Oral Advocacy – Tips and Techniques

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Overview

- The Rule of the Three Cs: be Courteous, Candid, and Concise
- The Basic Structure of Oral Arguments on Motion and Appeal
- A Lesson Learned the Hard Way

The Rule of the Three Cs

Courtesy

- At all times, be courteous to the bench, the other side, and court staff
- Lawyers are not combatants – they are their clients' counsel and officers of the court
- Best to tone down the rhetoric here: don't overstate your case (as being perfect and the only conclusion) or ridicule your opponent's case (as being ridiculous, deeply flawed, misleading, or worse yet, lying)
- Want to leave the impression of preparedness, confidence, and professionalism – proper courtroom decorum and manners often display all three
- When dealing with rude or overblown counsel, less is more. Contrast inflammatory rhetoric with cool courtesy – it makes the other side look bad, harms their credibility, and makes you look good. Don't be baited into a fight.

Candid

- Be open and scrupulous with the record. As an adjunct to that (and to being concise), have a mastery of the record
- Concede points when appropriate – this will build credibility, and is the hallmark of a good advocate
- Try to illustrate to the court where the guideposts are. For example, "If taken to its logical extreme and you assume x, then yes, my client would lose; however, this is why our situation is different from x"

- Answer the court's questions head on. Don't dodge. Handle when asked, if at all possible
- Key is determining what the court sees as your weakest point and looking for opportunities to meet that head on in order to persuade them in your favour. Don't pretend they don't exist or ridicule them – treat your weaknesses fairly, deal with them, and show how they can be overcome or why your client should win despite them
- If being pressured by the court to concede, or if being badgered by the court on the position taken, state "Those are my submissions, your Honour" or "I don't believe I can be of further assistance to the court at this point"

Concise

- Process of reading, reviewing, summarizing, understanding.
- Organization and distillation are key. Should have thorough understanding of the facts and the governing legal principles. Understand the case inside and out. Make it simple.
- Focus on three major issues. In oral argument there is rarely time for more. Further, there will rarely be more than three dispositive issues.
  Some famous lines that illustrate the importance of brevity:
    - Court once replied, when I advised that I had six points to make, "Do you have one good one?"
    - A Judge once said, "No competently appointed judge of the Superior Court would make more than three reversible errors in one case."
    - "No one ever won or lost a case on the third point raised in reply."
    - "Multiplicity [in issues] hints at a lack of faith and confidence in your major grounds of appeal, and may dilute and weaken a good case, and will not save a bad one."
- Focus on the winners and the key dispositive issues. This will take confidence.
- Prepare an outline of submissions; it should keep you focused. Do not simply read Factum or submissions to court (but know where you are in your Factum should the court ask). Attempt to have a dialogue with the bench. Attempt to engage them on winning issues and your weakest parts. But do it quickly. Get to the heart of it as soon as possible, and then be done.

The Structure of an Oral Argument

1) **Opening**
   - This often has two purposes. To provide an outline of what you are going to cover in your submissions and to provide an opening whereby you frame the issues in the case in a way that is persuasive to your client's outcome.
   - Example of persuasive framing: The court below found the statutory provision in question clear and unambiguous. It has spawned over twenty-seven different motions and rulings regarding its interpretation over the years on a number of issues, and has spawned differing legal outcomes at the trial level on the very issue in this case. It is not clear and unambiguous, and when one employs the necessary interpretive aids it reveals that the issue should be resolved in the insured's favour.
   - "Say what you're going to say, say it, and then say what you said."

2) **Issues: Points At Issue**
   - The recommendation here is to limit the number of issues you are going to address in the manner suggested above. This is one area where you may well be able to simply read from your Factum where you will have taken the time to frame the issues concisely and appropriately for your case.
   - Framing the issue. Controlling the narrative. Example: a concrete ledge was present in the shallow end of a pool as a "safety ledge". The question, based on framing the issue, became whether it was negligent to have installed a concrete "safety" ledge.

3) **Facts**
   - This involves a review of the evidence and facts that are key to the disposition of the issues on appeal. Can't stress enough the importance of the facts. In the early stages of my career, I was enamored with the law and I thought the law would dictate all outcomes. Experience (through observation, personal experience and readings) has taught me that two major factors drive most outcomes: the facts as presented, and the perceived rightness or justice as between the parties. The law is the vehicle, the facts determine the destination.
   - The Court of Appeal once stated: "We know something of the law; we know nothing of your facts".
   - It is sometimes a good idea to read a key passage from the judge's finding of fact below or from the evidence. As has been said, "Most judges were

former trial counsel. Suddenly the drama of the courtroom comes to life when some dramatic passage of the evidence is read."

- Do not overstate or mislead when summarizing the facts.

4) Law and Application of Law to Facts

- Review general legal principles and cite text that is in support, or leading case law.
- If available, leading appellate authority for general legal principles, plus one or two cases that are factually similar.
- If there is a leading appellate authority on all fours, then lead with that; otherwise, better to speak of the applicable legal principles and have at the ready the appropriate support.
- Lead with the logic of your argument which will be supported by the cases. Show the court that what you are saying makes sense. Text writings and academic writings are often helpful here because they very often address the subject not just from the aspect of whether or not it is covered by stare decisis, but whether it makes sense.
- In citing a case, tell the court why you are citing the case and the proposition it stands for. Sparingly reading passages from the cases can be effective when they sum up a generally accepted proposition of law or provide well worded support for a fairly novel one.
- Should keep in mind that judges are less interested in learning what results flow from analogous extensions of principles stated in cases decided years ago; they are more interested in reaching a result consistent with what is fair and right in the particular circumstances before the court.
- "It is usually more persuasive if the argument is based on an applicable principle of law rather than a mere recital of precedent." Again, less is more here. The most recent appellate decisions; and the lower court case or cases closest to your facts, is probably all you need.
- While reviewing the law you will weave in, demonstrate how the principles relate to the evidence such that you will turn, issue by issue, through a statement of the legal principles and how they apply to your case.

5) Conclusion

- Will often bookend or mirror your opening. Often best to focus on why justice and fairness as between the parties dictates the outcome your client wants.

Leads to my last point to make and maybe the most important:

Last Tip: Lesson Learned the Hard Way

- More convinced than ever that effort should be focused on convincing the court that finding for your client is the right and just thing to do in the circumstances; not just a result that the court may be reluctantly compelled to by jurisprudence.
- Example: In a judicial bias appeal, jury had found plaintiff 75% to blame. Issue was judicial bias. Reviewed law extensively on principles regarding judicial bias and the great reluctance with which a court is to overturn a jury verdict. Determined to find how every ground of negligence or finding made by the jury was well grounded in the evidence.
- It was a car accident; left turn case. Jury found left turning vehicle 25% to blame.
- When court asked me whether the split seemed wrong and whether it should be 75%/25% the other way I glossed over it indicating I didn't necessarily think so but that it didn't matter; the jury was entitled to come to the conclusion that it did, and there were facts that supported their conclusion which was amply grounded in the evidence.
- In retrospect, this was a mistake. It was clear the court thought the outcome was wrong and they wanted to overturn it.
- I would have been better off focusing on how the jury's verdict was in fact just and appropriate based on the evidence before them in that case. Not just supportable, but fair and just – why, on the facts, it made sense that the jury found the left turning vehicle only 25% to blame.
- I believe it is always best if you can point out to the court how it is the right or the just outcome that the appeal be disposed of in your client's favour.
- Another example: Excluded driver endorsement. Focus not on the harshness of the application to an owner who may be liable without coverage, but rather on the importance of the excluded driver endorsement to the industry and the fact that, without it as an underwriting tool, the risk would just not be written and insurance could not be purchased for owners who have bad drivers in their household.
- The just outcome would be to uphold the integrity of the endorsement.
- It may not always work, it may not always be appropriate, but I would always look for ways to try to find your client's case to be seen as the right or just outcome in your oral argument before the court.

Conclusion

- In short, remember to put yourself in the judge's position and think about what would make you want to decide for your client – that deciding for your client would be the right or just thing to do. Remember, also, the three Cs of advocacy: be courteous, be candid and be concise.
- I must apologize if I did not obey all of my own rules.