MAY IT PLEASE THE COURT

ORAL ARGUMENT TECHNIQUES THAT GET RESULTS

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The main point of oral argument is not to argue. It's to establish credibility; to get at least a majority of the panel members to believe in *the speaker*. Once they believe in the speaker, they're ready to believe in his or her argument.

There are two main ways to establish credibility: (1) preparation and (2) answering the court's questions. Sounds simple, but in practice it may be less so.

1. Preparing for the Hearing

Success at oral arguments depends on preparation. Credibility comes from knowing the law and the facts of the case better than anyone else in the courtroom. Once the panel members have identified which attorney that is, they are ready to place their trust in his or her arguments and adopt them as their own reasoning.

There are three appellate arguments in every case: (1) The argument you planned to make coming to court; (2) the argument you actually made in court during the heat of battle; and (3) the argument you wish you would have made after the fact. That may suggest that planning one's argument is pointless, since you'll end up making a different argument in court anyway.

Nothing could be further from the truth. The planning process is crucial to surviving the heat of battle. Only with preparation do you know, for example, when to stick to your guns in spite of heated questions from the bench, or when to abandon a line of argument in favor of another one.

Plans may be worthless, but planning is priceless.

Readings the briefs is an obvious part of preparing for oral argument. But in doing so, it's easy to fall in love with one's own arguments and summarily dismiss the other side's. After all, you wrote those arguments, and now that you read them again you realize just how clever they are.

Be wary of this. Love of one's own argument is not going to do you any favors come oral argument because the appellate panel does not have the same inherent love of your arguments. They don't have your investment in those arguments; an investment that comes from spending countless hours, often late at night, doing research and reediting the briefs for the umpteenth time.

So you have to try to start from a blank slate. That's not always easy to do, but it's also not impossible.

One way is to continually ask yourself "Why" and "So what?" as you read your own arguments. These short, simple questions can be utterly disarming if thrown at you cold during oral argument. Nothing takes the wind out of your sail quite like having presented a two-minute argument on your main point, only to hear "So what?" from one of the panel members. Asking yourself those kinds of questions as you reread your briefs will at least give you a fighting chance to answering them during oral argument.

When reviewing the other side's arguments, fight the urge to be hypercritical. Recognize that you have an obvious bias to reject everything your opponent has written. Give your opponent the benefit of the doubt you never would give him or her in open court. If you do, you might find that your opponent actually makes a salient point or two. Then set out to counter those points at oral argument—if the opportunity presents itself, that is (meaning, don't get so focused on countering your opponent's points that you forsake your own argument).

2. Effectively Using Your Precious Minutes

a. Connect with Your Audience

The point of oral arguments is to persuade. You can't persuade in a vacuum. It requires a connection between the speaker and the audience. Without that connection, the oral argument becomes a lecture or sermon, neither of which is particularly persuasive.

The goal of oral argument should be to engage in a dialogue with all members of the appellate panel. That requires two things: (1) willingness to talk about what the panel members want to talk about; and (2) a level of comfort with your overall case, not just the issues you consider to be the main issues.

Willingness in this sense should go all the way to abdication. Your role, both in brief writing and at oral argument, is to guide the court through the record and the law to reach the "right" outcome from your client's perspective. Don't abdicate that role at oral argument. Whenever possible, try to steer the dialogue back to the points you'd like to focus on.

Connecting with the panel in this way is an art, not a science. It's difficult to describe exactly what it takes, since it depends so heavily on the personality of the speaker and each member of the panel.

But while it's difficult to list the do's of connecting with the audience, there are a couple of don'ts that deserve mention:

- Not answering questions

Questions from the bench are an opportunity, not an interruption. You *want* the panel to ask you questions. They are a window in into what the panel considers important, and they give you an opportunity to build rapport with the particular questioner.

From the panel's perspective, an unanswered question means that judge will have to find the answer somewhere else. That hurts your credibility and the judge's trust.

- "This is a simple case"

This is particularly lethal in arguments to the highest court in a jurisdiction. Those courts typically have discretion to select which cases to hear. They're likely to select cases they deem significant and deserving the attention of the highest court. They're not likely to accept a case that they see as "simple".

So by telling the panel that your case is "simple", you've accomplished one of two things, or perhaps even both: (1) You've attacked the court's intelligence for not recognizing this case as a "simple" one; and/or (2) you've illustrated to the court that you don't fully understand your own case. Either is a killer to your credibility.

- Not telling the court what you want them to do

The author once visited an *ex parte* courtroom that displayed a simple yet effective sign. It read:

WHAT DO YOU WANT THE COURT TO DO?

This sign was presumably there because the *ex parte* commissioners were visited by litigants, many of them appearing *pro se*, who jumped right into their argument without ever actually telling the commissioner what they want him or her to do.

That mistake is not exclusive to *ex parte* courtrooms. It's repeated in courts across the state all the way to the Washington Supreme Court. It may be perfectly obvious to you what should happen in this case. But that does not mean it's obvious to the members of the court. Take a few seconds early on to tell the court what you want them to do. Don't leave it up to the panel to guess.

If you want the court to let the lower court's decision stand, tell them that they should affirm. If you want another day in court, tell them to reverse and remand for further proceeding. The panel might get there themselves even if you don't tell them, but your chances of actually getting what you want increase immeasurably if you actually say it out loud.

b. Accept Responsibility for Successful Communication

It's your job to make yourself understood. It's not your audience's job to try to understand you. Don't blame your circumstances, no matter how daunting, if your message is not getting through.

This has a number of components.

- Focus on your audience

Watch the panel members faces as you speak, and try to make eye contact. Respond to the signals they send you. For example, if it looks like a panel member is waiting for a pause in your argument to ask a question, give him or her that pause, and perhaps even expressly invite the question—"Justice Smith, did you have a question?"—and then address that question right then and there, regardless of where you're at in your argument.

Do not invite a question, and then dismiss it by saying something along the lines of: "I'll answer that when I get to the next point in my argument". (This also applies to uninvited questions, by the way.)

Try to make eye contact with *all* of the panel members, not just the ones who seem friendly to your arguments. That's not always easy; some panel members tend to look down throughout the argument. That could be a sign of disinterest, but not necessary.

Keep looking for the opportunity to make eye contact, even with the judge who seems uninterested. For all you know, he or she is listening and going along with what you were saying. If, say, five minutes later that judge looks up to ask a question, but you never look his or her way, you may have missed a golden opportunity to cement that judge's vote.

- Don't complaint about the obstacles you face

Sometimes, we don't get a fair shake. That's just the way it goes. Accept it and make the best of the situation.

For example, let's say you planned to leave 4 minutes for rebuttal, but your opening argument ran over by 2 minutes because one of the panel members had a seemingly endless series of questions about a point you considered minor. To make matters worse, the courtroom is approaching 100F because the A/C stopped working, and there's road work going on right outside the courtroom making it hard to hear what's being said. Not an ideal situation by any stretch of the imagination.

Still, the answer is not to complain about it. If you've noticed that it's 100F and noisy, so have the judges on the bench. They probably don't like the situation any better than you do. They will, however, respect they attorney who just swallows hard and does the best of the situation under the circumstances.

c. Create the Perception of Credibility and Trust

Speak to the court with respect, but without trying to sound like a lawyer. Use your normal English, keeping in mind your settings.

One way to accomplish that is to imagine yourself having a discussion with the panel members somewhere you tend to be comfortable—for example, at your favorite coffee shop over a cup of coffee.

Also, be sure that whatever you say is true and accurate. Talk only about what you know. There will be clues if you try to fake it, both verbal and nonverbal, and you lose credibility.

If you don't know the answer—because it was a truly unanticipated question in light of the written arguments—say so and offer to submit additional briefing. If you don't know the answer to an *anticipated* question, however, you probably didn't prepare well enough and it's too late now to make up for it.

d. Use Audible Organization

An introductory roadmap can be the difference maker, especially when the briefs are lengthy. Tell the panel what you intend to talk about, and in which order. ("I intend to cover three points: (1) standard of review; (2) the trial court's interpretation of this contract using the context rule; and (3) the award of attorney fees".) Then set out to follow that road map.

But don't get too fixated on your roadmap. Remember that you're there for the panel members' benefit, not the other way around. If the panel wants to talk about a different issue, that's what you'll be talking about, while always looking for ways to get back to your road map.

Likewise, if you intended to spent most of your time on issue (2), but the panel monopolizes your time with questions on issue (1), go with it and adjust your arguments on issues (1) and (3) accordingly.

e. Use Visual Organization

Demonstrative exhibits are just as useful in an appellate court room as in a trial court room. There is no need to go overboard in this regard. Old-school poster boards works well.

Combine the poster boards with handouts of the same parts of the record. Then arrange with the courtroom bailiff to have them handed out to the panel members as your case is called. If you're lucky, the panel members will put your handouts with their copies of your briefs, which means there're there when the panel discusses your case afterward.

Some appellate lawyers use Power Point presentations with great effect. That takes a lot of skill, however. Make sure you know how to operate the machinery (cables, projector, etc.) as well as the software. If you have any doubt about this, go old school. You don't want to waste your

precious time dealing with technical difficulties. Not only will it reduce the amount of time you have to make your arguments, it'll likely kill your credibility.

f. Keep it simple

Keeping it simple takes courage. It takes knowing what to include and what to leave behind. In a sense, it's the next step in the decision-making process you made when you wrote your brief. There, too, you had to decide which available arguments to include and which ones to discard. In preparing for oral argument, you now have to pare it down even more.

This can be daunting, but it's crucially important. You're better off fully developing your arguments on one point than cramming in three points and not having enough time to develop any of them. A well-developed argument on one point can enhance the credibility of all your arguments, including the ones were you rested on your briefing. And a poorly developed argument on several points can undermine your credibility—not just on the points you raised at oral arguments, but on all the points you made in your brief.

Try to limit yourself to three points, maximum. In many appeals, one or two points is more realistic. If you find yourself making four, five points or more, go back to the drawing board.

One tool to keep it simple is to employ what's sometimes called the Mother Rule. This rule presumes you have a mother of average intelligence, but without a legal education. If your mother asked you what your case is about, what would you tell her to make her understand?

This exercise forces you to keep it simple so that a layperson, untrained in the law, can understand what your case is about and, more importantly, why your side is right. That understanding is the foundation for persuading those who *are* trained in the law to cast their vote for you rather than your opponent.

g. Sit Down

When you're done, sit down. Stop talking, except to thank the court, and go to counsel's table and sit down—even if you have some time left. Afterthoughts or repetition to fill the remaining time indicates a speaker isn't certain he or she has finished. These usually cost more than the add, since they tend to reduce credibility and trust.

"Done" in this context means either (A) you've said all you planned to say or (B) you're out of time. In either case, thank the court for its attention then sit down.

3. Strategies to Survive the Hearing

a. Research the Panel

Whenever possible, try to find out who will be on your appellate panel and read their opinions in the area of your case. If you find a relevant opinion, look for opportunities to use it at oral arguments.

In this regard, concurring and especially dissenting opinions are often more useful than majority opinions. A judge writing a majority opinion sometimes has to revise their opinion to achieve or maintain a majority vote. A judge writing a dissenting or concurring opinion, however, often times has the luxury of saying precisely what is on his or her mind.

b. Answer Questions Directly

Answer questions as soon as they are asked, even if the question relates to a different topic than the one you were talking about. Do not dismiss the question by suggesting you'll answer it in a few minutes when you get to that topic. Adjust your planned argument accordingly. Answer the question, and then go back to what you were talking about. Or, depending on the situation, use the question as a segue into your arguments on that topic.

Use rebuttal to answer questions that were asked of your opponent, especially if the opponent's answer seemed less than satisfactory to the questioner. Starting your rebuttal with a brief answer to that question can be a tremendous builder of credibility and trust because it shows (A) you were paying attention and (B) you care about what the panel cares about.

c. Know the Record

Regardless of whether you were trial counsel or just brought in for the appeal, you're expected to know the trial record. An appellate judge asking about something in the record that happened at the trial court level will not be impressed by an appellate counsel saying, in effect: "I don't know, Your Honor, I wasn't trial counsel." If it's in the record, you should know.

4. Conclusion

Oral argument is a time to build credibility. You are there primarily to answer the panel members' questions, not the other way around. The panel members are not there to listen to your pre-planned argument. That may be how it goes if the panel proves cold, but ideally your argument will be a back-and-forth dialogue between you and as many members of the panel as possible. At least, that should be the goal.