

Snatching Victory: Arguing to Win

by Kenneth R. Berman

You wait, sitting in a hushed courtroom. What is the judge thinking? For what seems like an eternity, but has only been the last 30 seconds, the judge has been looking at the first two pages of your opponent's motion. Now, he makes an indecipherable facial expression. You can't be sure whether the judge has even read, much less thought about, the briefs you spent hours writing. Suddenly, the judge puts the motion down, peers over his glasses, and chisels into your eyes with a look that could stop a train. "Counsel," says the judge. "Why shouldn't I allow your opponent's motion?"

In one instant, a hundred thoughts cross your mind. "I've lost it," you think. If the judge had read the briefs, he would have asked my opponent "Why *should* I allow this motion?" If he understood my position, or what the cases say, my opponent would be in the hot seat, not me, and I'd be the one sitting here smugly, itching to get to the phone to tell my client what a wonderful day we had in court.

How do you turn this judge around? Why doesn't the judge like your case? Why doesn't the judge like you? Are there any magic words you can utter that will do the trick?

If you had more than an instant to think about it, you would realize there is no reason to panic. The judge has only lobbed you a softball. Of course the judge may not understand your case. But he's given you an engraved invitation to engage in the highest and, conceivably, the most effective form of persuasion: an oral argument. And it may be the only real chance you get.

Your brief, no matter how eloquent, has been demoted to a mere device that preserves issues for appeal. Oral argument is the only thing that matters now. Sure, the facts and the law might handcuff you. You cannot change the facts. And, although you might have some influence in how the judge interprets or applies the law, you are powerless to change the cases, statutes, and principles of interpretation.

Given the inherent rigidity in the facts and the law—your tools and materials—the challenge is to get the judge to focus on the particular facts and principles of law that go your way, and do it in a way that causes the judge to want to

rule in your favor. After all, if the judge only hears that your client promised to sell her house to the plaintiff, the judge is likely to enjoin your client from selling it to someone else. But if the judge also hears that your client showed up on the day of closing with the deed to find the plaintiff did not have the purchase price, the judge is likely to allow your client to sell the house to anyone your client chooses. But then again, if the judge hears that the reason the plaintiff did not have the purchase price was because he claims you orally extended the date of closing to allow the plaintiff to get his financing, the outcome is not so clear.

That is where the effective advocate makes a difference.

Nearly all disputes can reach this muddled area, and, since the applicable facts and law are different in every case, no one can give you the exact words that guarantee your argument will win. But you can carry winning techniques from argument to argument. Despite a contrary point of view, there are certain techniques that can make the difference between being an ordinary or an outstanding advocate. Here are some tips, not necessarily in any order of importance.

Make a good opening. Judges are, first and foremost, human beings. You cannot expect them to know everything. They may not know the law that affects your case. Their knowledge of the facts, or important details, may be limited. They call balls and strikes. They rely on whatever information, however fragmentary, that has impressed them to move in one direction or another.

Therefore, make a good and lasting first impression. Of course, this means all the elementary things, such as dressing well, looking the judge in the eye, and standing up before you address the court. But most important, it means starting your argument in a way that favorably grabs the judge's attention, without losing your credibility.

If you were in a trial, you would have 15 minutes to make an opening statement, knowing that your opening will be pivotal in whether you win your case. In an oral argument, your opening plays the same critical role, except that the opening is what you say in the first 30 seconds. Good openings answer two questions, whether or not the judge asks them: What do you want? Why do you want it? The answers,

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and hence your opening, should be short, on point, and—if possible—stated in a way that appeals to the judge's visceral notions of doing the right thing. Here is a good opening:

Good afternoon, your honor. I'm John Smith, and I represent the plaintiff. The defendant lives next door to the plaintiff. She has 14 horses on her property on less than an acre of land, and the stink is just awful. We'd like the court to issue a preliminary injunction limiting the number of horses to three. We've tried to work it out, but the smell won't go away unless the court helps us out.

The judge may have known nothing about this case until she heard the opening. But after listening for 30 seconds, the judge knows that you are complaining about a nuisance (even though you have never used the word nuisance), that the problem involves offensive odors coming from horses, and that you need a preliminary injunction. This opening is effective because, with an economy of language, it has grabbed the judge's attention ("She has 14 horses on her property on less than an acre"), educated the judge about the nature of the dispute ("the stink is just awful"), and appealed to the judge's sense of right or wrong in a way that gives the judge an opportunity to be a problem-solver, hence a hero, by ruling your way ("the smell won't go away unless the court helps us out").

Good openings, though, are not the exclusive domain of the attorney who argues first. The opposing attorney needs to open equally well to steal back whatever ground the first attorney purloined. In the horse case, the lawyer for the defendant could open her argument like this:

Good afternoon, your honor. I'm Jane Brown, and I represent the defendant. The fatal flaw in the plaintiff's motion lies in the reality that smell is in the nose of the beholder. And at this stage, where all that's before the court are conflicting affidavits, the court has no way of making even a preliminary finding that the blame for this suit belongs to the defendant's horses, rather than to the plaintiff's unusually delicate sense of smell.

This opening packs a punch. It reminds the judge that there are two sides to every story ("All that's before the court are conflicting affidavits."). It sends a message that perhaps the plaintiff is trying to get something from the system not because of wrongdoing by the defendant, but because of peculiar sensibilities of the plaintiff ("Smell is in the nose of the beholder:").

Don't bore the court. Judges have heard it all before. "In order to get a preliminary injunction, the plaintiff has to meet a four-part test. First, . . ." "In order to get summary judgment, the defendant has to show that there are no genuine issues of . . ." "The plaintiff's document request is overbroad and irrelevant." Why argue in a way that is virtually guaranteed to make the judge glaze over your words? Reciting boilerplate is not argument. Being ordinary is not advocacy. To get the judge interested in your case, you must make it interesting.

There are many ways to do this. One way is to use sound bites—a short expression or a colorful phrase that clearly encapsulates your message and burns it into the listener's short-term memory. Politicians use sound bites because, like litigators, they carry a burden of persuasion that must be met in a limited amount of time. Mindful of your burden, instead of arguing:

The court should grant the attachment in order to secure the plaintiff's expected judgment. . .
the following is likely to pull more weight:

I need this attachment, your honor, or otherwise I'll end

up with a million dollar judgment but only a fishcake to show for it.

Two words of caution: First, know your judge. Some judges are turned off by informality. You will have to win them over in other ways. Second, avoid being flip. Taking sound bites to extremes can make your argument sound disrespectful.

Another way to enliven your argument is through tempo and pitch, the rhythms, cadences, and volume of your delivery. This does not mean you should speak loud to get the court's attention. To the contrary, when there is a particular point you want to emphasize, slow down and speak softly. A softly spoken phrase conveys the impression that the uttered words are the inevitable and correct conclusion of whatever has preceded it. By contrast, loud rhetoric, in addition to being a turnoff for almost any listener, generally conveys a subliminal message that volume is substituting for logic.

Yet speaking with enthusiasm can be important and very effective when timed correctly, especially if you are the second person to argue. If your opponent has just ended a lengthy monotonous argument, a healthy display of energy in your opening remarks will wake up the court and make it pay attention. Of course, racing through your argument should be avoided. But speaking with just a tad more pep than you would in normal conversation conveys the impression that you have a good command of the record, the law, and the logic behind your position.

Body language and facial expressions play an important role too. Suppose your opponent has just argued that your client, a former employee of the plaintiff shoe manufacturer, should be enjoined from working for the plaintiff's biggest competitor because your client had access to the plaintiff's most intimate secrets. It might be adequate to argue in opposition:

It's absurd to think that John Smith could possibly injure the plaintiff. When he worked for the plaintiff, he was in the sneaker department. In his current position, he's in the ladies' boots division.

But it might be better to make an argument like the following, coupled with some well-timed brow-furrowing, subtle head shakings, and strategic voice inflections:



The plaintiff claims that John Smith was at the heart of the plaintiff's operations, that he knew all of the plaintiff's tenderest marketing secrets, and that in the hands of the defendant, John Smith will cripple the plaintiff's sales. John Smith worked for the plaintiff only for eight months. In that short time, he was the plaintiff's top salesman in the sneaker division. Before that, he was XYZ Corp's top salesman for personal computers. Before that, he was ABC's top salesman in the corrugated box division. Now he has a promising future at Acme Corp., where he's going to be selling lady's boots—a new product for him. John Smith has talents that most of us would love to have. He had these talents before he worked for the plaintiff and—so long as the plaintiff doesn't interfere—his talents should carry him for many years. Yet the plaintiff would like the court to endorse the idea that John Smith's future success as a lady's boot seller for Acme is somehow not based on his talent but is based on alleged marketing secrets he supposedly learned when selling sneakers for the plaintiff. [Stop, furrow your brow, take off your eyeglasses, shake your head ever so slightly, lower your head, roll your eyes up, and look at the judge as you say in soft tones and slight pauses between the next three words:] That, just, could not be. . . Our courts fortunately have not held that the innate ability to peddle a company's product is a protectible trade secret.

Be confident, not cocky. Before going into an argument, you ought to have a good idea of what you will say. It should make sense to you. Think out carefully the logic of your position, and anticipate the most logical way to counter the most difficult questions. If what you are about to tell the judge does not pass your own smell test, don't argue it, even if you think the lawyer on the other side will never find your argument's weaknesses. Apart from the risk in presenting an argument whose logic is less than sound, you will not be able to disguise your own lack of confidence in the position. Your voice and body language will send a message to disregard whatever words you are uttering.

Being confident in your position, however, should not be carried to the point where your confidence is perceived as cockiness. It is one thing to say: "The cases are quite clear that an injunction should be granted in these sorts of circumstances." It is, however, too presumptuous to say: "The appeals court agrees with me that I should have this injunction."

Avoid overstatement. In their zeal to win, lawyers sometimes push the facts or the law a little further than it ought to go. They may argue, for example, that their client sent a letter and received no response (thereby implying that the letter was ignored or that the recipient acquiesced in the content of the letter), when the reality is that the letter was sent only a few days before the hearing and the recipient had no reasonable time to respond.

Despite the ethical constraints against such behavior, these sorts of arguments occur with disturbing frequency. While wordsmithing might be an accomplished trait of an effective and ethical advocate, distortion is not. Mischaracterizing an opponent's position, apart from being unethical, is bad strategy. No self-respecting advocate can expect to win if his argument is grounded on misstatement, mischaracterization, overstatement, or distortion, even if innocently done or done because of a misunderstanding.

Therefore, the effective advocate will be scrupulous in fairly presenting the holdings of cases, the positions of the

adversary, the facts as revealed in the record, the testimony of key witnesses, and the like. A surefire way to lose the argument is to take liberties with the facts, prior procedure, or the law, and to have your opponent reveal what actually occurred. From that moment on, your credibility is lost. A lawyer without credibility is like a car without gasoline: neither will go anywhere.

Don't make opposing counsel the issue. There are ways of advancing your client's case and burying your opponent's, without having to dump on opposing counsel. Judges detest incivility and acrimony among lawyers. If you need to attack, attack your adversary's position, not the lawyer who delivers it. Thus, avoid statements like, "Mr. Smith [the opposing lawyer] refused to give me the documents." The point can be made more forcefully by saying, "The defendant refused to give me the documents."

Why is it important to refrain from attacking opposing counsel? First, it is unprofessional. It sounds like bickering rather than argument. It sounds like you are trying to embarrass your opposing counsel, rather than trying to win your case. Second, if you make opposing counsel the issue, it creates the impression that the facts, procedure, and law are inadequate to support your position.

And what about those instances in which opposing counsel truly deserves reprobation, such as when opposing counsel distorts the record or conceals evidence? You can get that message across effectively without engaging in gutter tactics. A judicious use of the passive voice is sometimes warranted. "This is the first time I've seen this document" is better than "Mr. Smith hid this document from me until now." Take the high road and stay on it.

Be respectful, but avoid excessive formality or obsequiousness. An argument should be thought of as a conversation between two adults, each of whom have equal standing in the justice system. The government has hired the judge to make decisions. The client hires the lawyer to focus the

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judge's decision on relevant facts, principles of law, and considerations of fairness.

Some lawyers mistakenly see it another way. They see themselves as beggars at the table of the law. They are so afraid of offending the judge that they spend too much time on matters of formality. Their tribute to formality interferes with the process of educating the judge. Awkward supplications, such as "if your honor please," are needless distractions that interfere with the process of educating the judge. If you let the symbol of the black robe intimidate you the way the Wizard of Oz intimidated Dorothy, you will look weak, and so will your argument.

Don't summarize your argument at the end. Some lawyers conclude their argument like this:

Therefore, your honor, to sum up, the reason that the



complaint should be dismissed is because, as we stated earlier, the complaint doesn't allege privity between defendant and plaintiff, the complaint doesn't plead fraud with particularity, and nothing the plaintiff alleges in the complaint can possibly be attributed to my client. As we stated in our brief, your honor, all of these allegations, even if they were true, would not entitle the plaintiff to relief. Therefore, under the principle of *Conley v. Gibson*, the complaint should be dismissed. Thank you.

This is regurgitation, not argument. It adds nothing to what was already said. It wastes time. It's unpersuasive. It's a real low point and an awful way to end an argument.

The better way is simply to sit down after you make your last point. The ending could go something like this:

Finally, the plaintiff is claiming fraud. I'm entitled to know what the defendant supposedly said that was false, when he said it, and how the plaintiff relied on it. I've read this complaint from beginning to end, and the closest the plaintiff gets is this statement in paragraph 49 that says: The defendant defrauded the plaintiff by selling him the airplane for \$200,000, which far exceeded its fair market value. That's not enough. Selling an airplane for more than its fair market value isn't fraud.

Then sit down and shut up. You've made your point. Anything you say after that only weakens the impact of your presentation.

Answer all questions directly, but always advance your case. A lawyer on his feet in a courtroom is like a teacher in a classroom, like a tour guide on a trip. He is there to instruct and guide the judge to the desired decision. And like a student or tourist, the judge will often interrupt the presentation with questions. But the judge has no patience for long-winded answers or indirect responses. When she asks a question, she does not want to be kept in suspense. She wants a straight answer and she wants it as soon as she asks the question.

Some lawyers don't know this. They think every question is a trap, a gateway to defeat: If they give the wrong answer, they lose. They try to out-think the judge between the question and the answer. In the instant between the question and the time they open their mouth, they try to figure out the safe answer, the answer that won't get them into trouble, the answer that won't invite a harder question, or the answer they think will make the judge like them. They play for time. They dance around. They give a speech before they give an answer, as if they can ease the judge into accepting the end-

ing of the speech as an answer to the question. They evade. They say anything except the thing the judge really wants: a simple and honest response.

Here is an example of a dialogue that occurs too frequently with disastrous results:

Q: (by the Court) Mr. Smith, did you produce the contract to Ms. Taylor?

A: Your honor, the document request was very complicated. When we got the document request, we called Ms. Taylor and asked her if she would narrow the request so that we. . .

Q: But Mr. Smith, did you produce the contract?

A: I'm explaining your honor. As I said, we had a lot of trouble trying to figure out exactly what Ms. Taylor was looking for. So we called her up and asked her if she would. . .

Q: I'm allowing the motion to compel. Mr. Smith, I want that contract produced by 9:00 tomorrow morning. Ms. Taylor, if you don't get that contract by nine, please let my clerk know and send in an affidavit of how much time you spent on this motion. I'll consider an award of fees. Is there anything else Ms. Taylor?

Why did this motion go so terribly for Smith? Because Smith was evasive. He assumed that if he admitted he had not produced the contract, the judge would be upset. So Smith tried to prepare the judge for a "no" answer with a non-responsive preamble. Smith failed to realize that the judge was taking things one step at a time. The judge only wanted to know whether Smith had produced the contract, not whether the document request was complicated. If Smith had candidly answered that the contract had not yet been produced, there would have been ample time for Smith and the judge to talk about why the contract had not been produced and whether its production ought to be compelled. Instead, the judge saw Smith as evasive, as if he were hiding something, as if he were conscience of having done wrong, as if he were saying: "Judge, I know I should have produced the contract earlier, and I don't really have a good excuse but, if you buy what I'm about to tell you, I think I can wiggle out of this."

What should Smith have done? He should have answered the question first, and explained later. The best approach with a yes-or-no question is to answer it "Yes, because. . ." or "No, because. . ." or "I don't know because. . ." The "because" serves as a lead back into the rest of your argument. It neutralizes the effect of a "wrong" answer and allows you to keep

advancing your position. The "because" focuses the judge's attention on your follow-up remarks. It permits you to answer the judge's question without destroying the tempo of your argument or sounding like you're hiding the ball. Here is how the argument could have gone in Smith's favor:

Q: Mr. Smith, did you produce the contract to Ms. Taylor?

A: (by Mr. Smith) No, your honor, because we couldn't tell from the document request what the plaintiff was looking for. The document request was very complicated. When we got the document request, we called up the plaintiff and asked if she could narrow the request so that we could make an intelligent response, but we had no luck. Instead, the plaintiff filed this motion. We're willing to produce any relevant document, but we think the plaintiff should first give us a document request we can understand.

Q: Which part of the request are you having trouble with?

A: Paragraph 3. They want all documents "relating to the construction of project c-12." This is overkill. We're dealing with an alleged wrongful termination, and in all events, we don't know where to draw the line. When does a document cease to have a relationship to the construction so that it falls outside paragraph 3? I can't tell.

Q: Ms. Taylor. I'm inclined to agree with Mr. Smith. Is there any way the two of you can work this out?

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A: (by Ms. Taylor) I'll give it another shot judge. I think we can narrow this. But if I can't get any cooperation, I may have to come back.

Q: I understand. But see what you can do. I'll hold off on this motion. If you can't reach agreement, let my clerk know and I'll either rule on the motion, send you to a magistrate, or call you in for another conference. But please see what you can do to work this out without my intervention. Next case.

Notice that when the judge asked Smith to identify the troubling part of the document request, Smith didn't merely say "Paragraph 3" and stop, hoping the judge would find it on his own, read it, and agree with Smith. Instead, Smith kept forging ahead with his argument, using the question to bring the judge further into Smith's camp.

Use **analogies**. Analogies are the secret weapon of oral advocacy. A good simple analogy reduces the complexity of an issue, while making a compelling pitch for your position. It also catches your opponent off guard. It won't be until the cab ride back to the office before your opponent thinks of some possible flaw in your analogy that he wished he had thought of when he was making his ineffective rebuttal. The trick in arguing by analogy is to think of the analogy before

you are in the courtroom and anticipate any defects in your comparison so you can effectively respond when challenged.

Imagine, for example, that you represent a lender who is suing the former investment advisor of the insolvent borrower. The lender claims to be a third-party beneficiary of the advisor's promise to the borrower that any change by the advisor in the company's investment policies wouldn't impair the borrower's ability to redeem its investors' shares on demand. The advisor argues that the promise was made to the company, not to the lender, and that it was intended to benefit only the company and its shareholders; the lender is an unintended beneficiary having no standing to enforce the promise. The advisor moves to dismiss, arguing that if it had been the intention to benefit lenders, such an intent would have been stated in the contract.

Your position is that lenders (debt holders) rank higher on the liability side of the balance sheet, and must be paid before equity investors. Therefore, you argue, the promise could not have been intended to benefit the equity investors without also intending to benefit the company's lenders. An analogy like the following could well defeat the advisor's argument:

Your honor, if an opera producer hires a soprano and procures a promise from her to sing loud enough so that the patrons in the last row can hear her, the patrons in the last row are certainly intended beneficiaries of that promise. But so are the patrons in the first and middle rows, even though they aren't mentioned in the promise.

What can your opponent say? He can try to argue that investment advisors and opera singers are not the same, but the argument won't address your winning point. After all, the analogy shows that it would be wrong to rule as a matter of law that someone is not an intended beneficiary simply because he was not mentioned in the promise and others were. Since the court can easily understand and agree with your point in the context of the opera singer, it is unlikely the court will grant your opponent's motion to dismiss.

When the judge has ruled your way, pack your bags. Lawyers have a hard time taking no for an answer. Sometimes a judge will rule from the bench in your favor, or will make statements that at least sound like a tentative ruling in your favor. The lawyer on the other side, not wanting to take no for an answer, will jump up and try to talk the judge out of it. They follow the philosophy that the argument isn't over until the judge yells, "I don't want to hear anymore. My mind is made up. Next case."

If opposing counsel continues the argument after a bench ruling, an average advocate will sit politely, listening to opposing counsel, with the hope of being able to respond when opposing counsel is done. This is a mistake. You need to do something other than sit there. When you see opposing counsel trying to take your victory away, you should organize your papers, put them in your briefcase, stand up and close your briefcase, and start to walk out of the courtroom. Your body language is sending a message to the judge that the argument is over. You hope that opposing counsel will get the same message and stop talking, and that the clerk will call the next case. If that doesn't happen, do a double take over your shoulder as you walk away from counsel table, in an effort to convey the thought, "What? You mean the argument is still going on? I thought the judge had ruled. Didn't my opponent hear what I heard?"

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