Twenty Tips from a Battered and Bruised Oral-Advocate Veteran

by Sylvia Walbolt

A partner of mine was once arguing in front of an appellate panel when, suddenly, the lights went out and the courtroom was plunged into utter darkness. My partner heard "Counsel, continue with your argument." Unfortunately, his brain had "short circuited" in the dark, and he could not remember what he was saying—he could not even remember what case he was arguing. He stammered "Your Honor, I can't see my notes," and he remained silent for hours (minutes) until the lights returned.

He then finished his argument and returned to his seat. This panel rarely asked questions. When the chief judge of this local district court was on the panel and asked a question, it usually foreshadowed a reversal. The chief judge called my partner's name, and his spirits soared as he thought "The chief has a question; I have a chance to win!" He jumped back up, expecting to be challenged with a question going to the key issue in the case. Instead, the chief judge declared "Counsel, I want you to know that we're still in the dark about your argument."

The point is, you never know what may happen at oral argument, no matter how hard you have prepared. Here are some tips, from hard, cold lessons learned over many years of being beat up in oral arguments.

Get to the point right away. Start with your best point in your first sentence out-of-the-box. Don't try to build up to it. You may never get there. Never start with a basic discussion of the facts or the law.

Counsel for the appellee, the plaintiff Mr. Sullivan, in *The New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), began his argument to the U.S. Supreme Court by saying "this is an appeal from a jury verdict for the plaintiff," thereby reminding the Court that all presumptions had to be applied in favor of the jury's verdict. Years later, a justice told the appellee's counsel that this was the best opening the justice had ever heard while on the Court. It would have been a more gratifying compliment had the Court not reversed the jury verdict for the plaintiff 9–0.

Have a two-minute drill of what you must tell the court in order to win. It should be the crux of your position—the core of what the court itself would write to explain why you win. With luck, you can say it, before the questions come, at the very beginning of your argument. You also should be able to use it to answer a question or, at worst, to sum up your argument before you sit down.

We once had a two-hour hearing scheduled in federal court on a motion to certify a class action. The judge was running very late and ultimately sent word that, in one hour, each party would have two minutes to argue the motion to her. We boiled down our prepared argument to two minutes and rested (successfully) on our best precedent. Most cases can be similarly condensed, but it takes great discipline. Just assume in your preparation that the court may only give you two minutes to frame your argument, and figure out what you would say to win in those two minutes.

Always be prepared to address your weakest point. Even if the other side did not catch it, the court will do so at oral argument. Be especially prepared if there are any jurisdictional or standard-of-review issues in your case. Do not assume the appellate court will be so eager to correct the egregious error you have demonstrated that it will overlook those issues as mere technicalities. One federal appellate judge told a group of experienced appellate lawyers that one thing he discovered after going on the appellate bench was how seriously the judges take the standard of review. By the same token, be prepared to address any preservation of the record issues that may lurk in your record.

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Answer every question directly. Only then can you go on to explain why you still win. Do not tell the judge his question is not "relevant," as one lawyer did. The judge thinks it is, and that makes it relevant by definition.

I could not write an article on oral arguments without at least one story about my partner, the late Alan Sundberg. He was a very tall, physically imposing man, as well as a terrific oral advocate. On one memorable occasion, he was presenting argument to the Florida Supreme Court, on which he had previously served. He was on a roll when one of his former colleagues on the bench interrupted him to ask a question. Alan held up his hand to the justice in the classic policeman's "stop" sign and kept speaking. My jaw dropped, everyone on the bench laughed, and Alan finally turned to hear the question once he had finished the point he wanted to make.

Only Alan Sundberg could get away with that. The rest of us have to stop and respond to the question as soon as it is asked. It never is appropriate to tell the judge you will get to that later. Answer it immediately, even though it will interrupt your flow. The best course, if possible, is to weave your answer into your argument.

Sometimes you may not hear a question or understand it correctly. Being very hard of hearing, I once answered what I thought was the question, only to be met with a puzzled look from the judge. I said "I'm afraid I answered a question you didn't ask could you please ask it again." There have been other occasions where I did not even understand what the judge was asking me until someone else on the panel framed it in simple terms I could understand. As long as the court knows you are trying to respond, rather than being evasive, you should get there in the end.

Never assume a question is hostile. One of my partners, who was an appellate judge in his former life, was sitting on a panel when another judge threw a softball to a young lawyer. The lawyer struggled with the question, sure it was a trap. Finally, my partner said to the lawyer "just say yes."

By the same token, sometimes the question is downright hostile and you should take any help you can get in dealing with it. As a young lawyer, I was in the middle of my first oral argument to the Florida Supreme Court when the chief justice curtly asked me why the court even had jurisdiction over my appeal. Because I was a very young lawyer, I did not then know about my third tip (above) and did not have a clue what to say as the other side had not challenged jurisdiction, and I had never thought about that mere technicality.

Another justice took pity on me and said "Mrs. Walbolt, wouldn't you agree that this court has jurisdiction under our decision in [name of case]?" I had never had heard of the decision, much less knew what it held, but immediately I began to nod vigorously in agreement and climb in the lifeboat that had appeared miraculously. Everyone knew I was clueless, but that was the end of the questions about jurisdiction, and the court went on to rule (in my favor!) on the merits.

Concede only what you must to retain your credibility with the court. If it appears likely that the issue will come up during oral argument, consider raising it first and then explaining why you still win.

There are two wonderful stories about the legendary lawyer Buddy Segal. Making the point that "[l]awyers sell effectively by talking straight to judges and juries," one of Buddy Segal's partners related the following:

> In a case in which he was drafted at the last minute to make an argument in the Court of Appeals for the Third Circuit (and that ultimately went to the U.S. Supreme Court), Buddy started this way: "I'd like to withdraw the argument made in section III A of our brief. That argument was persuasive to my partners who wrote the brief, but it doesn't persuade me. And I'm not going to try to convince you of something that doesn't convince me."
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> In another case, Buddy was asking the Iowa Supreme Court to reverse the action of an administrative agency on a ruling within its discretion—an almost impossible task. Buddy began his argument by saying to the justices of that court, "Let's start with the recognition that everybody in this courtroom knows that I have only one chance in 10 to win this appeal—but let me tell you why I should." I would like to tell you he won that argument. He didn't. But they listened. They listened because he was talking straight to them.

Dennis R. Supplee, "Buddy Segal and the Art of Diplomacy," *The Philadelphia Lawyer* (Winter 2005).

Never try to blow smoke at the court at oral argument.

Most of us would never dare to do this, but the point remains a good one: never try to blow smoke at the court at oral argument. As Judge Mark Kravitz has pointed out:

> Lawyers are held accountable at oral argument. There is no place to hide when one stands at the lectern before the judges; it truly is a lonely spot. Counsel has no choice but to respond to the court's questions about aspects of the case that they might have purposefully ignored in the briefs.

Mark R. Kravitz, Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on their History Function and Future, 10 J. App. Prac. & Process. 247, 265 (2009).

Point out any concessions by the other side and build on them. Point out any of your arguments that the other side has ignored. I had an appeal in which we had relied at trial on a controlling (so we said) statute that required the result the trial court had reached. The appellant's initial brief did not address the statute. Our brief did so in depth, and the appellant's reply brief, again, wholly ignored the statute. So I went to the oral argument not knowing what the appellant was going to say about the statute. I still did not know after the appellant's opening argument because she did not address it, and no one on the bench asked her about it.

In my response, I pointed out, politely, that the appellant

had failed to address the controlling statute. I proceeded to discuss it in some detail. Only when the appellant arose in rebuttal did I hear for the first time what she had to say about the statute. Not surprisingly, it wasn't much, and the panel had been expressly forewarned that the rebuttal argument would be the first time the appellant might address the statute. The court held in our favor, resting on the statute. Had the appellant raised anything in her rebuttal warranting a reply, I would have stood up at the end and, politely and non-argumentatively, requested the opportunity to address the new argument made for the first time in rebuttal oral argument.

Know each crucial case backwards and forwards. You must know its facts, the actual holding, and what relief was granted. Read every case either party cited, and read it in its entirety, not just the head note that helps your case. There may be something else in the decision that some judge may ask you to address.

One of my partners was once arguing away when one of the judges asked him about something discussed in a decision that had been included in a long footnote string—citing to cases outside our jurisdiction that held in our favor on an issue of first impression in Florida. Precious minutes passed as he fumbled to frame an answer about a statement in a case he had never read. He swears he will never go into an oral argument again without reading every word of every cited case.

It also is a good idea to run a check of cases a few days before the argument to make sure nothing has come down that might affect your argument. I learned this lesson when I once discovered, to my horror, that the Florida Supreme Court had just disapproved an old decision of the Second District Court of Appeal that I had relied on as my principal authority in my appeal before the Second District. Better, however, to have learned it before the argument than during.

Which leads to a related tip—if you know your panel, check to see what cases or law review articles those judges have written on the issue before the court. One of my partners had a pro bono child custody appeal in which he represented a woman who had a child from birth to age five but was not the birth mother and had never legally adopted the child. In those days, that appellate court did not announce the judges on the panel until the day of the argument. On arrival at oral argument, my partner learned that presiding was a judge who had recently published a law review article titled "Quasi-Marital Children," in which he analyzed two recent Florida family law cases. Although the issues there were substantially different from those of the pending case, the judge had coined the phrase "functional parent" in his article, which my partner thought aptly applied to our client.

In his opening argument, my partner used that term to describe our client. Opposing counsel took umbrage, saying my partner was "making up labels" and that he didn't know where my partner got the label "functional parent." The presiding judge replied, "[p]erhaps he got it from my recent law review article on that subject."

The moral of the story—if a judge on an appellate court has written an article on any substantive topic that is remotely close to the issue in your appeal, you should know what is in that article. It goes without saying you should read any relevant decisions of your judge(s). I once had a hearing before a federal district judge on an issue he previously had ruled on in a decision we cited in our responsive brief. Midway through opposing counsel's argument, the judge interrupted him and asked "Haven't you read my decision on this issue in [case name]"? Unbelievably, opposing counsel was forced to admit to the judge that he had not read the judge's decision, and things then went from bad to worse.

Sometimes there is no way to know that a judge has some specialized knowledge. One appellate lawyer arguing an issue about expert testimony in a products liability case used an analogy based on *The Joy of Cooking* and told the panel that what happened in this case was like baking a cake and not having the recipe. It turned out one of the judges was a gourmet cook who immediately rejected the analogy and used up valuable argument time by explaining why it was inaccurate.

Be prepared to answer a question with "I don't know." A friend of mine was once watching an appellate argument in which a lawyer responded to a question by saying "I wasn't trial counsel." Frowning, the judge said "That's the wrong answer, counsel." It is always the wrong answer because you are expected to know the record better than trial counsel. A simple "I don't know," followed by a request to be allowed to submit a short letter providing the answer within 24 hours is the right answer.

Sometimes the question will be about a matter that is outside the record. Say so and tell the court if you can answer the question, if the court still wishes you to do so.

Always answer the other side's substantive points. Go for the jugular immediately, and demolish their arguments. Do not ignore them and simply advance your own arguments. The court has to resolve the case in the light of the arguments on both sides of the issue.

Do not go down rabbit trails. You do not have to address every argument, or even every misstatement, if it is unimportant in the total scheme of things. Stay focused. Do so even if a judge becomes unfocused and asks questions on peripheral matters, as Justice Harry Blackmun famously did in asking counsel whether the drug store (in Justice Blackmun's home town) that sold the drug at issue was the one located at such and such corner. "Who cares" is not an appropriate answer, but "I do not know" is.

Answer questions the court asks of opposing counsel. When it is your turn, answer the court's questions to the other side, especially if your answer is different, and pick up on these questions and the other side's answers to advance your argument. Support your answer with a record or case cite whenever possible. Go where the court wants to go, even if that is not where you had planned to go. It is the court's decision, and you want to help the court reach the right decision—that is, the result you seek.

Politely and professionally correct any material misstatements by the other side. Be prepared to do so with record or case citations. Explain why the misstatement is important to the issue before the court. Do not respond to any personal attacks on you, your client, or the trial judge—and do not retaliate with personal attacks against the opposing party. Stick to the issues.

Acknowledge and apologize for misstatements. Then move on to why you still should win. Never ignore it if the other side or the court does not pick up on it, however innocent it was.

In a Supreme Court argument by then Solicitor General Elena Kagan, Chief Justice John Roberts called her on what he viewed as a shift in the government's position in its briefs

and its failure to address a certain point in sufficient detail. She responded "if we didn't emphasize it enough, I will plead error." She issued a simple apology and returned to the point she wished to press. Good advice for all.

One experienced appellate lawyer reminds us of the danger of over-arguing, which can lead to misstatements that the court will catch. During oral argument as appellant's counsel in a malicious prosecution case, he noted the plaintiff had never moved to dismiss the criminal prosecution against him for want of probable cause. One of the judges immediately pointed out that no such motion exists. Counsel, a civil lawyer, quickly conceded the point, stressing it was not germane to his argument. As he later told me, the judge "graciously resisted the temptation to ask me 'Then, why did you say it in the first place?' for which 'Sheer stupidity, your Honor,' would have been my only truthful answer."

Do not respond to any personal attacks on you, your client, or the trial judge.

Learn in advance any customs of the court in which you are appearing. The New Mexico Supreme Court has a lovely custom that any out-of-state counsel, even though already admitted pro hac vice, is introduced to the court by a local lawyer at the time of oral argument.

Learn how to address the judges. One of Justice John Paul Stevens's law clerks tells the story of an argument before the Supreme Court in which a very nervous lawyer arguing in the Court for the first time repeatedly referred to the justices asking questions as "Judge." After being told by then Chief Justice William Rehnquist that it was Justice [Anthony] Kennedy and Justice [David] Souter who had asked the questions, the lawyer called Chief Justice Rehnquist "Judge." Justice Rehnquist sternly said "Counsel is admonished that this court is composed of justices, not judges." Justice Stevens took pity and interjected "It's OK, Counsel. The Constitution makes the same mistake."

By the same token, always double and triple check the time and location for the oral argument and always arrive early. One of my partners had an argument in an appellate court in another city. About a week before the argument, he got a postcard saying the time had been changed from 10 a.m. to 9 a.m. There were three cases set to be heard at 9:00 a.m. on that day, and his was scheduled to be first. Because his opposing counsel had not yet arrived, the court decided to hear the other cases first. Both were completed, however, by about 9:30 a.m.

The panel looked out and saw that my partner now was the only person sitting in the courtroom. He reminded the court that it had just recently changed the time of the argument, and perhaps that accounted for why his opponent was late. The presiding judge, who knew my partner had traveled a long way, directed him to come up and present his argument.

From the start, Judge A was quite hostile to my partner's arguments, asking very pointed, slanted questions. Judge B was considerably more receptive to his arguments, lobbing him softball questions and helping him out with his responses to Judge A's questions. Judge C remained silent during my partner's presentation.

About 10 minutes into my partner's argument, opposing counsel and his client walked into the courtroom. Judge B, who recognized him immediately, told him to "come on up." The counsel quickly learned that the time for the argument had changed but explained that he had not received the notice. Judge B told him, "Counsel, don't worry, you have not missed much. Let me bring you up to date. Judge A has been siding with you, I have been siding with your opponent, and Judge C has yet to take a position. So why don't you go ahead and present your argument." To his credit, the opposing counsel did not miss a beat, was not flustered, and he presented his [winning] arguments. But he no doubt gained more gray hairs from this experience.

Some of my own gray hairs came from an experience that occurred before an argument I was making for the first time in one of Florida's intermediate appellate courts across the state. I arrived at my hotel the evening before, only to discover while unpacking that I had failed to pack the skirt that went with my suit jacket. In fact, I had failed to pack any skirt at all, and I could hardly appear before the court in the jeans I was then wearing. Luckily stores were still open. I purchased a new suit, and all went well the next morning. The young lawyer who had come with me was shocked at my lapse of memory, but it never happened again, to either of us.

Know the facts of your case inside and out. Judges know a lot about the law. What they may not know as well are your facts. So it is critical for you to know the facts, good and bad, cold. Judge Alex Kozinski said it best in his own inimical way: "There is a quaint notion out there that facts don't matter on appeal—that's where you argue about the law; facts are for sissies and trial courts. The truth is much different. The law doesn't matter a bit, except as it applies to a particular set of facts." Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. REV. 325,330 (1992).

Be prepared, therefore, to support any crucial fact. Never make a factual statement you cannot support with a record cite.

An accomplished appellate lawyer tells of a civil rights case in which opposing counsel for the appellee cited a page in the trial transcript that he asserted contained testimony creating a jury issue as to liability. The appellant's lawyers had the transcript at counsel table and, in rebuttal, pointed out that the statement opposing counsel had cited was contained in a question, to which the answer was a denial. Opposing counsel went home with his tail between his legs, and the court promptly reversed his jury verdict.

Never do a split argument. Well, hardly ever.

Never give up, however hostile the panel seems to be. Press your position. That is what oral argument is for.

Never feel you have to use all of your time.

Always finish with a bang. Never end by saying "if there are no further questions" or by telling the court what it should do (affirm, reverse) without tying that requested relief to the substance of your argument. If the court does not know the relief you seek by the end of your argument,

you should be ashamed. Judge John Godbold was always surprised by how many lawyers "could not respond when asked how they wanted the court to rule." David A. Webster, *Judge John C. Goldbold—Remembering a Wrestler,* Eleventh Circuit Historical News, Vol. VII (Spring 2010).

Never make a factual statement you cannot support with a record cite.

One of the best appellate lawyers I know tells this story about her first appellate argument when she was a second-year associate. Her firm had taken the appeal on a pro bono basis for a pro se plaintiff who had claimed the local power company had substantially overcharged her. When the power company produced the records of her power usage showing the charges were correct, she argued the company had snuck into her house, taken her bills, forged new bills, broke back into the house, and substituted the forged bills. Based on the "cold record," the plaintiff seemed to be asserting an incredible story.

Not surprisingly, the senior partner who had taken the case sent my friend to present the appellate argument (it is a long story why he took the appeal in the first place). Although very nervous, she presented the best argument she could, while the panel sat silent. When she concluded, there was only one question: "Ms. [client's name], why in the world would the power company want to do this to you"? After listening to this budding appellate lawyer's argument for 15 minutes, the court thought she was the pro se client! So make sure at the start that the court knows who you are and what relief you are seeking for whom. Then you can end substantively and end strong.

The most important lesson of all is to be prepared. There is no better way to be sure you are as prepared as humanly possible than to subject yourself to a mock oral argument before some folks who are completely cold to your case other than from the briefs. Being prepared is better than being a great oralist. It also is better than being well-dressed. One appellate advocate appeared for argument in a beautiful custom-made suit. Unfortunately, he was not well prepared to argue, causing one judge to comment to another "Better dressed than equipped."

No matter what happens in your oral argument, it is not the end of the world. You have simply joined the legions of oral advocates who have made bloopers and dropped routine fly balls during oral arguments. One day you will laugh about it. Or write an article about it.