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Article

*347 EFFECTIVE ORAL ARGUMENT: SIX PITCHES, FIVE DO'S, AND FIVE DON'TS FROM ONE JUDGE AND TWO LAWYERS

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I. INTRODUCTION

Although it is becoming increasingly common for courts to decide cases without oral argument, the ability to deliver a persuasive oral argument remains critical to a lawyer's success in trial courts and, perhaps more so, on appeal. Most courts permit oral argument in a significant number of cases, particularly in civil matters where both parties are represented by counsel. In those instances where courts grant oral argument, it is difficult--but not impossible--to change a court's mind if it has decided to rule in favor of your opponent. However, if the court intends to rule in your favor, the easiest way to change the panel's mind is to be utterly unprepared or ineffective at oral argument. Thus, in addition to knowing how to write persuasive briefs, good lawyers must also know how to present a persuasive argument.

This article offers a number of guidelines to teach lawyers how to craft such arguments and provides several “do's” and “don'ts” to help lawyers along the way, from preparation through argument itself. In Part II, we describe six different types of questions that you can expect when arguing a case--all described in baseball parlance--from the easy “soft-ball lob” to the more difficult “fastball.” In Part III, we present five “do's” and five “don'ts” that should be kept in mind when preparing for and arguing a case. Part IV concludes. By learning to recognize the different questions judges are likely to ask and mastering the “do's” and ***348** five “don'ts” discussed below, lawyers can improve their likelihood of getting on base in the courtroom, or can at least avoid striking out.

II. THE JUDGE AS PITCHER: SOME LESSONS FOR THE COURTROOM FROM THE BALLPARK

For a baseball player to be most effective at the plate, it is important to know what kinds of pitches to expect. The same is true with oral argument: a lawyer must know what kinds of questions to expect. This section discusses six kinds of questions that a lawyer can expect from the bench during oral argument, all described in baseball parlance.

Why baseball? Oddly enough, baseball and American jurisprudence share a storied tradition. The two institutions seem to be inextricably intertwined: Justice Holmes once announced that the National Pastime is not interstate commerce and is thus exempt from federal antitrust laws. [FN1] Justice Blackmun reeled off the names of his eighty-eight baseball heroes when the Court revisited the antitrust exemption fifty years later. [FN2] An insightful law student pointed out the parallels between the development of the Infield Fly Rule and the common law. [FN3] Most recently, then-Judge John G. Roberts compared the role of a jurist to that of an umpire during his Senate con-

firmation hearing. Baseball's official rules even read like a comprehensive regulatory code. Thus, it appears appropriate to draw on a central part of the game--pitching--to illuminate the interactions between bench and bar during oral argument. [FN4]

Pitch Number One: The Fastball. In baseball, the fastball is the most common pitch. Also known as "throwing heat" or "putting steam on it," the fastball is a straightforward pitch that dares batters to hit it if they can. In court, a judge hurls a fastball at an attorney in much the same way. A judge might ask a fastball question when he or she disagrees with counsel's argument or when controlling authority dictates an outcome opposite from that being advocated. [FN5] In order to successfully handle heated questions from the bench, you should anticipate that judges are going to put steam on some questions. Prepare in advance by ***349** considering your case from the judge's point of view, and think about what fastball questions may come your way. That way, when a judge throws a fast one to you, you can be ready to hit it out of the park.

Pitch Number Two: The Breaking Ball. From the mound, the breaking ball does not travel straight toward the batter, as does a fastball. Instead, it changes direction or "breaks" as it crosses the plate, often fooling batters into swinging at a pitch outside of the strike zone. From the bench, this question might indicate that the judge is concerned about the effect of your particular case on other areas of the law. [FN6] Or it might indicate that the court is concerned that you have missed the central issue in the case and wants you to think beyond the four corners of your brief. A judge might ask, for example, whether ruling in your client's favor would unnecessarily encourage litigation or whether the case also involves due process issues. If you have prepared carefully, you will know how to answer these questions. If you did not anticipate an issue raised by the judge, pause long enough to give a carefully considered response or offer to submit supplemental briefing addressing the court's concern. Either way, the ability to deftly handle breaking ball questions is the hallmark of a strong, thinking advocate.

Pitch Number Three: The Softball Lob. Before 1884, baseball rules required pitchers to deliver the ball from below their waists as if they were pitching horseshoes. [FN7] You are unlikely to see this pitch today at a major league ballpark, but it occasionally appears in the courtroom. The softball lob can indicate one of two things: either the judge agrees with your position and is giving you an opportunity to hit a home run or you have struggled with aspects of your argument and the court is giving you a chance to pad your batting average (or at least put the ball in play). [FN8] The court might ask, for example, whether adopting your argument would provide clear guidance to trial judges who confront similar issues or whether it would deter unsavory conduct. As with any question from the bench, listen carefully to what the judge is asking. Do not treat every question as a fastball. If you do, you will run the risk of whiffing on an easy pitch. You should *always* hit this pitch out of the park. [FN9]

350Pitch Number Four: The Changeup*. On the diamond, the changeup is an off-speed pitch that has a relatively straight trajectory and thus looks like a fastball. But unlike a fastball, it travels relatively slowly and can throw off the batter's timing. From the bench, a judge who agrees with your position might ask a changeup question in order to elicit reasoning that will help to convince an uncertain colleague. The judge may do this by asking why a particular interpretation makes sense in light of precedent or what the effects of a particular rule might be in hypothetical scenarios. [FN10] For example, a judge might ask whether there is sufficient evidence in the record to support a jury's finding; she is not asking because she thinks the evidence is insufficient, but because she wants you to describe that evidence in detail for the benefit of one of the other judges. Changeups are not hostile questions and are likely to appear in cases where the court must consider and analogize to other fields of law. Just as a hitter must pay close attention to whether a pitch is approaching at more than one hundred m.p.h. or whether it is floating toward the plate in the low sixties, you must carefully discern the nature of a changeup question.

Pitch Number Five: The Beanball. In baseball, a beanball is a pitch that the pitcher throws directly at the batter and is intended to either hit the batter or push the batter away from the plate. Such a pitch allows the pitcher to assert dominance from the mound. In court, a judge might hurl a beanball question when counsel obfuscates or frustrates the sitting judges by talking over them, avoiding questions, and arguing about inconsequential points. By doing so, lawyers prevent judges from getting to the heart of a matter and deciding a case. You can easily avoid beanball ques-

tions by providing direct answers to questions and staying away from our list of “don'ts.” If you find yourself on the receiving end of terse questioning, do not rush the bench. Take a deep breath. Apologize (but not profusely). And then answer the question. If you follow the “do's” and “don'ts” in Section III below, you will greatly reduce the risk of getting beaned. [FN11]

Pitch Number Six: The Wild Pitch. Occasionally, a pitcher will throw a wild pitch that does not meet hardwood or land in the catcher's ***351** mitt. Or you might see a knuckleball, which usually lands in the catcher's mitt but does strange things as it crosses the plate. Every now and then, a judge might ask a nonsensical question or a question that seems unrelated to the case at bar. [FN12] The court might ask, for example, whether the lower court instructed the jury on a particular legal theory when your case was decided on summary judgment, or whether the statute of frauds applies when your case involves a tort and not a contract. Keep in mind that every court's docket is large, and sometimes a judge might confuse one case with another. If you are confident that the question is nonsensical or unrelated to your case, the best response is to politely notify the court of your confusion and hope that the court attributes an unforced error to itself.

III. FIVE DO'S AND DON'TS

Once you know what sort of questions to expect, you need to know how to prepare for and properly deliver your oral argument. In the remainder of this article, we present five things you should do and five things you should not do--the “do's” and “don'ts” of oral argument. Both are important to keep in mind as you approach the plate.

A. Five Do's

1. Do Look at Your Case from the Court's Point-of-View

In preparing for oral argument, you should change places with the judges who will hear your argument and look at the case from their point-of-view. There are several ways to see how judges see things. One way is to attend oral argument in state or federal appellate courts. Ninth Circuit Judge Harry Pregerson notes that “you might find it helpful to scout oral argument in other cases set before the same panel that will be hearing your case. Time thus spent could give you useful insights into how the panel conducts oral argument.” [FN13] It is extremely helpful to have those insights before you find yourself standing before a microphone and a ticking clock.

Another way to get a judge's perspective is to attend CLEs where judges present their likes and dislikes. You should also review any articles that a judge on your panel wrote; these articles provide insight to the individual judge's preferences and to judges' preferences generally. There is a wealth of such literature to pursue, such as Ninth Circuit Judge ***352** Alex Kozinski's tongue-and-cheek article *The Wrong Stuff*, [FN14] in which he assumes that you want to lose your appeal and offers advice for doing so--much like the “don'ts” discussed below. Or you can read more serious articles, such as First Circuit Judge Michael Ponsor's article *Effective Oral Argument*[FN15] and Fourth Circuit Judge Karen Williams' article *Help Us Help You: A Fourth Circuit Primer on Effective Oral Arguments.*[FN16]

Beyond that, your imagination and intellectual rigor can help you see the case from the court's perspective. Judge Williams offers the following advice on this issue:

> As you prepare for argument, it is important to take off your advocate's hat and take stock of your case with the objective eyes of the judges who will hear your appeal. In the process of reviewing the already-prepared materials, it is important to consider what your briefing has, and has not, accomplished. Switch places with the court and consider what the judges hearing your case will need and want to know. Do not waste your opportunity to persuade the court to your view of the case by treating oral argument as a summary of what you said in your briefs; the judges have read the briefs. To be thoroughly prepared for oral argument,

> you need to try to begin thinking about your appeal from the point where you ended in the briefs. Identify those points of law upon which the outcome of the case is likely to turn and which, when viewed objectively, could be resolved in favor of either party. Those issues should be the focus of your oral argument. Make notes on what points are clear and unclear as discussed in your briefs. You should concentrate on clarifying the most important points for argument. [FN17]

As Judge Williams suggests, ask yourself what weaknesses exist in your case. You should be prepared to address those weaknesses in your argument. Remember that judges will ask you about the holes in your armor, not just the solid plates.

Another way to look at your case from the court's point-of-view--a way that does not seem to be mentioned in prior articles on the topic--is to judge moot courts. Doing so is an excellent way to see things from the other side. Suddenly, you are the judge. You can see what works and what does not work, and you can see how frustrating it is when counsel is unprepared, reads from a script, refuses to answer questions, or argues with the court (all addressed below). And not only will you be better ***353** prepared for your own arguments, but you will also get CLE credit. What could be better?

2. Do Prepare, Prepare, Prepare

One famous commentator has pointed out that if the question is “how to succeed” in the practice of law, “[t]he answer is quite simple. It is: By work .... There is no other road to success at the law. Work. More work. Then more work.” [FN18] Oral argument is no different: “During oral argument, it is impossible to focus the court's attention on the most relevant facts and legal analyses with the required precision if you have not invested the time in thorough preparation.” [FN19] In fact, one of the biggest complaints of sitting judges is that counsel appear unprepared for their role as an oral advocate. During oral argument, there are only a few minutes available to you, so you should be prepared to do the most with the allotted time. You should never disappoint a judge by your ill preparation, a judge who had some questions and might have gone your way if you could have distinguished the facts of a key case or if you could have provided a concise timeline of what happened.

The best way to ensure that you properly prepare yourself for oral argument is to begin early. While Samuel Johnson's remark that “when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully,” [FN20] was uttered to describe the defendant in an appeal, it may also describe the remarkable effect an impending oral argument has on an attorney. Start about two weeks before oral argument by refamiliarizing yourself with the record, rereading the briefs, identifying and reviewing key cases, and refocusing on the other side's key arguments. That way, if and when your schedule gets too busy to focus on the impending oral argument, you won't find yourself saying, “I wish I had started sooner.”

Finally, one important point to keep in mind in preparing for oral argument is that you should know the record forward and backward. Some judges believe that any prior opinion can be distinguished on its facts. To a large extent, that is correct because every case is different as far as the facts are concerned. Therefore, one of your most important tasks on appeal is to answer the court's questions regarding the record. Judge Kozinski states this point well: “Where the lawyer can really help the judges--and his client--is by knowing the record and explaining ***354** how it dovetails with the various precedents. Familiarity with the record is probably the most important aspect of appellate advocacy.” [FN21] Judge Ponsor agrees: “The factual background of the case is your keyboard. If you cannot hit the notes, you certainly cannot flaunt your artistic interpretation.” [FN22] By preparing early and knowing everything there is to know about your case, you will impress judges and have more positive results for your clients.

3. Do Engage in a Civil Discourse with the Court

Oral “argument” is really not a good name for the process we are describing here. You certainly do not want to end up arguing with a judge. And arguing a case to a judge--whether in the trial court or on appeal--is not like argu-

ing a case to a jury. While juries may decide a case a certain way because one party is more sympathetic than the others, judges are charged with applying the law fairly and impartially. Judge Kozinski recognizes this difference in his article, where he explains that "oral argument can be tiring and the judges need a little comic relief once in a while. Few things are quite as funny as hearing an appeal to passion during an appellate argument." [FN23] Judge Ponsor makes the same point in a different way: "As in most courtroom races, facts--not adjectives--will get you where you want to go." [FN24]

Oral "argument" is more like an advanced academic seminar than a closing argument. There are two different advocates (whether plaintiff and defendant or appellant and appellee) who have diametrically opposed views; each is attempting to convince the seminar participants of their viewpoint. There is wide-ranging give and take, lots of questions, [FN25] and answers to those questions. [FN26] Speak clearly and at a moderate pace. Use appropriate diction and avoid inappropriate rhetorical flourishes. Remember that your goal is to deliver information to the judges. To do that, you should "[s]peak naturally and make your style unobtrusive so that your words, rather than your voice, are the object of the judge's attention." [FN27]

***355** 4. Do Welcome Every Question

In a typical ten minute argument on appeal, the questions start flowing shortly after you clear your throat and start to say your name. Questions from the court are not being asked to vex you; the judges are just trying to find their way to the right conclusion. Here is your last chance to help. As a result, questions are good, not an unpleasant distraction from a prepared speech. Develop the habit of listening carefully to questions and pausing before launching into a clear, concise, and direct response. Don't change directions or answer a question that you wish the court had asked but didn't. Addressing this issue, Judge Pregerson offers the following advice:

> Your primary job at oral argument is to answer the judges' questions carefully. Do not view these questions as interruptions, but as indications of the court's interest in a particular area. Pay careful attention to each question--there may be a hook in it or it may be the lifeline that will help you win the appeal. Do not assume that a judge is for you or against you based on the questions asked. If you do not understand the question, ask for clarification. [FN28]

Judge Williams likewise notes that "the most important task in successfully responding to a judge's questions is to listen carefully to the question itself. Make sure you understand what the judge is asking before you start responding. If you answer the wrong question, you have missed your opportunity to clarify the judge's concerns." [FN29]

5. Do Practice

In baseball, there is no substitute for batting practice: batting practice occurs before every game and is essential to every hitter's success. The same is true for all-star advocates. As with hitting a baseball, answering a question well requires good timing and meeting the question head on. Judge Ponsor suggests that you "practice your argument *out loud* before you give it in court. Many phrases that seem killingly effective in the confines of an attorney's mind fall flat in the open air." [FN30] Record your practice performances so you can dissect the mechanics of your responses and discuss those issues with your colleagues.

***356** Better yet, schedule "a full-blown rehearsal with partners and associates listening and offering suggestions." [FN31] Be sure to do so "at a time when your preparation is nearing an end so that you are ready to argue, but with sufficient time before your scheduled court appearance so that you will be able to implement any necessary changes" and encourage "your panel of 'judges' to critique substance and style so that you can gain the most from the experience." [FN32] As with any other pastime, there is simply no substitute for lots and lots of practice.

B. Five Don'ts

1. Don't Attack Opposing Counsel or the Court

Judge Kozinski provides the following advice for losing a winning argument:

> [L]et's face it, a good argument is hard to hold down. So what you want to do is salt your brief with plenty of distractions that will divert attention from the main issue. One really good way of doing this is to pick a fight with opposing counsel. Go ahead, call him a slime. Accuse him of lying through his teeth. The key thing is to let the court know that what's going on here is not really a dispute between the clients. No, that's there just to satisfy the case and controversy requirement. What is really going on here is a fight between the forces of truth, justice, purity and goodness--namely you--and Beelzebub, your opponent. [FN33]

On a more serious note, Judge Ponsor adds: "Attorneys often arrive at court annoyed at each other. Poor attorneys will want to talk about this." [FN34] Just as you should not attack opposing counsel, you also should not attack the judge. Simply put, "[j]udges do *not* want to sift through this wastepaper basket of accusations." [FN35] If you want to be an excellent advocate for your clients, stick to the facts and the law, and don't try to stick it to opposing counsel. Remember, lawyers--like baseball players--are "professionals." You should be one too.

2. Don't Read

Reading from a script is a common deficiency in many rookie advocates. Obviously afraid of what is about to befall them, they trudge to the podium, deposit their weighty notes on the lectern, and make a preliminary***357** eye contact pass of the judges. Then it is back to the comfort of notes for as long as the judges let them read. If you read your argument, the court will probably not ask many questions, which may be in deference to the fact that your body language says "don't bother me." Worse, you may lose the court's attention. Judge Pregerson explains: "[R]eading a prepared speech is rarely effective. Our interest in what you say wanes as we continue to watch the top of your head." [FN36] Remember that questions are good, so anything that discourages questions--like reading a script--can undermine your argument.

One way to keep the judges' attention is to hone your argument down to its most essential outline of "the points you want to make and the order you want to make them, even if you never take it out of your briefcase." [FN37] Most lawyers are not quite daring enough to leave their outline in a briefcase; they prefer to keep their prepared outline handy at the podium for security in case all else fails. Either way, be sure to converse with the judges rather than read to them. Remember that you are well-prepared. You have carefully considered and followed each of the "do's" discussed above. So, act like it by making eye contact with the court rather than with your notes. Try to speak extemporaneously, or at least give the court the impression that you are doing so by making good eye contact with the court rather than with your notes.

3. Don't Cut Off the Judges or Talk Over Them

This "don't" is a corollary to the "do" regarding civil discourse, but it should be addressed separately. When we are engaged in normal conversation, it is common for one person to talk over the other. But when a judge starts talking, an oral advocate should shut up. As Judge Kozinski notes, not only is interrupting a judge rude, but "there is really no substitute for offending the guy who's about to decide your case." [FN38] And if you interrupt, you may never know what the judge intended to ask and you might answer the wrong question. Remember that questions are how you address the court's concerns, so let judges complete their questions before you launch into a response.

***358** 4. Don't Get Sidetracked

During an oral argument, there are at least two ways to get sidetracked. The first occurs when a judge asks a question that has nothing to do with your case. In those instances, you should consider answering the question as best you can and then adding "but that's not our case and here's why ...." But be careful: the judge may be asking the

question because you missed an important issue and this is your first and last opportunity to address it. [FN39] A few examples of this are provided in the "breaking ball" discussion above. [FN40] If you think the issue *might* be relevant and you simply cannot respond (if, for example, the issue or case was not briefed), you should tell the court that you are unable to respond and offer to provide a short brief on the topic within a few days following oral argument. The court will likely say yes, and you can move on.

Another way to get sidetracked is to allow your opposing counsel to lead you astray (if, for example, opposing counsel argues inconsequential points or attacks your credibility rather than your arguments). If you are the appellee, you are able to shape your argument to rebut what appellant has said. And if you are the appellant, you can reserve a few minutes for rebuttal to respond to whatever your opposing counsel just said. In either case, you should avoid inconsequential points raised by your opposing counsel. Stick with your pre-argument assessment of what is and is not important. Otherwise, you risk spending valuable time rebutting a point that has little if any bearing on the court's analysis.

5. Don't Use Visual Aids

Although you may be the rare exception, very few advocates can effectively argue and simultaneously use visual aids. Effective argument requires you to actively engage with the court in a focused and collegial discussion of your case. If the visual aid is a foam board on an easel, it will take you away from the podium. Judges do not like it when you leave the podium because it takes you away from the microphone, and whatever you say may not be heard and may also be lost to the transcript. [FN41] If the visual aid is software presentation such as Microsoft PowerPoint or Apple Keynote, consider how likely (or more accurately, ***359** how unlikely) it will be that the judge will allow you to stick to the outline contained in your prepared presentation. The court is probably going to ask questions, which will in all likelihood require you to deviate from your prepared outline. Also, consider whether you really want the judges admiring your animated fades and dissolves when you are trying to explain the common law origins of the wrongful death statute. In the rare instance that a visual aid will actually benefit your case, make sure that you can integrate it into your argument without losing your effectiveness. For example, if your case involves a key statute or contract provision, consider providing the court "a copy of the material, in reduced or abbreviated form, for each judge." [FN42] Although this option is better than a full-blown visual presentation, even this mild interruption can have a negative impact on your case. A better option is to tell the judges where they can find the statute or provision in your brief. Don't waste your time (and the court's) fumbling around with an unnecessary and distracting presentation.

IV. CONCLUSION

By mastering the five "do's" and five "don'ts" and learning to recognize the different questions judges are likely to ask, lawyers can improve both their batting average and their win-loss percentage. In baseball, there is nothing worse than standing at the plate without knowing how to identify or hit a pitch. Similarly, in oral argument, there is nothing worse than being subjected to difficult and often painful questioning where you barely answer some questions and completely miss others. This article provides helpful advice that, if followed, will help you avoid such an experience. Even if you don't hit a home run after heeding this article's advice, at least you have a fighting chance of getting on base.

With this advice as a backdrop, it seems fitting to end with the following words of former Chief Justice Rehnquist:

> [T]he All American oral advocate ... will realize that there is an element of drama in an oral argument .... But she also realizes that her spoken lines must have substantive legal meaning .... She has a theme and a plan for her argument, but is quite willing to pause and listen carefully to questions .... She avoids table pounding and other hortatory mannerisms, but she realizes equally well that an oral argument on behalf of one's client

requires controlled enthusiasm and not an impression of *fin de siècle ennui*. [FN43]

***360** The United States Supreme Court obviously has high expectations of the lawyers that appear before it. Other appellate courts share those same expectations, and every court you appear in needs your assistance in sifting through their ever-burgeoning dockets. If you properly anticipate the court's questions and follow the “do's” and “don'ts” above, you can easily satisfy those expectations and, at the very least, avoid striking out without making contact.

[FNd1]. Stephen Dwyer was elected to the Washington State Court of Appeals, Division One, in November 2005. Prior to that, in February 2004, Judge Dwyer was appointed to the Snohomish County Superior Court after serving for nine years as a Snohomish County District Court Judge. Leonard Feldman is an attorney at Stoel Rives LLP, where he specializes in appeals before the Ninth Circuit and Washington appellate courts. Robert Nylander is a commercial litigator at Cutler Nylander & Hayton, PS, and has practiced in the appellate arena since 1987.

[FN1]. *See*Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof 1 Baseball Clubs, 259 U.S. 200 (1922).

[FN2]. Flood v. Kuhn, 407 U.S. 258, 262-63 (1972).

[FN3]. William S. Stevens, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975).

[FN4]. A more traditional description of question types can be found in Michael A. Ponsor, *Effective Oral Argument, in* 1 FEDERAL CIVIL LITIGATION IN THE FIRST CIRCUIT § 4.2.15 (2nd ed. 2008). Judge Ponsor describes similar questions as “the query informational,” “the query directional,” “the query confrontational,” “the query of bliss,” and other “miscellaneous queries.” These authors prefer baseball analogies to scientific terminology. But for comparison, many of Judge Ponsor's alternate formulations are referenced in the footnotes that follow.

[FN5]. Judge Ponsor calls this question “the query confrontational.” *Id.* at § 4.2.15(c).

[FN6]. *See* Karen J. Williams, *Help Us Help You: A Fourth Circuit Primer on Effective Oral Arguments*, 50 S.C. L. REV. 591, 596 (1999) (“[Y]ou must understand the rule of law that you are requesting and be able to enunciate its parameters. Be prepared to explain the policy arguments supporting your requested relief and be ready to respond to the policy arguments that detract from your case.”).

[FN7]. DAVID NEMEC, THE RULES OF BASEBALL: AN ANECDOTAL LOOK AT THE RULES OF BASEBALL AND HOW THEY CAME TO BE 35-36, 151-154 (Lyons & Burford 1994).

[FN8]. Judge Ponsor calls this question “the query of bliss.” Ponsor, *supra* note 4, at § 4.2.15(d).

[FN9]. *See* David M. Gersten, *Effective Brief Writing and Oral Argument: Gaining the Inside Track*, 81 FLA. B.J. 26, 29 (2007) (“If you have a sympathetic judge, your response might be the perfect opening for that judge to ask you, why? The door is open for you to make an argument that may win the day ....”).

[FN10]. *See id.* ([S]ometimes “the question posed is asked with the express purpose of affecting one or both of the other judges. When this occurs, the practitioner becomes a tool of the questioning judge to obtain another vote on the panel. Answer the question and use logic or reason to solidify your argument.”).

[FN11]. It is possible, of course, that you did nothing wrong. This may be what Judge Ponsor calls “the query intemperate,” an indication that “even the best judge is having a bad day.” Ponsor, *supra* note 4, at § 4.2.15(e). Either way, it never hurts to be contrite.

[FN12]. Judge Ponsor calls this question “the query bizarre,” indicating that the judge “has wandered in from a different universe and needs to be gently retrieved.” *Id.*

[FN13]. Harry Pregerson, *The Seven Deadly Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. REV. 431, 440 (1986).

[FN14]. Alex Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. REV. 325 (1992).

[FN15]. Ponsor, *supra* note 4.

[FN16]. Williams, *supra* note 6.

[FN17]. *Id.* at 594-95 (footnote omitted).

[FN18]. E. Barrett Prettyman, *Some Observations Concerning Appellate Advocacy*, 39 VA. L. REV. 285, 301(1953).

[FN19]. Williams, *supra* note 6, at 593.

[FN20]. James Boswell, *The Life of Samuel Johnson, LL.D., in* GREAT BOOKS OF THE WESTERN WORLD 351 (Robert Maynard Hutchins ed., 1952) (1791).

[FN21]. Kozinski, *supra* note 14, at 330.

[FN22]. Ponsor, *supra* note 4, at § 4.1.3(a).

[FN23]. Kozinski, *supra* note 14, at 333.

[FN24]. Ponsor, *supra* note 4, at § 4.3.1.

[FN25]. Pregerson, *supra* note 13, at 440 (“Your primary job at oral argument is to answer the judges' questions carefully.”).

[FN26]. *Id.*

[FN27]. Williams, *supra* note 6, at 598.

[FN28]. Pregerson, *supra* note 13, at 440.

[FN29]. Williams, *supra* note 6, at 599; *see also* Gersten, *supra* note 9, at 29 (“At any stage of your argument, if any judge asks a question, answer it as directly as possible. Answer the questions honestly, even if you are afraid this might hurt your case. There is nothing worse than losing credibility with the court.”).

[FN30]. Ponsor, *supra* note 4, at § 4.1.3(c).

[FN31]. *Id.*

[FN32]. Williams, *supra* note 6, at 597-98.

[FN33]. Kozinski, *supra* note 14, at 328.

[FN34]. Ponsor, *supra* note 4, at § 4.1.7.

[FN35]. *Id.* at § 4.2.7.

[FN36]. Pregerson, *supra* note 13, at 439; *see also* Williams, *supra* note 6, at 598 ("[Y]ou should remember this cardinal rule: do not read your argument."); Gersten, *supra* note 9, at 28 ("If you come to court with a prepared script, you will quickly learn what it is like to be dropped from a plane without a parachute.").

[FN37]. Ponsor, *supra* note 4, at § 4.1.3(c).

[FN38]. Kozinski, *supra* note 14, at 331; *see also* Gersten, *supra* note 9, at 29 ("Arguing gains enmity, whereas intelligent respectful discussion gains respect").

[FN39]. *See* Williams, *supra* note 6, at 595 n.19 ("In all likelihood, the judges are not off-track. Rather, what is more probable is that, in the course of studying the applicable law, there was some reason for the judges to conclude that the issue was important to the outcome of the case.").

[FN40]. *See* Williams, *supra* note 6, and accompanying text.

[FN41]. Some judges will listen to oral argument more than once: first when you argue the case, and later in their chambers when they are drafting their opinions or deciding how to vote. If your remarks are not picked up by the microphone or court reporter, they will be lost both at the argument itself and during post-argument review.

[FN42]. Pregerson, *supra* note 13, at 440.

[FN43]. WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 281 (Morrow 1987).

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