a theme of your case, you will never get stuck answering a question. Argue your theme, and contradict the other side’s theme. Once you know your theme, develop it, and discard everything that does not relate to your theme or the other side’s theme. Then dwell on emotional themes without getting emotional.

(7) Provide Perspective. People understand things if they can experience them through those who underwent them. The advocate can make the judges identify with someone significant to the case, not necessarily the paying client, by telling a story when reciting the facts that support an argument.

(8) Start at the Beginning. At the very start, after you introduce yourself, give a quick roadmap of the points you plan to argue: “This case should be reversed for three reasons. First, . . .” That will assure your organization and the judges’ understanding. It will also focus the court to ask what it is concerned about and allow a side-tracked speaker to mention something important at least once—at the beginning, when it counts most. Do not begin with a lengthy recitation of the facts or some melodramatic point about what this case is really (allegedly) about. Advocates

have the court's maximum attention at the start. They should not squander the opportunity to persuade.

(9) Talk. Have a conversation with the court. Talk slowly; talking too fast is the novice's error. Be formal but not stiff. The court will appreciate a clever, original line if not drawn out, but do not be a stand-up comic. Do not be casual, but show enthusiasm and appreciation for the merits of your client's case. Cut your "ums" and "ahs" by saying them in front of a mirror 100 times. Do not lecture to the court on the basics of the law. Do not read. Especially do not read your brief or recite long quotations. You had the chance to speak without interruption when you wrote your brief. Oral argument is the judges' chance to ask questions. The advocate who welcomes a conversation will answer the judges' concerns without being accusatory, belligerent, defensive, loud, or strident. Imagine that you wrote an important letter to a decision maker of some kind. After getting your letter, the decision-maker invites you to talk about it. Will you just read your letter again? Will you read a prepared statement? Will you yell? Of course not. You will answer all questions and resolve existing concerns. Reading, which bores the listener, means losing eye contact. Maintaining eye contact while scanning the bench enhances your credibility, encourages the judges to listen to you, and lets you know whether the judges are getting your point.

(10) Know Your Place. Being respectful is smart advocacy. The speaker's place is to stand behind the podium when speaking and to rise when the court addresses you. Oral advocacy on appeal or before a trial judge in a formal argument is different from trial advocacy before a jury. The speaker's goal is not to distract. Hand movements, body swaying, and non-business attire distract. Make the judges listen to what you are saying, not what you are doing or who you are trying to be. The speaker's place, moreover, is to answer questions, not to ask them. Never ask a judge, "Does that answer your question?" You will know based on the court's comments and questions, or you will have to await the court's decision. If two judges are talking to themselves, keep going. Talk to those who are listening. Being polite is an end in itself. It is also successful lawyering. Do not, therefore, speak over a judge who is speaking, even if the judge interrupts you. Doing so is impolite, makes you unlikeable, and might cause you not to hear the judge's question.

(11) Respond. Answer all questions when you get them. Never say, "I'll get to that soon." Begin your answer with a yes or no. Then give your position. Then support your position with fact and law. The pro se does not speak that way. Only the trained lawyer does.

(12) Be Civil and Professional. Do not interrupt your adversary, talk to or cross-talk with your adversary, or make faces or gestures while your adversary or a judge is speaking.

Do not, in a personal way, attack your adversary, the judge below, or the judges before whom you are arguing.

(13) Timing is Everything. Watch the time. Try to end before the time expires. Best of all, end on a high note before the time expires. When your time is up, acknowledge it. If you are in the middle of a point, ask the chief judge or presiding justice to allow you to finish your sentence, and then say "thank you" and sit down. When the light goes on, you are on the court's time, not yours or your client's. Never give a canned conclusion. It did not work in law school moot court. It will not work in real-life advocacy.

(14) Rebut. Rebut if the court's rules allow you, as the movant or appellant, to do so. But rebut only if the following applies: You have something important and brief to say in response to what your adversary said, which you did not say during your argument, and about which the court did not question your adversary.

(15) ET, Don't Phone Home. Turn your cell phones and pagers off when you enter the courtroom.

Oral argument is rewarding and exhilarating. Effective argument requires lawyers to draw on all their forensic skills on their clients' behalf. The hope is that your 15 minutes before the court will lead you as the advocate to points above and beyond a mere 15—to advocacy in service of the law and society.

In addition to his judicial responsibilities, Judge Lebovits is an adjunct professor at St. John's University School of Law, where he teaches trial and appellate advocacy. For many years, he has also written a regular column on legal writing for the New York State Bar Association's Journal. The Advocate has asked Judge Lebovits to write four articles on oral and written advocacy. This is his first installment.

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