What *to do* Before, During, *and* After Oral Argument:

Averting Disaster

By *Joshua Yount* [1]

Presenting an oral argument in the Seventh Circuit (or any other court of appeals) can be a challenging task: in the Seventh Circuit, the composition of the panel is not disclosed until the morning of argument; you frequently receive only ten minutes to argue, and even then, questions from the panel can consume most of that time. You often cannot predict the questions and sometimes not even the areas of questioning. And if that is not bad enough, sometimes a judge will ask a question that reveals the central weakness in your arguments, or worse, ask a question you simply do not know how to answer. Just averting disaster at oral argument can be an achievement. Fortunately, there are a few techniques that can you help not only avert disaster but advance your case.

Getting Prepared

Thorough preparation, of course, is essential to a successful oral argument in the Seventh Circuit. The judges, with the assistance of their clerks, will have read the briefs, examined the record, and independently researched the merit of both sides' arguments. They understandably will be annoyed and disappointed if you have not done at least those things yourself.

Your preparation should also include reading every case cited in the briefs, for it is usually difficult to predict which case will be the outcome-determinative precedent for each judge or which cases opposing counsel will raise at argument. And you cannot restrict yourself to the cases cited in the briefs; the judges certainly do not. Especially important is a search for new authorities from, at a minimum, the Seventh Circuit and the Supreme Court. You should submit any new authorities before oral argument by way of a letter under Fed. R. App. P. 28(j), and must do so if you intend to argue from them (*see* Cir. R. 34(g)). Similarly, when you review the record, do not just familiarize yourself with the appendix materials, also go through the entire appellate record at least once. You should aim to be expert in both the law and the facts pertinent to your case. Indeed, a good way to approach your task at oral argument is to think of yourself as an expert brought in to inform a group of generalists about the specifics of your case.

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Two additional pieces of preparation are vital. You absolutely must ensure that the jurisdictional statements establish that both federal subject matter jurisdiction and appellate jurisdiction exist (*see* Fed. R. App. P. 28(a)(4) and Cir. R. 28(a)). And you must double-check that the appendix contains the required items, especially the lower court orders and opinions (*see* Fed. R. App. P. 30(a) and Cir. R. 30(a), (b)). If you find a problem, submit a revised brief or appendix post haste. The Court not infrequently takes lawyers to task for deficient jurisdictional statements and appendices (*see BondPro Corp. v. Siemens Power Generation, Inc.*, 463 F.3d 702 (7th Cir. 2006) (sanctioning lawyers on both sides of the case $1000 jointly for violating Circuit Rule 28)). Nothing will disrupt an argument more than an accusation that you have failed to comply with the jurisdictional statement and appendix rules. And, at least with respect to a deficient jurisdictional statement, being the appellee does not protect you from the same treatment (*see* Cir. R. 28(b)).

Getting Started

When the day of oral argument arrives, get to the courthouse early and stay in the courtroom. Not only will this give you a sense of your panel (assuming yours is not the first case), it will ensure that you are present when the presiding judge calls your case. Sometimes, prior arguments conclude sooner than expected, and even a short wait for counsel will likely bother the panel members. When you come to the podium, bring a copy of the briefs and appendices, in addition to your notes. Although you probably will not need them, the briefs and appendices can help you if you get a question about where something is in your brief or appendix.

So where do you start your argument? Many attorneys start with the facts or the lower court decision or proceed seriatim through the arguments in their brief. This is generally a mistake and, depending on your panel, will arouse varying degrees of annoyance. You will be met with a variation of the, "we've read the briefs counsel and know the facts" repudiation. This is an inauspicious way to start and can throw a lawyer so off track that he or she never quite recovers. In most cases, the better practice is to start with your very best argument. Although lawyers are constantly told not to burden the briefs with make-weight arguments, they continue to do so. The practice is not only not helpful, it is harmful.

As the appellee, you should normally start with your best argument unless the appellant has failed to satisfactorily or correctly answer a question that the panel plainly appears to consider important or outcome-determinative. If you have the answer, do not make the Court wait to hear it. The same goes for the appellant on rebuttal. Indeed, rebuttal time should be used only to clarify any previous, unsatisfactory answers of your own and to respond to queries inadequately answered by the appellee.

In arguing, avoid reciting the facts. They are in your brief, which the judges have read. Most cases in the courts of appeals are straightforward applications of precedent and principle. Of course, the key facts must be brought to the panel's attention – but when you discuss them it should be in the context of demonstrating how the facts show that the lower court did or did not commit reversible error. Do not read at length (more than a sentence) from a brief, a case, a script, or any other material. Not only does Circuit Rule 34(g) forbid such a practice, it is unpersuasive and wastes everyone's time. The Seventh Circuit wants a conversation, not a speech. Restrict yourself to the high-points of your arguments. Not only is this sound advocacy, but the inevitable constraints of time require that you be selective. Save the details for responses to questions from the panel members. Consider also focusing your argument on the precedent or two that you believe provides the best promise for victory. Sometimes it is helpful to feature an attack on your opponent's theory of the case. Doing so can shift attention away from problems on your side and put your opponent on the defensive.

Getting Out Of Trouble

Frequently, you do not have a chance to make much of a presentation in the Seventh Circuit before the questions start flying. The hypotheticals, counterfactuals, and leading questions often quickly follow. It should be noted parenthetically that it is unwise to tell a judge that his hypothetical does not match the facts of the case and then to try to move on. Judges want answers to their questions, and a sound answer to a hypothetical that, to you may have no relationship to the case, can win you a vote. Be prepared for exploratory questions that have little direct connection to the case or ask about some decision, statute, or doctrine not briefed. How do you do this? Prepare, prepare, prepare! Handling such sustained questioning can be difficult, but approaching the questions as an expert on the facts and law of your case can often help you retain or regain some control of the argument.

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You also should not assume that seemingly hostile questions from one or more judges mean that you cannot persuade either the judge or the panel. You cannot necessarily tell a judge's view. Many of the Seventh Circuit's judges will slip into the Socratic method to test the limits and implications of your arguments. And hostile questions, even if they fairly bespeak a dim view of your position, may not represent the views of the other panel members. For precisely such reasons, do not assume that, because your opponent is having a tough time, you have won the case or will have an easy time when you stand up. Sometimes aggressive questioning of your opponent only signals that judge's concerns either about a particular point or the correct outcome of the case.

When you are under tough questioning, be alert for the friendly softball question from another panel member. Sometimes a judge will give you a question that supplies the answer, in his or her view, to a question another judge is pressing you to answer. Look for these questions and do not fight them. They can provide an excellent springboard for moving away from a difficult subject.

More frequently, of course, no help will be forthcoming when you are having trouble answering a question. In such circumstances, do not dodge the question. Answers like "my client should prevail on another ground" or "those facts are not the facts in this case" are not responsive, will frustrate the questioning judge, and may be treated as conceding that the answer is unfavorable to your client. Just collect your thoughts and give your best answer. If you truly do not have an answer—for example, when you are unfamiliar with the legal authority on which the question is based—say you do not know and ask for leave to submit a short supplemental brief or letter on the question following the argument. Such a response will often put an end to the unproductive line of questioning and, if you are granted leave to file a brief, will give you time after argument to figure out your position. A supplemental brief or letter is also a potential solution if you make an improvident concession or other material mistake at oral argument and do not realize it until after the argument (audio recordings of which are posted on the Seventh Circuit's website within one day). But with respect to post-argument supplemental briefs or letters, keep in mind that the Court is not obligated to grant leave to file the brief or letter and your opponent will have a chance to respond.

Keep in mind that F.R.A.P. 28(j) also permits a party to advise the Circuit Clerk by letter of pertinent and significant authorities that come to a party's attention after oral argument but before decision. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited. Prior to the 2002 amendments to the Rules, Rule 28(j) prohibited any argument in the letter. Enforcement of the restriction was lax because of the difficulty of distinguishing statement of the reasons for the supplemental citations from argument about them. As amended, Rule 28(j) leaves it to the author of the letter to decide what to say about the cited supplemental authorities. Note, however, that the 350 word limitation – which was increased from 250 – will be strictly enforced.

Following these tips cannot promise an easy oral argument, much less victory on appeal. But they will help you avoid common pitfalls that can make oral argument a disaster.

Upcoming Board *of* Governors' Meeting

Meetings of the Board of Governors of the Seventh Circuit Bar Association are held at the East Bank Club in Chicago, with the exception of the meeting held during the Annual Conference, which will be in the location of that particular year's conference. Upcoming meetings will be held on:

Saturday, December 2, 2006
Saturday, March 3, 2007

All meetings will be held at the East Bank Club, 500 North Kingsbury Street, Chicago at 10:00 AM