

Staying on track

By Andrew Baida
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Some may think that being an empty-nester for 12 hours has nothing to do with the subject of today's article, which was prompted by an email I received from a lawyer asking for advice on how to handle judges who ask irrelevant questions at oral argument. But if you are one of those thinkers, you would be wrong because there are several ways — some obvious, some less so — in which the two are inextricably linked.

Let's start with the link that might not be so obvious, which would be me, an individual who has personally experienced both short-lived empty-nesterhood and judges who ask seemingly irrelevant questions. Had I not survived either of these encounters, I could have been the proverbial missing link, but this article has not been written posthumously, which means that I am almost, although perhaps not quite, somewhat of a living legend. (I recognize, of course, that I'm probably not the first person whose trials and tribulations of being an empty-nester ended on the same day they began. I also know, in light of the aforementioned email I received and many oral arguments I've been a part of or otherwise witnessed, that I'm not the only lawyer who has faced questioning from the bench that could be characterized as coming out of left field. But I am pretty confident that I occupy a rather unique place in history as a result of having undergone both sets of experiences.)

There are, however, more obvious ways in which the two share a common connection. First, both phenomena are pretty much unexpected. You send the kid to college and expect him or her to stay there for four, five, or even eight years maybe, but certainly more than a day. You go to oral argument and anticipate that the judges will ask questions about the issues raised in the parties' briefs and the proceedings below, but not about unrelated matters. Even expecting the unexpected has its limits, which each of these situations exceeds.

Second, no matter how much time we spend preparing for the big day, whether it be sending the offspring to college or appearing before judges at oral argument, there is only so much we can do when that knuckleball comes our way. Despite how logical and well-laid-out our plans and briefs may appear to us, they may not be universally embraced. And when that happens, there is very limited control we have over our grown children and judges. The process of being a parent, like that of the oral advocate, can be exceptionally difficult to manage, much less predict.

I'll hold off for another day offering suggestions on how to deal with the erstwhile student. But here's a thought or two as far as the judges are concerned.

Keeping the judges engaged

It's not a good idea to tell the judge that his or her question is irrelevant, as tempting as it may be to say this. I learned this lesson fairly early in my legal career when, after confronting a barrage of increasingly hostile missiles from the court, I disputed the relevance of the final one in a last-ditch effort to alter the direction in which the argument was inexorably headed. Fortunately, the judge who had launched this rocket in my direction did not verbally obliterate me but took pity instead and laughed, "We'll decide what's relevant."

I lost the case but have thought about what that judge said to me many times since. So here's my advice to the lawyer who sent me the email: Treat every question as if it is relevant. Because it is.

There will be in virtually every case multiple routes which judges can follow to get to the ultimate destination known as judgment affirmed, reversed, or vacated. As one of my law school professors enjoyed saying, with a slightly disturbing malevolent smile, there's more than one way to skin a cat. Questions are not irrelevant just because the manner in which a judge decides a case strays from the particular path proposed by the lawyers or otherwise does not align with the advocate's view as to how the case should be resolved.

I am not suggesting that we should shrug our shoulders and acquiesce in the case taking a different direction when a judge asks what we perceive to be an irrelevant question. After answering the question as succinctly (but fully) as possible, the advocate should attempt to stay the course by resuming the argument at the point immediately preceding the detour. Most judges expect some push-back from the lawyers and will not penalize the oral advocate who tries to keep the argument on track by advancing two or three big-picture points.

But there is a balance to be struck between advocating for our clients and keeping the judges engaged at oral argument when their questioning suggests that there may be some interest in proceeding in a manner other than the way we have mapped out. Resisting persistent questions, or addressing issues in which the judges have expressed no interest, may reassert control over the argument. But it also runs the risk of shutting down the oral argument and defeating one of its core purposes, which is to answer any and all questions the court has about your case.

The opportunity to be heard is most meaningful when it operates as a two-way street. There are no guarantees, of course, how things will turn out at the end. But if I learned anything now that I am once again an empty-nester, it's that going with the flow is probably the best course of action to take.

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