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

By Elaine Whitfield Sharp

On motion days, a state or federal trial judge may hear between 10 and 55 pretrial motions.[1] Most of these demand quick decisions. With only about five to seven minutes to orally argue a pretrial motion, the advocate—to get a favorable decision—must find the judge's hot button and press it—fast.

Finding the right button calls for a blend of tact and common sense. *Pressing* it effectively requires serious preparation.

State and federal judges are eager to suggest ways lawyers can reach them because, as Clinton County Circuit Court Judge Randy Tahvonen puts it: "Anything the lawyer can do to stop me from looking like a dope, I appreciate."

May It Please the Court....

Most law schools teach that when our feet reach the podium the first words we should pronounce—with clarity, while meeting the judge's eyes—are: "May it please the court...." There is nothing wrong with the phrase, except it's just a polite nicety if the advocate does not know *how* to "please the court."

"You've got to know how much the judge knows about a case before you get into oral argument," stresses Judge Douglas Hillman of the United States District Court, Western District of Michigan.

Taking the Temperature of the Bench

It's easy to bungle oral arguments by either assuming that the judge is as intimately conversant with the facts and law of the motion as you are, or by failing to credit the judge for what she or he does know. Either shortcoming wastes the court's time and may harm the client.

There's no mystery involved in penetrating the judge's mind. Just ask how much the judge knows, but—in the public forum—ask prudently. Bluntly asking whether the judge has read the brief "is not the most tactful approach," cautions Judge Hilda Gage of the Oakland County Circuit Court. "Some judges may be offended by any implication that they have not done their homework."

Judge Tahvonen suggests a charitable alternative: "Your Honor, have you *had time* to read the brief?"

Judge James E. Mies of the Wayne County Circuit Court suggests avoiding a possible courtroom *faux pas* by calling the judge's secretary or law clerk to find out whether the judge has read the brief. "I wouldn't view that as improper," assured Judge Mies.

If you do not know the judge's staff, or would not feel comfortable calling the secretary or law clerk, Judge Hillman suggests taking what he terms a "least-offensive approach," such as: "I know you've read the briefs and the file, Your Honor, but in a nutshell, here are the facts." Explains Judge Hillman: "If the judge has read your brief, he or she will probably tell you right then."

Tailoring to Suit the Judge

Once you know how much the judge knows, you can tailor oral argument to suit the judge's needs. Hot benches, cold benches, and all temperatures in between have different needs. And you must be prepared—well-prepared—to handle the range of possibilities.

Hot-bench judges have had, or have taken, the time to read the brief and understand most of, if not all, the crucial issues. These judges typically head straight for the thorny issues, for any flaws in reasoning, and for a reason why they should not rule for the other side. They're looking for some give-and-take. "Usually, I will come on the bench with my mind made up," said Judge Gage. "I've read the briefs before I come on the bench. I'm usually just looking for counsel to tell me where I'm wrong."

Cold-bench judges have (1) not read the brief and know nothing of the facts, issues, and possibly the law; or (2) have read the brief but, because it was so poorly written, were unable to fathom central arguments. Those judges need the facts, the law, the issues, and the argument laid out in user-friendly fashion. The advocate needs to prepare the cold-bench judge so she or he can then become a hot-bench judge, one who is involved in a lively give-and-take about the issues. "If the judge has not read the brief, the lawyer must be prepared to state the obvious," advises Judge Richard Knoblock of the Huron County Circuit Court.

To the lawyer who fails to consider tailoring oral argument to the

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judge's needs, Judge Gage cautions: "Remember, you're there for the client, not yourself."

Warming the Cold Bench

To the cold-bench judge, learning about the motion for the first time during oral argument, rather than through the brief, is much like the difference between reading the news in the newspaper for the first time and hearing and seeing the news for the first time on television. If concentration drifts while reading, one can always re-read. Not so with television; like the scenery from a runaway railway carriage, it's here in a moment and gone in a flash. The ability to absorb spoken information—and make sense of it—pales in comparison with the ability to absorb it by pondering the indelible word.

To get the message across, the *oral* advocate cannot possibly hope to go into the degree of factual detail and legal analysis as in the written advocacy medium, the brief. Rather, the oral advocate should try to sort the information for the judge before presenting it, so as to make up for the cold bench's information gap. Preparing for the cold bench is analogous to preparing an opening statement for the jury. In both situations, the audience knows nothing about the story that is going to unfold, but is capable of quickly grasping the story if it is told effectively.

Lawyers, many of whom love to ham it up, can learn about effective oral argument by observing what *effective* television advertisers do to get over the problem of low retention levels:

- They keep it simple.
- They give one message, and one message only.
- They use pauses to punctuate the spoken word.
- They use repetition for dramatic emphasis, but only a little.

So if the bench is cold, sell the product—your argument—in an easy-to-grasp package. "A good lawyer at oral argument," says Judge Hillman, "concentrates on one or two really key points and makes it interesting. A good lawyer won't ramble; it's important to know when to quit."

Easy-to-Grasp Package for the Cold Bench: The Opener

Some judges suggest starting with the basics: State why you are there and what you want the judge to do for the client. "Lawyers should *immediately* state the relief they are asking for and the basis for the motion," Judge Gage suggests. Adds Judge Tahvonen: "Tell me what you want me to do *very* precisely."

Example: "Your honor, this is a motion to compel discovery. Plaintiff asks that you order defendant corporation to produce certain financial books and records which are relevant and not privileged."

Stating the Issue

According to Judge Hillman, the lawyer should state the issue first: "If you state the issue first, the facts are in some context. Put the punch at the beginning," suggests Judge Hillman.

Example: "Your Honor, the sole issue in this case is whether defendant corporation has a proprietary interest in the financial books and records which plaintiff now moves to compel defendant to produce."

Whether the relief or the issue comes first is probably a matter of preference more than necessity. And note that you could easily combine the two by ending our second example with "records."

Stating the Facts—Briefly

Keep the facts brief. That's not difficult if you apply the rule of primary relevancy: If a fact is crucial to understanding the issue *as it's been described to the judge,* it is of primary relevancy; if not, don't mention it.

Even though you should not plan to bring in all the kitchen-sink facts, it's important to know them all just in case the judge asks you about them. Remember, the judge may be on the wrong track, chasing the wrong facts. If you don't know all the facts, you may not be able to steer the judge back to the facts that are primarily relevant.

Judge Mies puts it simply: "Know your case. Know what your facts are. The lawyer needs to be able to tell all the facts." Judge Mies adds a caveat: "Don't send a younger associate who isn't familiar with the case. If you do send someone who is unknowledgeable about the case, the judge will think the motion is not very important to you."

Stating the Law

With great consistency, judges say they don't want lawyers to read the law during oral argument. Judge Knoblock said lawyers should paraphrase the language in statutes. Reading statutes or long, boring quotes from appellate cases chokes the lively fire of oral argument. It's a wet-blanket, perhaps even inhumane, technique.

The point is illustrated by the tale of the young lawyer who, after he finished reading a rather long statutory section, detected signs of the judge's

boredom. He stopped in the midst of his long and wearisome presentation and asked: "Is it Your Honor's pleasure that I should continue?" "Pleasure, my dear man," sighed the judge, "has long ceased, but you may go on with your presentation."

So as not to mercilessly weary—and displease—the captive audience on the bench, make sure you are conversant enough with the law to paraphrase it in simple terms, so the busy trial judge can get a quick mental grip on the law and apply it to your case.

While the bench will always attract a certain number of persons who are insulted at any suggestion they might not be omniscient, most judges do not fit that stuffy stereotype of arrogance; they do want—and need—you to teach them the law. Judge Knoblock puts it simply: "A good lawyer makes my job easier."

Even for conscientious trial judges, looking uninformed on the record, indeed being uninformed on the record, is a real danger on today's bench. In 1990, the Michigan Court of Appeals issued 348 published and 3,842 unpublished opinions, according to Carol Bride of the Michigan Court of Appeals. And in 1990, of the 2,755 cases disposed of by the Michigan Supreme Court, 71 of those were completed by an opinion, according to a spokesperson at the Supreme Court clerk's office.

When law developed slowly, like the imperceptible movements of glaciers, judges could be expected to know it all—they just read Blackstone's work or some other weighty tome. Against this old legal culture, one can understand, then, that judges did not always take kindly to advocates like the Earl of Birkenhead who, as a young barrister, never hesitated to inform the judge of the law. On one occasion a judge, offended by this, stopped him to ask: "Are you trying to teach me the law?" Birkenhead smiled and said softly: "My Lord, I never attempt the impossible."

Buried by an avalanche of opinions in the modern practice of law, Lord Birkenhead's quip about "attempt[ing] the impossible" takes on an entirely new meaning. Today, it's up to the lawyer to sometimes educate the judge about the law and to do it in a humane way. "The lawyer," said Judge Mies, "should go to oral argument prepared to treat the judge as a human being and understand that the judge does not have much time."

Colorful Big-Letter Law

In the rushed atmosphere of today's trial courts, judges need lawyers to break from the monotony of the talking head and use pictures, colors, and big letters. Still pictures, like print, give us something sound and moving pictures cannot—the ability to spend time looking at them. They are great for capturing and keeping the judge's interest.

"If you're going to use a statute, have a copy of the statute right there for the judge and opposing counsel," suggests Judge Gage. "Blow up the statute and highlight the crucial language. Do the same with the pivotal language in cases."

Judge Hillman suggests using "a blackboard, for example, to write down the main points of law, to simplify it. Above all, be innovative," he encourages, adding hopefully: "A little humor also helps."

"Diagrams, flow charts, and graphs are also helpful to the judge," notes Judge Tahvonen.

Lawyers can apply the big-and-colorful-picture principle to any exhibit. Highlight copies of *portions* of deposition testimony and direct the judge's attention to these, advised Judge Mies, rather than handing the judge the entire deposition. Using a colored highlighter on or blowing up the pivotal language in an exhibit helps the judge follow along as you explain the law, said Judge Mies. "Sometimes, for example, there'll be a dispute over an insurance policy and the lawyers will hand me an 8-10 page insurance policy in fine print which isn't even highlighted!"

But not all good intentions lead to success. Insists Judge Mies: "Make sure copies of statutes and cases and exhibits are good copies. It's insulting to be handed an illegible copy of anything. If you can't get a good copy, type in what you think the exhibit says and tell the judge that you have done that."

Finally, if lugging a blackboard into court would make you feel clumsy, page-size outlines may be just as effective for helping to keep the judge on *your* track. Judge Tahvonen explains that "giving judges a written outline of the oral argument so they can follow along eases the judge's note taking and structures the judge's thinking about the case in a way that's consistent with the advocate's position."

The advocate does not have to live by words alone. ■

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Footnote

1. These are estimates only. They are based on the author's informal survey of a handful of state and federal judges. Judge Douglas Hillman of the United States District Court, Western District of Michigan, says federal judges may have as many as 10 in one week, in addition to the press of trials which, in federal court, tend to be very complex. Judge Thomas Brown of the Ingham County Circuit Court and president of the Michigan Judges Association, hears about 10 on his regular motion day. Judge James E. Mies of Wayne County Circuit Court hears between 25 and 40, at a minimum, and once had 80 motions scheduled on a regular motion day. The chief clerk for the Oakland County Circuit Court said judges in that circuit hear about 55 motions on motion day.