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Smile: This Is Oral Argument

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Jerry Seinfeld once quipped that "According to most studies, people's number one fear is public speaking. Number two is death. … This means that to the average person, if you go to a funeral, you're better off in the casket than doing the eulogy." While one might think the joke has limited applicability to attorneys, whose profession is so dependent on public speaking, a trip to the Appellate Division on brisk fall weekday to hear the oral argument calendar often makes me think of the comedian's line. Avoidance of argument seems to be a theme, as does a funerary mood. And both run contrary to my view of oral argument, which I never forgo, and always deliver with a smile.

A good third of the cases on the typical Appellate Division calendar are marked submitted, both parties having decided to forgo the argument altogether at the time that they wrote their briefs. This always struck me as odd, for as appellant, the need for oral argument may not become apparent until after respondent's brief is read; and respondent's need for argument may not become plain until the reply brief counters points of fact, law, or policy. Making the decision in advance of seeing the briefing in its entirety seems premature, and is a loss of a potentially valuable opportunity. It's like buying a lottery ticket and throwing it out before the drawing.

Invariably, another handful of attorneys, who have presumably prepared for argument and have taken the time to make the trip to court, stand up during the calendar call and declare that they will submit. Surely this is a generous gesture to a busy bench and the other attorneys, who can now cross that case off the calendar and shorten their own wait time. But as I strike through the submitted case in black Sharpie, thinking of the wasted hours of preparation and travel time, I cannot help but wonder if the submission was caused by a certainty of victory or a resignation to defeat, and if such certainty might have been misplaced. For the losing party at least, the argument might have made a difference. Studies show that oral arguments impact the result in as many as 20-30 percent of cases, and are helpful to the court in as many as 75 percent.[1] And even to the winning party, an oral argument might prove useful in convincing the court to write a fuller decision, enunciate a broader or narrower rule of law, and thus provide a more useful precedent for cases to come or a better chance of defending that decision in a subsequent appeal to a higher court. But, more fundamentally, after all the work has been done, and the trip to court made, it seems such a pity to not stand up and argue. It's like packing for a trip to Paris, making the flight, and then turning tail to go home before leaving Charles de Gaulle Airport.

Then there are those who make their appearance and request their time, only to stand up when their case is called and say, "if there are no questions, I rely on my brief." The court seems to recognize this as the functional equivalent of a submission, as I have never seen this approach elicit a question, even from an otherwise "hot" bench. Doubtless, though I have not seen it, the words do, on occasion, elicit a stray question, just like the "speak now or forever hold your peace" at a wedding. But this is clearly not the common, anticipated, or hoped-for result.

And of those attorneys still left in the courtroom after all the submissions are excused, a good number deliver scripted speeches in such somber or monotonous tones that Seinfeld's funerary comparison is not a far stretch, and one is left to ponder if perhaps the lawyer is the one in the box. Surely, the argument is D.O.A. Even if the attorney follows to the letter all the oft-recited rules—opening with his name and "may it please the court," deferring to the court about whether to provide a brief recitation of facts, always saying versus instead of v., keeping distracting gestures to a minimum, and never speaking over a judge—none of this can revive a bench or resuscitate an argument. But, admittedly, this is still better than those attorneys at the opposite end of the spectrum, who either do not listen to the judges' questions or refuse to answer them, who interrupt judges so as to finish their own points before being burdened with a question, who refuse to even recognize, let alone discuss, any viewpoint different than their own, and who are ultimately tuned out or harshly silenced by an offended court.

But then, every once in a while, an advocate gets up and really *argues*. And when that happens, you not only hear it, but see it and feel it. As soon as such an advocate begins to speak, the confidence of preparation and conviction reverberates in his voice, and it is like a ray of sunlight burning through the dim and foggy room. The opening lines of argument are not a dull recitation of a point heading, but enticing and intriguing, hitting a controversial issue or difficult proposition head-on, inviting—*inciting*—further inquiry, and making the whole courtroom take notice. The other lawyers all look up from their folders and papers simultaneously, as though roused from a slumber, flowers turning toward the sun. The judges sit up straighter, lean forward in their seats, and, then, invariably, one of them smiles. And in the animated exchange that follows over the next 10 or 20 minutes, and the mutual respect that such exchange engenders, one sees fulfillment of the appellate advocates' standard invocation, "may it please the court"; for however difficult the questioning becomes, however skeptical of the advocate's legal position the court may be, the court is, in fact, pleased. Stories of such arguments are passed from lawyer to lawyer and judge to judge. After one such argument, a presiding justice was heard to exclaim as he walked towards chambers, "I just heard a symphony!" In another case, a veteran New York City judge remarked in an open courtroom, that while he had not received a raise for many years, if he could hear argument like that every day, he would come to work for free.[2] But what is more striking than the impact of a great oral argument is the rarity of one; for the ability to deliver a great argument is not unique to only a handful of geniuses who like Michelangelo or DaVinci were uniquely capable of sculpting David or painting the Mona Lisa. To the contrary, almost every attorney that I have gotten to know during the course of my career has at one time or another delivered a brilliant argument over a cup of coffee at Starbucks when explaining their latest difficult case to me, and passionately—but congenially—answering my skeptical questions about why they should prevail in the face of contrary authority or competing public policies. If only that conversation could be bottled like a Frappuccino and then opened in the courtroom, it would be David's unflinching strength and Mona Lisa's intriguing smile in one bundle, and it would jolt a sleepy courtroom awake like a double shot of espresso.

So the problem is not a lack of skill among appellate practitioners, nor a lack of conviction for their causes; to the contrary, in my view, appellate attorneys are among the smartest, most talented, most open-minded, and most passionate members of the bar. It is, instead, a problem of time and place. It can be easily solved, I think, if oral argument is moved out of the courtroom and into the corner Starbucks. But, in the event that your next calendar notification does not provide for this alternate forum, all is not lost. A shift in perspective on the part of the advocate can bring the congenial spirit of lively discourse and free exchange of ideas, which has long haunted the local coffee house, flying into the courtroom like a gust of fresh air, blowing aside the dusty reams of papers and notes, reinvigorating the room, and making everyone smile.

The root of the problem, and the source of the solution, may be found in many attorneys' fundamental misunderstanding of the nature and purpose of an oral argument as an adversarial, or even hostile, exchange with the bench. Indeed, the term "argument" suggests this by definition, and thus undoubtedly contributes to this unfortunate view. As a result, akin to a game of verbal dodge ball, many lawyers believe that the object is to duck the difficult questions being hurled at you by the bench, to try to elicit only easy questions that can readily be caught as the surest route to victory, and to throw back responses that are both surprisingly aggressive and impossible to fully catch or comprehend, so as to catch the bench off guard, confuse it into silence, and thus knock out the opponent. Nothing is further from the truth.

While perhaps counterintuitive, the way to win an argument is not to deliver a pre-prepared speech, harping on the strongest points of your case, which have already been fully briefed and have probably already persuaded the court, but to use every minute of your precious argument time to confront the difficult issues head on. Instead of seeking to duck hard questions, viewing them as distractions from the lawyer's prepared outline, advocates should welcome them and actively seek them out, for these are the questions that will crop up again when the case is conferenced, and they must be answered and dispelled if a victory is to be obtained. Of course, for this strategy to work, the advocate must be very well prepared, and, at a minimum, must have a thorough knowledge of the record and the law and a complete understanding of the adversary's arguments. While not every question can be predicted, preparation through the use of formal or informal moots, policy discussions with colleagues, and practice arguments delivered out-loud, with the advocate "talking to herself" by delivering an argument and simultaneously assuming the role of a questioning court, is very helpful. I have always done this in the car on my way to work, and was very grateful when Bluetooth technology spared me from the worried stares of passengers in other vehicles, who now no longer assume that I am crazy, but naively believe that I am talking on the phone like everyone else. The key is to practice out loud, as often as possible, not with a memorized script, but with a fluid and ever-changing discourse that helps you understand and effectively confront the weaknesses of your position.

In this regard, it should be noted that every argument has a weakness. If identifying the weak spots in your position is difficult for you, it can be helpful to argue the other side; for there is no surer way to understand the strengths and problems of an adverse position than to be forced to adopt it and try to convince someone of it. So, too, it must be recognized that almost every weakness in an argument, once identified, can be effectively countered through argument. If your problem is adverse case law, it can be distinguished on the facts. If the problem is factual, then strict construction of a

case or statute might provide a solution. And when all else fails, public policy can carry the day; for unlike a trial court, which seeks to apply the law, an appellate court has the ability to make, shape, and interpret the law to achieve a just result.

A dodge-ball approach to argument fails not only for seeking easy questions, and evading difficult ones, but also for attempting to stun the bench with overly technical or complex answers. It is well known and often repeated that an answer should plainly start with yes or no. But beyond this, an effective advocate's position should be easy to understand and capable of being expressed in plain language. In this, as in other areas, the principle of Occam's razor controls: The more simple and straightforward the argument, the more likely it is to be correct. So while appellate attorneys are often frustrated by a judge's request that they stop arguing intricate and "very technical" legal principles or citing cases, and just explain the "simple issue" and why the advocate's position "would be fair,"[3] the fact is, this is the fundamental question that shapes our law. And an advocate unable to answer this question in plain English is simply not going to be persuasive. A good test for me when preparing my most difficult cases was whether I could explain the crux of my argument to my grandmother, who was always very interested in my work, but had no legal background whatsoever. If I could make her understand the issues at the heart of a case, the arguments on both sides, and why I should prevail, then I was ready to persuade the most erudite bench. Indeed, in my view, the greatest compliment after a particularly complex oral argument does not come from a fellow-attorney's marveling at your recitation of every subsection of an arcane statute and your ability to provide the full cite of a case from memory, it comes from the layperson in the audience who tells you that she understood everything you said and believes that you are right.

Thus, in short, instead of being viewed as an aggressive game of dodge ball, an oral argument should be thought of as a partnership to untangle a kite. In briefing, the advocate's argument soars, the strengths are presented, the weaknesses downplayed, and there seem to be no obstacles that impede the advocate's line of reasoning. But during oral argument the judges' questions identify and hone in on the problem areas where the advocate's line of reasoning has gotten stuck. If the advocate listens carefully, he will understand the judge's concerns, and will be able to provide valuable information from the record or the law to help guide the court through the twists and turns of each knot, untangling the argument, clarifying it, straightening it. The knots cannot be ignored, because then the kite will not fly at all. Nor is it effective for the advocate to lose patience, and pull against the court too sharply, for this will only tighten the knot and may snap the line. Rather, like untangling a kite, it is necessary to quietly pay attention while the bench or opposing counsel speaks, to think the solution through, to recognize and deal with each twist and turn, to tease the line of reasoning and work it apart, before it comes out straight and clear, enabling your argument to fly.

The result is dynamic. It is liberating. It is alive. It is beautiful to watch and exhilarating to experience. While dodge ball used to make me cry as a kid, and funerals still do, flying a kite has always made me smile.

Endnotes:

1. See, e.g., Alicia Hickok, "Oral Argument: Not a Useless Exercise," published in Appellate Issues, www.ambar.org/AJCCAL (Aug. 2013); see also Myron H. Bright, "The Power of the Spoken Word: In Defense of Oral Argument," 72 Iowa Law Review 35 (1986).
2. Oral Argument of *People v. George Rodriguez*, Queens Co. Ind. No. N10873-06, May 11, 2009.
3. See, e.g., Oral Argument Transcript of *People v. Christopher Brinson and Lawrence Blankymsee*, at pp. 23, New York Court of Appeals, May 30, 2013.

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