

The Art of Appellate Advocacy - Running for the jugular

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You may be the kind of person who relates less to the thought of running a marathon than to the idea of walking to the kitchen to eat a pint of Ben and Jerry's, but you should know that lawyers who argue appeals have a lot more in common with long distance runners than they might otherwise think. This realization suddenly dawned on me two weeks ago when, in response to my inquiry about last month's New York City marathon, a friend who ran it replied that the race was a "forgettable" experience.

All of us have had at least one oral argument that we can describe the same way, but that's not what made me realize that even your typical schlub lawyer has something in common with those Kenyans who run like gazelles.

No, what hit me like a cold Gatorade in the face was when my friend told me he had this experience even though he had trained for months and was as prepared as he had ever been for a marathon. That is the moment when I had an epiphany in which I saw for the first time the unique bond that exists between the oral advocate and endurance greats such as Bill Rodgers and Joan Benoit. The principal characteristic that makes these seemingly unrelated human species soul mates and joins us at the hip is that oral argument, like running a marathon, is completely unpredictable.

Regardless of which of these activities you pursue, hours and hours of preparation are no guarantee that you will avoid cramps, dehydration, hypothermia, hyperventilation, muscle spasms or temporary dementia. Especially if the activity in question is oral argument.

This observation should not be interpreted as a suggestion either to save yourself the effort of preparing or to cut corners. Rosie Ruiz didn't win the Boston Marathon by riding the T to Boylston Street —well, initially she did, but truth and justice won out at the end —and taking shortcuts won't help you either.

The unpredictability of the event, however, is no reason to give up. I'm not sure whether John Davis, whose cardinal rule of oral argument about changing places with the court I addressed in last month's column, was much of a runner, but one of his other commandments — going for the jugular vein — is a tip that can benefit both oral advocates and runners in their common quest to reach the finish line without hitting the dreaded wall.

In my experience, spending time on peripheral points in oral argument, like running warm-up laps before a 26.2 mile race, is a waste of energy and resources. Identify the core of your argument and concentrate on addressing it from the moment you open your mouth to speak. The fine points are fine, but use them to help shape the big-picture view that you are advancing. Leave the minutiae for the brief and make the focus of oral argument one or two main points that lay at the heart of your position.

In defining those points for your audience, do so at the beginning of the argument so that you set up well-defined expectations and an overall structure for the court. This

approach can be effective not simply because it creates context for the argument, but also because it can establish a lifeline for you and an opportunity to get yourself back into the game.

I have seen on more than a few occasions a judge come to the rescue by asking a lawyer, after the attorney took a pounding in discussing one issue, to address the second reason that was provided at the outset of the argument as an additional ground for prevailing. The judges might not agree with everything you say, but you don't need them to if you let them know your central points at the beginning of your argument and one of those points piques their interest.

Smile when you slay that

Although going for the jugular is important, be careful about your approach because being too aggressive can backfire. One of my most miserable marathon experiences occurred when I attacked the first five miles by running them at such a rabid pace — and no, I did not mean rapid — that by the time I got to the half-way point I desperately tried getting to the finish line by hailing a cab, which, unfortunately, was not a particularly successful effort since the race was on the North Central Railroad Trail.

At least I got that far in the race before I began to crash and burn, which is significantly farther than you should expect to get in your argument if you begin with teeth gnashing. I invariably tense up when lawyers or students during moot court arguments project a certain edginess in their tone or body language, and I instinctively start looking for a baseball bat with which to defend myself when the edginess becomes decidedly hostile. Judges are human and will react in kind if you appear to be confrontational and antagonistic. Going for the jugular does not mean that you have to kill anyone.

So remember to smile while you go for it. If for no other reason, no matter how forgettable your argument may be, at least you don't have to endure the agony of another 10 kilometers before you can sit down.

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