

The Art of Appellate Advocacy - Braving the storm of oral argument

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One of the most telling observations about oral argument that I've heard anyone make came from a complete stranger who approached me immediately after the conclusion of a lively debate I had with seven judges who, to put it mildly, were a little skeptical of the trial court decision I had volunteered to defend on appeal. The question was whether the trial judge reached a bit too far in concluding that a property owner, whose building played a pivotal role in the illegal drug activity that had virtually consumed the surrounding community, could be ordered to destroy the structure.

The man who came up to me had just seen me argue that the decision should be affirmed because the trial judge did not, as the other side whined, trample any constitutional rights or, indeed, do anything improper in ordering the property owner to "clean house."

Now, I know what you're thinking, but before you look down from your royal high horse and roll your eyes at the thought of the position I was advancing, which I will admit might seem a tad extreme to a reasonably educated and civilized person, I'd like to point out that this was no ordinary nuisance I'm talking about. The property housed a "grocery store" that was renowned from within and beyond the neighborhood for the sale and consumption of drugs, which were purchased from "employees" behind the counter and other dealers outside, and then resold or used either on the spot or shortly afterwards in the immediate vicinity. By the time the litigation to get rid of this place had been initiated, community residents made nearly 500 drug-related calls to the police over a four-year period complaining about needles littering the street, drug users loitering on the steps of nearby properties, and cars blocking traffic while their occupants stopped to buy and consume drugs. As a testament to this property's notoriety, virtually the entire community association came to watch the argument, hoping to see the property owner get his just desserts. This place was so bad that a public interest group filed an amicus brief supporting the government. I had to read the brief twice to make sure I wasn't hallucinating. I was very impressed with all of this, especially the amicus support, but the Court of Appeals made pretty clear during the oral argument that it was not to be mistaken for the Israeli Supreme Court and that bulldozing private property, while perhaps acceptable in some parts of the world, was not a remedy whose time had come in Maryland. The questions escalated as the argument progressed, to the point that I practically got whiplash responding to inquiries coming in rapid-fire succession, sometimes almost simultaneously, from all sides of the bench. I had braced myself, however, for a much fiercer reception than the one I actually encountered, and so I left the courtroom feeling rather pleased that I could do so without the need to be carried out on a stretcher or taken to Shock Trauma.

It was at this point that a very large man, who was obviously a neighborhood resident — the double-extra-large community association t-shirt was a dead giveaway — came up to me, put his huge arm around my scrawny shoulders, and said, as he hugged me tightly, "You're brave, man!"

At first, after I concluded he wasn't going to eat me, I thought that he was kidding. Brave is living in this man's neighborhood and staring down the nightmare that gave

birth to the case I just argued. Brave is refusing to be cowed by drug dealers. Brave is sitting in the front passenger seat of a car being driven by my 16-year-old. Even with a helmet. But standing in front of a bunch of judges and trying to answer their questions?

I realized, however, that my new-found friend was not joking, and as that realization sunk in, so did his words. None of the arguments that preceded mine that morning was nearly as spirited, but oral argument can be a contentious experience even when the bench is not particularly active. On a not-so-slow day, it can be a battleground that, while not as physically dangerous as this man's neighborhood might be, will nevertheless make you long for a bulldozer. Not to go after the judges, but to seek shelter from and fend off the oral missives that rain down from the bench.

Other strategies

Although the best offense is a good defense, other strategies may be necessary if you can't get a bulldozer past security and into the courtroom. Ducking behind the podium and fleeing the courtroom are two other options, but you probably would not be able to exercise either of these more than once in your career, so neither quite qualifies as an effective (or especially positive) approach to braving the storm of oral argument. Fortunately, other alternatives exist.

While much has been written on the subject of oral advocacy, I would place near the top of the list 10 rules that John W. Davis, who argued more than 140 cases in the U.S. Supreme Court, offered in a speech, entitled *The Argument of an Appeal*, that first appeared in the *American Bar Association Journal* in the fall of 1940, and that was reproduced more recently in the Fall 2001 edition of the *Journal of Appellate Practice and Process*. Davis' 10 "commandments" range from his suggestion that you try to change places with the court to see how you would react to the argument if you heard it for the first time, to my favorite commandment, i.e., sit down. Beginning next month, I will discuss Davis' 10 rules of oral argument and offer suggestions on how to implement them.

If you have an appellate argument in the meantime and are looking for immediate advice, I have one tip to give: Be brave. Even if you lose the appeal, you may still get a hug out of it.

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