

## ORAL ARGUMENTS: TIPS AND A TALE

By

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Recently I argued in federal court a motion for summary judgment on an insurance coverage dispute. As I argued I struggled with an internal conflict of interest. My first interest, of course, was the need to do the best I could for my client, an insurance company who was very rightfully denying coverage on the basis that the loss alleged was excluded in FIVE policy exclusions. It was such an easy win that I would have been mortified if I had lost. (Of course, given the vagaries of the system, I still might.) My second interest was my need to impress my husband's nephew, about to start college, who had come along to see what a real courtroom looks like. Brought up in a very traditional household where his mother has never worked outside the home, all his life I have heard comments from him like "But a girl can't be president!" (at five years old) to "I didn't know you had a job" (last month). I wanted to use my brilliance at oral argument to replace his old-fashioned notion of gender roles with the thunderous realization that women--well, me, anyway--are great in the workplace as well as the home.

Unfortunately the need to do well for the client clashed with the need to impress my nephew. The judge had read the papers and made it clear from the get-go that he

thought there was no coverage under the insurance policy. In a situation like that, discretion is the better part of valor; in other words, sit down and shut up. When the judge is already on your side, the more you say the more you risk changing his or her mind. I threw my prepared argument out the window and answered the questions the judge addressed to me as concisely as possible. Answers like, “Exclusion N, your honor.” My nephew, I fear, did not recognize my brilliance. (He was suitably impressed however, when former Massachusetts governor and presidential candidate Michael Dukakis happened to walk past us in the corridor of the courthouse, and I pretended to know him and introduced him to my nephew. Even if girls can’t be president, we can pretend to know someone who ran for the office!) But I knew I had done the best job I could for my client.

I specialize in drafting and arguing dispositive motions. Over the course of my career I have won the great majority of the dozens I have argued. These are some tips I have picked up along the way.

1. A thorough, well-written motion that clearly and accurately points out why the law as applied to the facts is on your side will carry the day. Judges will rarely decide a motion based on how well-spoken an attorney is. Even if they don’t read the motion beforehand, after oral argument their law clerk will.
2. To win on summary judgment your argument has to be flawless. In Massachusetts a judge granting summary judgment is required to issue a written decision, but a judge is allowed to deny summary judgment by writing “denied” on the margin. Overburdened judges, therefore, whether consciously or not, look for excuses to deny summary judgment.
3. It helps a lot if the law and the facts are on your side.
4. If some points of law or fact are against you, discuss them in your written motion. This steals the thunder from the other side. Also, in figuring out how to minimize their impact, you might realize, and then convince the judge, that those points are not really against you.

5. If the cases don't stand for the proposition you claim, you will lose.
6. Shepardize! Shepardize before you submit the brief. Reshepardize just before oral argument.
7. Appearance counts in how the brief looks. Use exhibit tabs so the judge can find the exhibits. Spell check. Use point headings to outline your argument.
8. Appearance counts at oral argument. It's okay to flip through a couple pages of your legal pad to find a specific citation. It's not okay to go through piles of documents looking for a case.
9. Three legal arguments are the most you should make at oral argument; two is better; and one is best. A trick I like to use is to make three arguments in my brief ("This case should be dismissed because of this, this, and this.") and then start my oral presentation by telling the judge that I'm only going to argue two points and I'll rely on my papers for the third. This tells the judge that I'm not going to waste his or her time with a weak argument, and that what I am going to say is worth listening to.
10. Prepare, prepare, prepare. I practice my oral argument with a non-attorney, usually my running partner, because she'll always ask questions I'm not expecting. (Also, it makes that last mile go by a lot easier.) My basic argument is memorized; during my presentation I glance at a one page outline that really just provides phrases I'm likely to forget, such as the name of a case.
11. Always let the judge take the lead. Answer the question the judge asks. If you don't know the answer, be honest about it and offer to further brief the issue.
12. Know when to be quiet. If the judge indicates he or she will rule your way, say thank you and sit down.
13. Let the other side dig their own grave. If opposing counsel babbles on after the judge indicates that he or she has heard enough, sit quietly. If the other attorney claims you did or said something which is not true, calmly tell the judge this. A judge won't rule in your favor just because he or she likes you more than the other side, but it helps.
14. Don't argue to impress the client (or your nephew); argue to win the case. If your client will be in the courtroom, inform him or her beforehand what your strategy will be. Ultimately, clients are more impressed by a victory than by posturing in the courtroom.

**Epilogue:** My nephew came back for a second visit to a courtroom, this time when I was opposing a motion for a preliminary injunction where a scumbag ex-

boyfriend was essentially trying to extort money from my client by threatening to hold up the sale of her house; very different from the esoteric vagaries of Exclusion J(6) of an insurance policy. My nephew saw me face down the plaintiff's sleazy attorney; after settlement heard the plaintiff's attorney condescendingly tell me I had "done a great job"; and saw me refrain from replying "Thank you, you are a dirtball." Overall, I think my nephew was more impressed that I know Governor Dukakis.

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