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Winning Oral Argument: Do's and Don'ts

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Winning Oral Argument: Do's And Don'ts

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Lawyers are society's best speakers. The speaker's goal is to communicate. Communication skills are essential for all lawyers, not just litigators. For litigators, oral argument – together with the preparation, research, and writing that leads to the argument – is the ultimate, formal way to communicate. Except, perhaps, when arguing before a jury, nowhere more than at oral argument, whether before a trial judge or an appellate panel, is communicating effectively so essential. Effective oral argument is rewarding. Consistent with the rewards of oral argument are the difficulties and challenges. The challenge of oral argument explains why lawyers are paid to communicate. The challenge also explains why the lawyer who speaks well – why lawyers who argue fact and law persuasively – can win for the client while at the same time benefitting society and the administration of justice.

Real oral argument before a trial judge or appellate panel differs from a law-student's Moot Court argument. Students work with a fact pattern. Lawyers work with a record they help shape or which was developed at trial. Students argue distinct points of law professors or their intramural Moot Court competition director created for them. Most student issues are academic, constitutional questions of first impression designed to be argued before the highest state appellate court or the United States Supreme Court. Lawyers take diffuse points and creatively weave them into issues. Mostly the issues are bread-and butter problems, sometimes with twists and turns but rarely of first-time constitutional dimension.

Students are graded or receive pass-fail academic credit to represent imaginary clients. Lawyers have real clients, and with real clients come real pressures. Students have abundant time to prepare and practice. Lawyers must balance their time based on many factors; lawyers in the real world sometimes have to wing it. Students are scored by Moot Court judges who critique to encourage them and enhance their skills. Lawyers' performance is never scored by student criteria, and judges almost never critique or encourage: except by example, judges judge, not teach. Students almost always work in teams; Moot Court competitions are designed to have two issues, one for each student speaker. Lawyers work in teams when they write their briefs; they rarely argue orally in teams.

The biggest difference between Moot Court and real-life advocacy, however, is not in any of the above factors: The biggest difference is that law-school Moot Court stresses style while real-life advocacy stresses substance. Moot Court graders are told never to grade on the merits; grading on the merits would be unfair because students do not pick which side they argue. In real life, all that counts is the merits. Real judges do not decide which litigant wins on the basis of which side has the better lawyer. The lawyer's goal in real life, therefore, is to tell the judge, "I'm just a country lawyer who can never do justice to the merits of my client's case." In Moot Court, the students must suggest to the judge, "I've been assigned to represent the worst pretend client, but don't you agree that I'm doing a super-great job in this lousy case?"

Flowing from the difference between style and substance is that some believe that law school Moot Court winners are witty, charming, and gentle boy and girl scouts, whereas winning litigators are Rambo lawyers who intimidate and crush. The reality is that winning litigators aggressively fight for their clients with undivided loyalty and pursue litigation as a marshal art, but they fight under the rules, and with integrity, because a good reputation and professionalism persuades. Professionalism for winning litigators means understating: It is the honest understatement, never exaggeration or bluster that persuades.

Beyond fighting for the client and doing so with professionalism are some specific ways to increase the chances of winning when speaking to judges, whether before a trial judge or an appellate panel, and some ways to increase the chances of losing. Here are some dos and don'ts of oral argument.

Ten Oral Argument Dos

Start strong. Begin with a roadmap in which you introduce yourself, your client, and the issues you will argue. You must state what relief you seek and, quickly, why you should obtain that relief. It is ineffective to begin with or dwell on history and givens, why the case is so simple or interesting, or why it is such an honor to appear before the court.

Argue issues. Law school trains people to think like lawyers. Thinking like a lawyer means explaining in simple, clear understandable English why you are right. The uninitiated will explain things by telling a story, perhaps in narrative form, and hope that the listener will figure it out. The novice will be better than the uninitiated and will talk about cases and statutes. The expert will first give the rule and then support the rule with authority and apply the authority to fact, understanding that what persuades is the rule and its application, not what this or that case said about such and such.

Limit your issues. Less is more, in oral argument as in everything else. Winning requires the guts to argue only those points that are likely to succeed. That means arguing only the strongest two or three, maximum four, issues, unless you are dealing with a real issue of first impression or a critically

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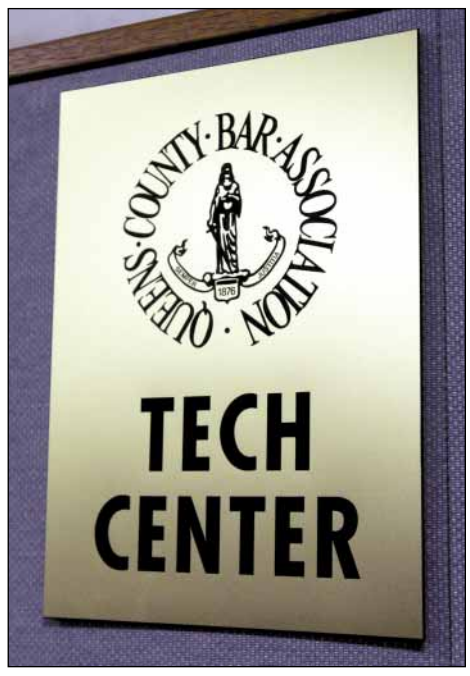
QCBA Celebrates Opening of New Tech Center and Pro Bono Office



BY MARK WELIKY

On the evening of September 22nd Queens Bar members celebrated the opening of QCBA's new Tech Center and new offices for our pro bono program, the Queens Volunteer Lawyers Project (QVLP). These new facilities are part of the newly renovated law library on the second floor of the Association building. Members were treated to a wine and cheese reception and a tour of the new facilities. Members of the judiciary, a number of QCBA past presidents and QCBA members were in attendance.

The newly revamped Tech Center has three new computer work stations which have access to Westlaw and the internet. A new laser printer is networked to the

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important case in which you must preserve the record for appeal or further appeal. Throwing in the kitchen sink or wasting time arguing contentious or irrelevant points distract the person you are trying to persuade and make that person believe that no argument you have is strong.

Argue your best issues first. The human mind expects speakers to begin with their strongest points and then to support these points with their best legal authority and their best applicable facts. Beginning with weaker points will tell the listener that your weak point is your strong point. You might even get derailed or run out of time and never reach your best issue. Vary from that format only to begin with a threshold argument like statute of limitations or when you must present issues in the order presented by the factors laid out in a statute or seminal case. If two issues are of equal winning weight, begin with the issue that will give your client the greater relief. Do not begin with rebutting the other side's points. You need to communicate that you are right because you are right, much more than you are right because the other side is wrong.

Apply fact to law. The judges might know the law, but they do not know your facts, and law without context is meaningless: Everything depends on the facts. When applying facts do not simply raise facts or even argue them: Apply them to the issue you argue.

Introduce; then amplify. Tell the court at every turn what you will argue. For example, "There are three reasons: First,...; second,...; and third... ." Then argue each in turn. That provides organization to speaker and listener alike, and it offers necessary, persuasive repetition.

Answer; then explain. You need to make it easy for the court to rule for you. One way to do that is answer with a yes or no, and then to explain why. Beginning the answer with a narration without first answering the question will frustrate the judge and possibly lead to confusion. The goal is to help the judge, not to speak for the sake of talking or preach for the sake of self-importance. Your client's rights are at stake – not your ego.

Make eye contact. Looking at the judge means not reading. It lets you know whether you are answering the judge's question, whether you are having a conversation, and whether the judge is listening. Looking at the judge – and before an appellate panel looking at all the judges without darting your eyes – forces the judge to look at you, and therefore to focus and engage, not bored or distracted. Besides, reading often means reading your brief, and reading your brief means wasting the opportunity to address the concerns the court might have after it has read your brief. This rule requires you to take to the podium only those things that are essential to your argument.

Be confident but restrained. Speak slowly, loudly (without yelling), and clearly. Maintain good posture; do not distract by slouching, leaning on the podium, or moving your body and hands; you want the court to listen to you, not watch you move around. Do not bang on the podium or make noises that a microphone will amplify. Be politely assertive, not comical or tentative. Argue emotional facts without arguing emotionally. Keep passion in check; be even-tempered. Project assuredness, but do not personally vouch for the validity of the argument or the honesty of the client. Stay within the four corners of the record.

Rely on visuals. A technique that always works well before a trial court and especially a jury, and sometimes also before an appellate court, is to use visual aids: Blowups of crucial evidence, diagrams, and charts. It is trite but true: A picture is worth a thousand words.

Ten Oral Argument Don'ts

Do not characterize or mischaracterize. The best argument focuses on issues, law, fact, equity, and public policy. The worst argument focuses on lawyers' making things personal. It will not help the court rule for you to attack, use biased modifiers, or impute motives. Stay away from the adverbial excesses like "clearly" and "obviously." Do not miscite the record or misinterpret a statute or case.

Do not debate. Effective lawyering means communicating by addressing the court's concerns. Answer questions in a respectful manner. You never know why a judge is asking a question. A judge might ask you tough questions, not because the judge disagrees with you, but, perhaps, because the judge is speaking to colleagues through you, because the judge wants to rule for you and needs to fill in a gap, because the judge wants to understand your point and learn, or, frankly, because the judge is mean, temperamental, and cantankerous. Stand your ground and concede what you should but only if and when you should, all without challenging the probing or even abusive judge. Never argue with a judge; if you are forced, say you respectfully disagree and move on.

Do not self-edit or worry. Many people correct themselves after they begin a sentence. It is better to fumble a bit than to repeat or start over. Starting over means making it obvious that you are nervous; if you are nervous, the judge will become uncomfortable and become distracted. Live in the moment; do not think about anything but where you are at that moment: That is the secret to the actor's success in remembering lines. In terms of style, it does not matter if you stumble from time to time. If you smile and are likable, pleasant, and honest, you will communicate, and the court will remember your point. If you do not know an answer, return to your theme, and you will always get the answer right while adding spontaneity and interest to what you are saying.

Do not cross-talk. Talk to the judge. Only the court can rule for you. Talking to opposing counsel, addressing points to opposing counsel ("I would ask the respondent... ."), and talking over the judge will score no points.

Do not over-cite or over-quote. Oral argument supplements the written brief or memorandum of law. Citing in detail interrupts the flow of argument and is boring. So is quoting anything more than a short part of a seminal case, statute, or contractual provision.

Do not ignore the other side. The effective advocate will know the other side's case. Do not stop after you have presented your side. Contradict, albeit with decorum, the other side's legal, factual, and policy arguments. Especially when you represent the non-movant or appellee, respond to what your opponent argued. Do not stick to a script.

Do not ignore your time. Keep your eye on the clock. End on a high note, even if you have a few remaining moments left to speak. When your time is up, ask the presiding judge to finish your thought or answer the question briefly, and then sit down. Do not give a canned conclusion.

Do not interrupt your adversary. Being civil and professional means not rolling your eyes, talking, or shuffling papers when your opponent speaks. Civility and professionalism also means not nodding your head if a judge asks a question with which you agree.

Do not forget policy and equity. To rule for you, a judge wants to know that doing so will help the good administration of justice, that a wrong will be righted, that evildoers will receive their just rewards, that the rule you propose will be fair and easy to follow in the next case. Law and fact trump policy and equity but should be stressed nonetheless, especially when the court has the discretion to weigh and balance factors and interests.

Do not expand. To help the court rule for you, you need to have a conversation in which you welcome the court's interruptions but in which you answer the court's questions concisely. Do not ramble. Get to the point, and make it count.

Conclusion

Oral argument is difficult but exhilarating. Oral argument affects cases. Cases, and not just close ones, are won and lost at oral argument. The advocate uses oral argument to correct misunderstandings, reinforce points, limit issues, rebut the opponent's arguments, and address concerns. Oral argument is an opportunity, never to be taken lightly, and always to be taken advantage of.

Editor's Note: Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, and an adjunct professor at St. John's University in Queens, New York, where he teaches trial and appellate advocacy.