



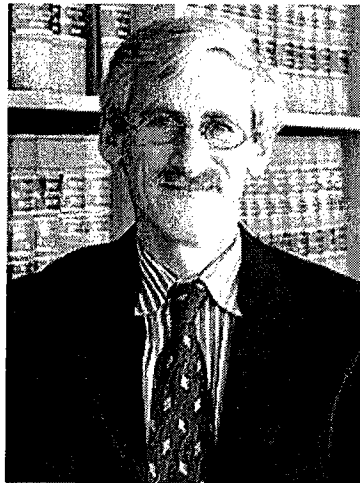
The Art of Appellate Advocacy - Questioned authority

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The first time I read John W. Davis' sixth commandment of oral advocacy, i.e., thou shalt rejoice when the court asks questions, I silently mused to myself that "rejoice" was the last word to come to mind whenever one of my law school professors would pluck me from my safe haven of anonymity to ask me questions in front of the whole world about whatever the case or legal principle of the day was. Others may have felt like rejoicing when called upon to participate in a Socratic tug of war with someone in possession of decades, if not centuries, of superior legal knowledge, but not me, pal.

Especially in my two-semester civil procedure class, where I spent the entire year avoiding eye contact with Professor Bernie Auerbach by, among other sophisticated and mature tactics, hiding behind the students in front of me whenever the death rays from his lethal gaze came within 10 feet of where I was sitting. Each day in that class I would silently pray, kill anybody but me, please, which apparently he did by the end of the second semester when no one in my immediate vicinity showed up for class, making me the lone survivor to be called upon to answer a series of questions about a dead cow.



By the time I was finished, that cow was looking pretty good. After I responded that the railroad would be presumed responsible for the cow's death if the cow was found on the train tracks within five feet of a breach in the railroad's fence, but that the farmer would be presumptively negligent if the carcass was within five feet of an open gate, the professor slowly proceeded to torture me by asking those classic slippery slope follow-up questions involving progressively longer distances.

Knowing that there was no correct response that any human could possibly give to the last of those questions, I finally confessed my ignorance and accepted my fate that I was going straight to hell, but, wanting company on the way, I asked my tormentor, "What do you think?"

These and countless other law school experiences reinforced a Pavlovian reaction to questions from authority figures I had initially acquired when interrogated by kindergarten teachers, school principals, and police officers. But after passing the bar and arguing my first few appeals, I quickly came to realize that — unlike the occasional sadistic professor encountered by some of us in our short careers as law students — judges, as Davis points out, do not ask questions to humiliate or embarrass counsel. At least most judges. Their job is to decide cases and, if we are lucky, to ask questions that provide us with the opportunity to eliminate any doubts or answer any concerns they may have about our arguments.

A chance to win

No one likes to lose, but losing is especially painful when the judges ask no questions. A decidedly hostile question is better than no question at all. You might not like what you hear, but it gives you some insight into the judge's thought process, unfavorable that it may be. More important, you can respond to a negative question, even if the judge asking it may not seem to like what you have to say. So rejoice when you are asked a question, even if at first blush it does not appear that there is much to celebrate, because it may be the only chance you get to save your case.

Once the party begins, consider the following observations, the first of which is that not every question asked during oral argument will be antagonistic or a trap for the unwary. Judges ask questions for various reasons, not the least of which is to advance the sometimes undisguised purpose of looking for answers to concerns that one of their colleagues may have. Decisions of the Maryland appellate courts tend to be more unanimous than those fractured opinions the U.S. Supreme Court is famous for issuing, but our judges don't see eye to eye all of the time. One of them may be trying to convince the other by throwing you a softball, so always be prepared for friendly questions that you can use to your advantage.

Remember also that all you need to win your case is a vote from most of the judges on the bench before you, so don't lose hope or give up when you engage in an exchange with one member of the court who does not seem to be buying your answers. Your responses may make points with the silent majority when they do not appear to persuade the judge asking the questions, but do not rule out the possibility that even that judge will cast a vote in your favor. Some judges routinely ask both sides tough questions to sharpen the issues and/or to be plain onery, but unless they invoke that "we're not going to decide this case" rule (Md. Rule 8-604(d)), their vote to affirm or reverse could be a vote for your side.

Avoid keeping the judges in the dark with your responses and answer questions "yes" or "no" whenever possible before you provide an explanation. Be sure that you also answer hypothetical questions substantively and not by responding, "That's not this case." The judges know what your case is and ask these questions to test the validity of your position and to see how far it extends in slightly or very different circumstances.

You can say that's not this case after you answer the question, provided you give enough information for the court to understand why the rule you espouse is not adversely affected by the hypothetical laid out by the court.

Be engaged. Use questions and weave them into your argument. If you represent the appellee or the respondent, you have the distinct advantage of going second, so try to make notes about two or three questions asked of the other side that you can use as part of your affirmative presentation.

Listen to the question carefully. If you do not understand it, say so, or if the question needs clarification, repeat it back to the judge. And if you do understand the question and don't know the answer, just admit it.

But don't ask the judge what he or she thinks. Trust me. You don't want to know.

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