Do You Please the Court? Judges Give Pointers on Orally Arguing Pretrial Motions (Part Two)

By Elaine Whitfield Sharp

Author's Note: This is Part Two of an article on ways to improve oral argument for pretrial motions. In Part One, which appeared in the July Plain Language column, some of Michigan's state and federal trial judges suggested ways lawyers might find out—tactfully, in the public forum—whether the judge has read the briefs, that is, whether the bench is "hot" or "cold."

Trial judges emphasize that effectively arguing a motion to a cold bench requires the lawyer to clearly lay out the issues, facts, and law in such a user-friendly fashion that the judge, who may have dozens of pretrial motions scheduled for oral argument that day, can get a quick mental grip on the case and give an informed decision.

User-friendly presentations may include using enlarged copies of the pivotal language in statutes and cases, highlighting copies of the crucial parts of deposition testimony, and using outlines and diagrams as visual aids. These aids help to intellectually involve the cold-bench judge and encourage the lively give-and-take that oral argument should contain.

Part Two includes ways of effectively arguing a pretrial motion to the hot bench, that is, to the judge who has read the briefs before coming on the bench. In addition to discussing the role of oral argument as distinguished from the written advocacy medium, the brief, Part Two suggests ways of avoiding and reducing the acrimony in pretrial motion practice.

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The night or morning before pretrial motion days, state and federal hot-bench judges, that is, those judges who regularly come on the bench with *at least* a basic understanding of what the motions are about, may read anywhere from 20 to 110 briefs supporting and opposing some 10 to 55 motions.[1]

Hot-bench judges say they want two things most of all during oral argument: highlights of the brief and answers to their questions.

Highlights: Painting with a Broader Brush

Although the hot-bench judge has read the brief, because of the volumes these judges read, highlighting your argument helps the judge recall and distinguish it from all the others she or he has read or heard about that day. Highlighting an argument requires that you balance brevity with just enough detail to sharpen the judge's memory about the distinctive features of your client's position. Choose the salient details.

Advises Judge Thomas Brown of the Ingham County Circuit Court, who is also president of the Michigan Judges Association: "Don't rehash the *whole* brief if you know the judge has read it." This wastes the judge's time and may be harmful to your client. Judge Richard Knoblock of the Huron County Circuit Court suggests that lawyers "tailor the strong points of the brief which are *most applicable to the decision at hand.*"

"Oral argument appeals to broader themes," emphasizes Judge Randy Tahvonen of the Clinton-Gratiot County Circuit Court. "While the brief is like all the parts of a cathedral with a pillar, template, and so on, oral argument is the cathedral as a whole." Once you start reconstructing the sections of your argument with just a few of its details, the hot-bench judge will typically show signs of involvement such as nodding the head, or giving a look of recognition. It's often then that the judge will start asking the questions which occurred to her or him while reading the briefs, or during your recap. Be alert for this change in focus from you as the speaker to the judge as the questioner.

Question Time

The effective oral advocate, say trial judges, anticipates and encourages questions. Whatever you do, "Don't duck them," advises Judge Douglas Hillman of the United States District Court, Western District of Michigan. Questions not only mean there's someone on the bench who is intellectually involved enough to form a question, but also give you yet another chance to really persuade the judge to rule for your client. "Oral argument," says Judge Tahvonen, "is a time to persuade by engaging the judge, by setting yourself up for give-and-take between you and the judge."

Many lawyers hurry past questions; they may be focusing on the outline of their oral-argument recap, following the course they have navigated for the bench, rather than following the course the judge is charting. That's a serious

mistake, warn many trial judges. It shows the advocate is not responding to the *judge's* needs. Judge Hilda Gage of the Oakland County Circuit Court emphasizes: "Take your *cue* from the judge's questions. Then answer them directly. The judge assumes you don't have an answer if you don't answer his or her questions."

Some lawyers shy away from answering because they think the judge is being combative or—worse yet—playing law-school professor. There may be instances when this is true, but according to Judge Gage, "Judges ask questions because they *really* do not know the answers. They are usually not asking rhetorical questions. They are looking for a discussion with the lawyers about the case."

If you finish your recap and there's an awkward silence from the bench, then what? Consider that the judge is having an off day (they're human, too); or, if the motion involves complex facts or issues, perhaps they simply don't know where to begin. If the judge doesn't ask questions, encourage her or him to become involved in the case by "ask[ing] if the judge has any questions," suggests Judge Hillman. As Robert Louis Stevenson said, "You start a question, and it's like starting a stone. You sit quietly on the top of the hill; and away the stone goes, starting others."

Answers: Prisms of Persuasion

Because questions often give clues to what the judge is *really* thinking about the motion, your answers to questions can be used as prisms of persuasion to advance your client's view of the case. Indeed, where the judge's questions indicate that she or he is considering ruling for the other side, your answers may be the powerful leverage you need to open the judge's mind to your winning argument.

As Judge Gage points out, answers need to be as direct as possible. But unless the judge asks only for a "yes" or "no" response, try to answer the question from your client's point of view; that is, give the "Yes, but" or "Yes, and, furthermore," response, which includes some aspect of your *argument.* An advocate is not, as Professor Lon Fuller observed, "expected to present his case in a colorless and detached manner. [Unlike] a jeweler who slowly turns a diamond in the light so that each of its facets may in turn be revealed, [the advocate] holds the jewel steady, as it were, so as to throw into bold relief a single aspect of it."[2] In answering, try to embroider your client's position on that question into your response. Keep your eyes on the bench while you do this, however, to make sure the answer that went beyond the mere "yes" or "no" is not irritating the judge by taking up more time than the judge wanted to spend on listening to your response.

Predicting the Future

What kinds of questions can you expect from the bench? Judge James Mies of the Wayne County Circuit Court advises pretrial advocates to "be ready for the question why the judge should *not* rule for the other side." In addition, you must also anticipate that the judge's questions will be limited only by the judge's imagination. Preparing for questions based on the broad reach of the judge's imagination is not such a nebulous exercise as you might think.

To predict where the judge is likely to come from, put yourself in the same place that the judge is probably coming from. "The advocate," explains Judge Tahvonen, "must be able to anticipate the concerns the judge may have after reading the brief. The advocate must be empathetic with the judge's role. In anticipating the judge's questions, the advocate must attempt to reduce any tension the judge might face between the decision and substantial justice and must show the judge that the outcome is in the mainstream of what is reasonable and just."

Read the briefs, critique their weaknesses, and develop answers to cure the weaknesses from your client's view of the case. If you are this well prepared, questions will be a welcome break in oral argument, making it lively and interesting, rather than a threat to your tidy outline.

Battle Plan: Positive Campaign

Whether arguing before the hot or cold bench, there are some things lawyers just should not do. Lawyers sometimes go into oral argument anticipating their opponent's battle plan. Their major offensive is not a presentation of reasons why they should win, but a complaining diatribe on why their opponent should lose. Is this technique really persuasive? Because it may suggest that your factual and legal arguments are frail, or that you think the other side's position has much more merit, the technique is, perhaps, the least persuasive strategy. And too often, such denigrations of an opponent's

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position may sound personal, even if they are not.

Authors Robert Klonoff and Paul Colby suggest that when a party, at trial, offers or "sponsors" an item into evidence, that party effectively *endorses the significance* of that item to the resolution of the case.[3] Before launching an attack on the other side's reasoning or cases, you might, like the trial advocate before the jury, consider the possibility that you may be effectively endorsing their significance in the judge's mind as your *opponent*—not you—has cast them.

To minimize the potential harm caused by focusing on and magnifying the adversary's agenda, if criticizing the adversary's cases or reasoning is absolutely necessary to save your case from certain death, then moving parties should only touch lightly on this during rebuttal, advises Judge Tahvonen. Responding parties could leave their criticisms to the end, and then only mention them casually, indicating that the other side's cases or reasoning are not that significant to the resolution of the issues. Judge Tahvonen: "Use affirmative arguments in oral argument. Bet your own agenda."

While focusing on your opponent's weaknesses may be harmful, should you focus on the weaknesses in your own case? Certainly, if a case is directly contrary to a point you are arguing, and it's controlling in the jurisdiction, the Michigan Code of Professional Conduct requires that you inform the court of the case, but only if opposing counsel does not.[4] If opposing counsel has done the homework, then you might as well let her or him run the destructive campaign. You can then respond with the reasons, described constructively, why the court should rule for your client despite the case.

But what about the less obvious weaknesses in your case? Should you expose them so as not to make it look as though you're concealing something? Traditional wisdom teaches that, in a spirit of candor, advocates should discuss the weaknesses of their own case. The argument is that, in effect, you should head off the opposition at the pass by beating them at their own game. But some seasoned trial practitioners now question whether it is tactically sound to bring out the weaknesses in one's own case.[5]

Taking into consideration the need to tailor *any* strategic approach depending on the circumstances, in general, an advocate might get better mileage out of oral argument by emphasizing those points which make it clear that the client's position is the more persuasive. If the judge thinks a weakness is significant to resolving an issue, the judge will bring it up, even if the opposition doesn't. In sum, there's no need to destroy your own case by highlighting its weaknesses. Let oral argument take its course and, if you need to deal with the weaknesses, do so constructively rather than destructively.

Oral Argument: Should You Waive It?

It's Monday morning and you just walked in to Friday's mess on your desk. You have an evidentiary hearing on Tuesday more than 80 miles away and depositions in a complex case starting on Thursday. Should you waive Wednesday's oral argument on your pretrial motion?

Even if you know the judge will read the brief, trial judges advise lawyers not to waive oral argument. The opportunity to persuade the judge during oral argument by, as Judge Tahvonen puts it, "engaging the judge" is perhaps the strongest argument for not waiving it. Explains Judge Knoblock: "Sometimes I have a question I really need the answer to, and the lawyer will waive oral argument. I am really disappointed when that happens."

Oral argument is also a chance to tidy up a poorly-written brief or present new material. Judge Knoblock: "If the brief was not well-written, don't underestimate oral argument. Use it to clarify any vague points." Judge Gage agrees: "Some lawyers are not very good at brief writing." Oral argument may be a chance to redeem an argument that doesn't look good on paper. For example, Judge Gage explains that, while she often comes on the bench with her mind made up because she has read the briefs, oral argument actually changes her mind between 10 and 20 percent of the time. So one who filed a poorly-written brief but whose oral argument is nevertheless well-presented, or whose answers to questions turned the tide of decision, may have as much as a two in ten chance of winning at oral argument in Judge Gage's courtroom. Other judges, like Judge Gage, don't make their *final* decision until the lawyers have had a chance to speak.

And oral argument serves other purposes: "It's a chance to add newly-decided cases," explains Judge Knoblock, adding that "if you're going to cite newly-decided cases, make sure you dash off a copy to the judge and opposing counsel first." Waiving oral argument may also be a mistake because, says Judge Knoblock, "a reply may raise new questions, and oral argument is a chance to address those."

Avoiding the Acrimony in Pretrial Practice

No matter how thoughtfully you prepare, oral argument sometimes turns into a nasty personal battle between the attorney and judge. Attorneys' complaints about this aspect of pretrial motion practice ring with a familiar sound:

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During oral argument, judges sometimes get personally abusive and demonstrate a lack of judicial temperment. Judges, on the other hand, complain that lawyers can be abrasive and rude.

"I find a number of judges who are trying to do the best they can, but they're impatient—they can make you feel as though you're wasting your time," says Barry Waldman, immediate past president of the Michigan Trial Lawyers Association. But from the bench, judges may get the same impression. "Some lawyers are very abrasive," observes Judge Knoblock. "Their body language, their demeanor is abraive. Some lawyers show a very begrudging respect for the court. [For example] these lawyers refuse to call you 'Your Honor'; they call you 'Judge.' There's a difference between 'lawyer' and 'counselor.' I don't say, 'Well, lawyer....' Why should they say, 'Well, Judge....'?"

Another courtroom behavior shared by some lawyers, observes Judge Knoblock, is that they exhibit "a presumption that the court is prejudiced, that the court is not going to give the client a fair deal." To many lawyers, it appears that some judges do, indeed, exhibit a bias against their client. It's hard not to show disdain for such unbecoming conduct, but, says Waldman, "Judges are the proof finders with regard to your motion. You need to argue to the judge like you argue to a jury. You need to show the same deference." Judge Hillman agrees: "Even if the judge is bad-tempered, don't antagonize the judge. Remember, you want the judge to do something for you."

Few are likely to disagree that even a little courtesy—from lawyers and judges—goes a long way. But courtesy is still only the salve that treats the symptom of stress, not its cause. "The problem with [pretrial] oral argument is that docket management has become a predominant source of irritation to judges and litigants," observes Waldman. The pressure is on today's trial bench and practitioners as never before—and it's not letting up. Besides motions, trial judges have a hundred details to tend to, including, for example, pretrial scheduling conferences, telephone conferences, and opinions to write.

Waldman believes that many pretrial disputes arise between judges and lawyers because judges are confronted with "whining, crybaby lawyers who haven't been able, or who refuse, to resolve their own discovery disputes." Judge Knoblock, like many other trial court judges, encourages lawyers to resolve their own disputes. Some local court rules require lawyers to ask the opposition to concur in motions before they are made, as do the local rules for the Eastern and Western Districts. The concurrence procedure should, but unfortunately does not always, encourage an out-of-court agreement.

As many trial lawyers will agree, sometimes the opposition can be deliberately obstructionist in discovery. Only a third party can resolve the pigheaded impasse. That third party does not have to be the judge unlucky enough to have been assigned the case. Instead, Waldman and Larry Donaldson, immediate past president of the Michigan Defense Trial Counsel, suggest that the third party could be an independent, privately-chosen umpire.

"If plaintiff and defendant can stipulate to a private umpire, not the judge, they should do that at the beginning of the case," says Waldman. He and Donaldson have discussed the development of a proposed amendment to the Michigan Court Rules permitting litigants to use an umpire to resolve discovery disputes, like the way federal courts use magistrates. The proposed amendment is still on the agendas of these two associations.

Asserts Waldman: "To take the acrimony out of pretrial motion practice,

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we [the lawyers] need to take the discovery disputes away from, for example, motion Wednesday in Oakland County Circuit Court. Plaintiff and defendant could agree that the independent umpire would have the authority to resolve all non-dispositive motions." The umpires could be other lawyers, or retired judges and lawyers.

Donaldson has been asked by circuit judges to serve as a private umpire. "Usually the discovery dispute is caused by the refusal of counsel to get along," says Donaldson. "A private umpire recommends a solution to the judge (which is usually adopted)." Donaldson believes a paid, private-umpire system would work for two reasons. First, making the parties pay the private umpire would probably create an incentive for them to resolve the discovery dispute themselves. Second, lawyers of a higher caliber are likely to serve if they are paid umpires, rather than volunteers.

In Case of War: Damage Control

Despite everyone's best efforts, if the relationship between you and the judge deteriorates during a pretrial motion oral argument, some judges suggest that attempts be made to reconcile the relationship *once the case is over.* "A lawyer could try getting with the judge and apologizing," says Judge Tahvonen. "But if the judge was abusive or bad-tempered, the *judge* should contact the lawyers and tell them something like, 'Look, I feel bad about coming unstuck. I was tired that day' (or explain what the reason was). It's harder for the judge to do, but no less necessary."

If the judge's behavior was unethical, you might, of course, consider filing a complaint with the Judicial Tenure Commission. But if your complaint is about a procedural, rather than an ethical, impropriety, and (assuming you have not or will not file an appeal) you anticipate the judge will make the same procedural error in your cases in the future, you could try to resolve the issue through a local bench-bar committee (if one exists), through the chief judge of the circuit, or, in some cases, through the Supreme Court Administrative Office (SCAO). For example, if a judge consistently refuses to allow you to make the record for your clients, a SCAO complaint may be the most efficient way of handling the problem. And since all SCAO complaints are confidential, a SCAO complaint may be less destructive to your relationship with the judge.

SCAO receives and handles some attorney and client complaints "about procedural improprieties," explains SCAO Adminstrator Marilyn Hall. "Mostly lawyers complain to the chief judge of the circuit, but where it's a one-judge circuit, or the complaint is against the chief judge, SCAO may handle the complaint directly." On receiving a complaint, Hall explains, "a regional SCAO officer will investigate the allegations and determine whether to talk to the judge or whether to refer the attorney to the Judicial Tenure Commission."

Another method of resolving a recurring procedural impropriety is to seek an order of superintending control from a higher court, according to Hall.

An ounce of prevention is worth a pound of cure. If it looks as though war between you and the judge is, for any reason, about to break out, Waldman says that you might suggest to the judge that the motion be heard on another day, especially if the courtroom is packed. Also, if the motion is complex, don't expect the judge to grasp all the finer points during regular motion day, advises Waldman. It might be better to schedule complex motions on a non-motion day and, in doing so, avoid unnecessarily aggravating the busy trial judge.

Cutting down the acrimony can be achieved by clearly explaining the facts, issues, and law to the judge, that is, by treating the judge like a human being. It can be done by keeping the presentation brief, because trial judges are under tremendous pressure. And if in the midst of all this, the human side of you or the judge errs, trying to patch it up later is not a legal taboo. Besides being courteous, patching things up is also good business if you regularly practice before the judge. As Judge Knoblock points out, "Remember, the judge has all the trumps." ■

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Footnotes

1. See Part One of this article, 70 Mich B J 700 n 1 (1991).
2. Fuller, *The Adversary System,* reprinted in Talks on American Law, Berman, ed (Vintage Books, 1961), pp 31-32.
3. Klonoff and Colby, Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials (Michie, 1990), pp 5-7.
4. MRPC 3.3(a)(3).
5. See generally Klonoff and Colby, *supra* note 3.