



SOME ADVICE ON HOW NOT TO ARGUE A CASE IN  
THE SEVENTH CIRCUIT — UNLESS . . .

## You're My Adversary

*By Brian Paul \**

**T**wo years ago in these pages I offered some advice to you, my adversaries, on brief writing in the Seventh Circuit, and that advice was so well received that I thought it would be appropriate to round things out with some advice on oral argument. Love your enemies and do good to them that oppose you—that's what I was taught. Just because you may be on the wrong side of things, while I fight for all that is good and just, doesn't mean we can't learn from each other. So I offer the following words of wisdom to you, my esteemed opposing counsel, sincerely and in good faith. No, really, I do.

The first thing to remember is that while you should obviously prepare for an oral argument in the Seventh Circuit, you shouldn't over prepare. Rereading the record and the cases cited in the briefs is a waste of time; indeed, it's counterproductive. You need to leave yourself a certain amount of (how shall I put it?) "flexibility" in answering questions at oral argument. The facts and the law will only weigh you down. If you can't answer a question off the top of your head about something that happened in the trial court, it probably wasn't important anyway. Just confidently answer the question the best you can, preferably with something you think the judges want to hear, and move on. Better to do this than to tell the court you don't know the answer. You'll look like a dunce if you admit your ignorance, and, besides, if the court catches you in a half-truth, you can just turn the situation to your advantage by admitting you must be "mistaken." This gives you the appearance of forthrightness. As Mark Twain said, "A man is never more truthful than when he acknowledges himself a liar."

One thing in particular that you shouldn't worry about as you prepare is subject matter jurisdiction. If the case has gotten as far as oral argument in the Seventh Circuit, you can assume the appellate court has jurisdiction. The court could care less about this procedural nuance.

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Nor should you attempt to anticipate the questions you'll get at oral argument, or (if you do engage in this fruitless thought experiment) concern yourself with the answers you might give in response to those questions. Rarely will you get a hot bench at the Seventh Circuit. This is for two reasons. The first is that oral arguments are often so short (10 or 15 minutes per side is common) that judges want to give you plenty of time to talk about what you want to talk about. Oral argument is not about giving the court the opportunity to engage you in dialogue about the case. Oral argument is about giving you, the lawyer, the opportunity to recap what you wrote in your briefs.

Which brings me to the second reason the court is typically so reserved at oral arguments: the judges do not read the briefs beforehand. This makes them naturally more inclined to give you ample, uninterrupted time to explain your case. An extended recitation of the facts is thus always advisable. Do not just jump in and get to the point. Start with the complaint or indictment and retrace chronologically the background of the case, both factual and procedural. I have never seen anyone on the court get impatient when a lawyer has tried to do this in the past.

But before getting into the facts, you've got to start with a big introduction. The introduction is your opportunity to shine, to show off your oratorical skills. So begin with something sensational. The more over the top it is, the better. I once heard an oral argument in a sexual harassment case where the plaintiff's counsel started off by quoting what purported to be the alleged harasser's own words:

"What color is your bra? Does it match your panties?" At which point Judge Rovner asked counsel, "Are you speaking to Judge Posner?" As you might imagine, the courtroom erupted into laughter, which is probably not the reaction plaintiff's counsel had hoped to elicit, but so be it. The gimmick got the court's attention, and that's really all that matters.

Once you get past your opening, slow down, let the court catch its breath, and then read your argument—deliberately, ploddingly, word for word. Do not engage the court in a discussion. Regard questions

as interruptions. This is *your* show, *your* time. So there is no need to make eye contact with the judges. Avoiding eye contact has the happy advantage of not only discouraging questions from the bench, it is a sign of proper deference. Judges respect lawyers who are obsequious. So reinforce your visible obsequiousness with verbal obsequiousness. Tell the court, for example, how wonderful it is to appear in the Seventh Circuit. Or, if you are lucky enough to have the author of a key decision on your panel, remind the judge of that fact and mention what an incisive, groundbreaking case it is.



If the court does ask questions (which, again, is unlikely) inform the court that you will be deferring your answers until the end of your presentation. It is far more important that you finish your prepared remarks than it is to satisfy the court's idle curiosity.

If you get a hypothetical question, preface your answer with the following words, "Those aren't my facts." Hypotheticals are often a sign of confusion borne out of a lack of knowledge. So take hypotheticals as an opportunity to clarify the court's obvious misperceptions about your case.

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Then, transition into a ponderous dissection of case law, discussing the facts and holdings of each key opinion. Quote liberally from precedent. And don't forget to give the court a citation for each case that you discuss. Watch as the panel studiously records everything you say. You want their notepads to look like a table of authorities by the time argument is over.

I have seen some lawyers make the mistake of answering questions directly. One technique, odd though it may be, is to respond to a yes or no question with "yes" or "no," and then, if necessary, to elaborate on the answer. That technique is for suckers. There's no need to hurry. Let the answer unfold like a good novel. Keep the judges in suspense. The court will patiently listen as it wonders whether you are answering the question that was asked.

Sometimes questions are designed to illicit concessions. Never, ever concede anything. If you've come to the argument minimally prepared, as I have suggested you should, you likely won't know enough about your case to discern whether something can be conceded or not, so it's just better not to concede anything at all. I recently observed an oral argument where the court had a question about some testimony in the trial court record. Counsel couldn't remember the testimony, and so after some fumbling on his part, one of the judges flipped to where it was in the appendix and read it to the lawyer. "Isn't that what your own client said?" the judge asked. The lawyer wisely refused to straightforwardly acknowledge

the judge was quoting from the actual language of the transcript. "Well, if that's what *you* say my client said, then I guess I'll have to take your word for it," the lawyer responded with not a little skepticism. Attaboy! For all the lawyer knew, the judge could have been trying to pull a fast one on him. Concede nothing.

Finally, a word about rebuttal argument. The key here is to be exhaustive. Don't limit yourself two or three critical points. Rebut each and every one of your opponent's arguments seriatim. And do so even if it's clear the court is in your corner. If this takes more time

than you have left, don't sweat it: ignore the red light and take all the time you need. The allotted time for argument is merely a suggestion. The court will appreciate your thoroughness.

I could go on, but you can learn only so much about oral argument by reading about it; you must actually put these principles into practice. That is why I offer private, one-on-one tutoring sessions. Mention this article, and the next time we are on opposite sides of an appeal, I will provide one complimentary lesson tailored to our case. What do you have to lose?



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