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# Appellate lawyers' version of high wire act: Oral argument

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SPRINGFIELD — Judges on reviewing courts often describe oral argument as their opportunity to have "conversations with counsel," the start of the court's deliberative process on most cases and sometimes even a peek into the minds of the judges deciding them.

Handled well, the hearings provide lawyers with golden opportunities to make their cases forcefully and convincingly. But it's not an easy task, as both reviewing judges and appellate lawyers will attest.

Most, but not all, agree with the observation that it is easier to lose a case during oral argument than to win it, raising the stakes in an often stressful situation.

"I don't think the quality of oral argument is very high, to tell the truth," said 7th U.S. Circuit Court of Appeals Judge Richard A. Posner.

Although there are some "excellent people" who appear before the federal appeals court, Posner said many inexperienced attorneys are easily rankled by the intense questioning by him and his colleagues.

"Some lawyers are terribly afraid of answering questions, because they're afraid it's a trap and that their answer is going to be treated as a fatal concession. So they fence and they evade, and that, of course, annoys the judges," said Posner, himself one of the reasons many unseasoned lawyers fear arguments before the 7th Circuit.

But the federal appeals court isn't the only Illinois venue where lawyers can expect to be peppered with questions.

Several state appeals judges take pride in their examinations, and even the once-sleepy Illinois Supreme Court has become more active during oral arguments in recent years.

And those experiences pale in comparison to the grilling most attorneys receive when appearing before the U.S. Supreme Court.

Illinois Solicitor General Gary S. Feinerman said he always prepares for "an extremely hot bench" when going before any appeals court.

Veterans of the process say lawyers should welcome such "hot benches," because it means the judges are usually interested in what the attorneys have to say.

"It's not that you're imposing stress on the lawyer," said 4th District Appellate Justice James A. Knecht, who is also the president of the Illinois Appellate Lawyers Association.

"It is rather that you are applying stress to the framework of the argument to see if it is structurally sound. It is not an academic exercise where you're testing the lawyers to see if they're really as sharp as they think they are. It is instead a testing of the idea," he said.

The Bloomington judge said attorneys often don't appreciate the full effect that oral arguments have in shaping the law.

Most practitioners want to know whether arguments have ever changed Knecht's vote on a case (he said they have), but more often arguments alter the path that judges take in arriving at their conclusions, he said.

Often, oral arguments will show why the court should adopt one analysis over another; a forceful presentation can also prompt a panel to thoroughly address issues it might otherwise have given short shrift, Knecht said.

Gino L. DiVito, a former 1st District Appellate Court judge and Knecht's predecessor as head of the appellate lawyers group, said there are several other benefits to holding oral argument.

He said the practice speeds up disposition of cases by ensuring that all judges focus on a case in time for oral argument. The process also ensures that judges hear aspects of the case that they might otherwise overlook, added DiVito, a principal in the Chicago firm of Tabet, DiVito & Rothstein LLC.

"One of the greatest arguments is that it's the only public thing the Appellate Court [or any reviewing court] does," he said. The ceremonial nature of the proceedings helps assure lawyers and the public that their side is taken seriously by those in power.

"When I have appeared before a panel that clearly has looked at the briefs and understands them and asks appropriate questions, it's ice cream in the summertime. It's wonderful because it shows the system is working, even if you get a bad result," DiVito said.

But in part because of the ceremonial nature of oral argument, judges are often perturbed when attorneys cast aside their questions or, worse, talk back to members of the court.

Illinois Supreme Court Justice Robert R. Thomas, who championed a high court initiative to promote civility among lawyers, said he was surprised that even a "small percentage" of attorneys behaved rudely to his colleagues.

"I don't think this court really lords position over the attorneys," he said. "But there is position, right? There is authority. I mean, this is the Supreme Court."

Likewise, Judge Ilana Diamond Rovner of the 7th Circuit said one of the most exasperating responses lawyers give to judges is: "That's not the issue."

"That's just an enormous mistake," Rovner said. "Whether it is or isn't, it is at that moment in time."

In fact, all of the appellate lawyers and judges interviewed for this story stressed the importance of answering questions from the bench directly, concisely and courteously.

## Answer the question

It seems simple enough, but balancing the need to address the court's concerns while still getting your message across is one of the most difficult and most important challenges of oral argument, they stressed.

A judge's reasons for asking questions, especially ones that seem easy or irrelevant, are not always readily apparent.

"Very often you will get the most intense questioning from a judge who agrees with you. Sometimes lawyers and their clients walk out of a courtroom thinking, 'Oh boy! He was skeptical of where we were coming from,' " said Chicago attorney Stephen M. Shapiro.

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Shapiro, a former deputy U.S. solicitor general who is now a partner at Mayer, Brown, Rowe & Maw LLC, said those initial reactions aren't always accurate.

"You know, they have to think through the legal rule they're going to announce and make sure it makes sense in lots of different future situations," he said.

On the other hand, lawyers often must answer questions while making sure not to lose sight of their own arguments.

Sometimes even a friendly question can be harmful if it takes away time without letting the attorney return to her message, said Benna Ruth Solomon, the City of Chicago's chief assistant corporation counsel.

That's why building connections between answers and your message is "the single most important device you can use," she said.

Posner called it the "critical skill" for appellate lawyers.

"If the lawyer, having answered the question briefly, then elaborates his answer in order to bring another point he wants to make, that's not going to bother the judge," he said.

But sometimes, Solomon said, judges aren't interested in returning to the lawyer's points. In those cases, she said, it's important to respond to the judges' concerns, even if it means you don't get to discuss your prepared points.

"Whatever it is you came to say is not as important as what the judge wants to talk about," she said.

When describing the "all-American oral advocate" in his book "The Supreme Court," Chief Justice William H. Rehnquist described how his ideal attorney would handle questions from the bench.

"She has a theme and a plan for her argument but is quite willing to pause and listen carefully to questions. The questions may reveal that the judge is ignorant, stupid or both, but even such questions should have the best possible answer," he wrote.

## Keep it simple

But those themes or plans that Rehnquist mentioned should be very simple.

Solomon said lawyers in her office only figure on making two or three points in any oral argument. And sometimes even that proves to be a challenge.

"Three is ambitious," she said. "But when we have practice, we have two points with a third ready at our fingertips."

Time constraints and judges' questions often prevent attorneys from covering much ground during oral argument, but the hearings give counsel the opportunity to show the court what the key issues are, said James R. Thompson, who worked as an appellate lawyer long before he became a four-term governor.

"The purpose of the oral argument, it seems to me, is to get the court's attention and focus on the real important issues in the case," he said.

That's a sentiment shared by those on the bench, as well. Illinois Supreme Court Justice Thomas R. Fitzgerald said the ability to focus on key points distinguishes the most effective oral advocates.

"The lawyers who seem to give the best arguments are the one who are able to find the most important issues in the case and argue those issues…. I think there is a real art in identifying the issues that are the ones that give them the best chance of success," he said.

On a related note, Shapiro, an author of a treatise on practicing before the nation's highest court, has long suggested that lawyers who argue before the U.S. Supreme Court should rely on only two or three previous cases when appearing before the justices.

*'It is not an academic exercise where you're testing the lawyers to see if they're really as sharp as they think they are. It is instead a testing of the idea.'*

It's a strategy he learned from 7th Circuit Judge Frank H. Easterbrook when both men were in the solicitor general's office, Shapiro recalled.

"He said the court is more interested in reasoning and common sense and practicality and explanation than it is in reliance on legal authority. The reason for that is appellate courts have broad latitude in applying previous precedent," he said.

"Most of these appeals are close cases that technically could be resolved one way or the other. So to persuade the court, you've got to be ready to answer questions about precedent, but your principal emphasis should be on the reason why you should win as a practical matter," Shapiro said.

Simple explanations also help reviewing judges who deal with hundreds of cases on all sorts of topics, Posner said.

Attorneys often "assume too much knowledge on the part of the judges" about the facts in their case or the specialized area of law it deals with.

"Especially in oral argument, the lawyer has to communicate with the judge on a very simple level," Posner suggested.

## Time management

Clock management seems pretty straightforward, but plenty of lawyers are still caught flat-footed when the red light signals the end of their time.

It didn't take long on the Illinois Supreme Court for Thomas to realize the value for lawyers of keeping track of time. During Thomas' first year on the court, one lawyer began his argument by announcing he would split his time with another attorney.

A heated discussion ensued, so by the time the yellow light came on — indicating that the side only had three minutes left — the first lawyer was still at the lectern. Finally, he turned the argument over to his co-counsel, who approached the lectern and gave his name just as the red light came on.

Then-Chief Justice Moses W. Harrison II interrupted, Thomas recalled, and told the second lawyer, "Your time is up, but finish your thought."

"And that was it," mused Thomas.

Some courts enforce their time limits more stringently than others. Many courts will allow lawyers to keep talking as long as they are answering questions from judges.

Shapiro, the Mayer, Brown attorney, said a panel of the Philadelphia-based 3d U.S. Circuit Court of Appeals kept him on his feet for two hours after the allotted time in order to get answers to their questions.

On the other hand, the U.S. Supreme Court is "extremely rigid" in adhering to its time limits, which is a long-standing tradition. Shapiro said there's an old saying that Chief Justice Charles Evan Hughes, who served in the 1930s, "would cut a lawyer off in the middle of the word 'if' when time ran out."

Many appeals courts, such as the 7th Circuit and the U.S. Supreme Court, require counsel to reserve time for rebuttal. Lawyers who request rebuttal but then burn up all of their time also irk judges, especially if they later ask for additional time for rebuttal. The best way to prepare for such procedural variations is to listen to other arguments before the same court before your own case, Shapiro said.

Even though oral argument routinely tests the skill of lawyers, the judges who hear the presentations often appreciate the effort.

Rovner recalled that, as an assistant U.S. attorney, she used to get nervous before her arguments before the appeals court she now sits on. She stressed that attorneys should be prepared to face a panel full of tough questioners, but she said she does try to be "gentle" when possible in oral argument.

"I full well recall the way I used to walk into the courtroom trembling…. I'd walk in trembling and walk out trembling," she said.

Fitzgerald, a long-time Cook County trial judge who joined the Illinois high court in 2000, listed the traits he likes to see in lawyers who appear before the court.

"It's always obviously [helpful] in the art of delivering the argument to be able to do it in such a way that it is concise yet complete and to deliver it in the manner that can hold the attention of people," he said.

"It's a very difficult skill to develop — easier to criticize than to do."

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