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[COMMENTARY]

Subtly Gauge Judges' Interest to Keep Oral Argument Interactive

by MARTIN J. SIEGEL

If trial lawyers live for the clinching closing or the cutting cross, appellate lawyers live for oral argument. It's admittedly not quite as dramatic. In fact, it's often 20 minutes or so of anticlimax.

Still, through months of combing the record, reading the cases and drafting the brief, oral argument shimmers in the distance. When the big day finally arrives, appellate lawyers understandably see it as their moment to shine. They will deliver carefully worded profundities, eyes will open, and the world will ineluctably see that they have been right all along.

Why, then, would a lawyer use her long-awaited platform to ask questions of the judges? Isn't she supposed to answer questions, not pose them?

Observers may have wondered this recently while watching the argument in *Hertz Corp. v. Friend*, a case before the U.S. Supreme Court about determining a corporation's principal place of business. In a Nov. 11, 2009, posting on The Blog of Legal Times (a *Texas Lawyer* affiliate) describing the scene, Supreme Court correspondent Tony Mauro explained how the respondent's lawyer Todd Schneider chose to raise his argument that the court should avoid the whole mess because district court decisions to remand are not ordinarily reviewable.

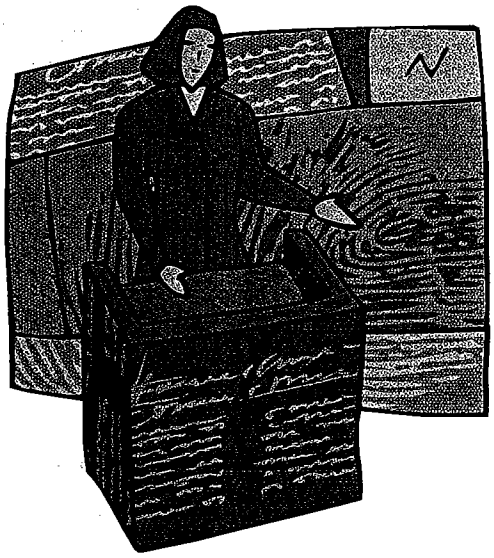
Schneider tried what Mauro called an "unusual" tactic: questioning Chief Justice John Roberts Jr. "Mr. Chief Justice," he asked, "did the Court have any interest in the jurisdictional argument?" Mauro described what happened next:

> Roberts seemed stunned by the question, with a startled look on his face. "I don't know," Roberts answered finally, with an annoyed tone and an exaggerated shrug of his shoulders. As spectators laughed, Roberts looked at his colleagues as if to encourage others who might want to hear that argument to jump in. Then Roberts said, "I can only speak for one member of the court, and that one doesn't." Put in his place but undeterred, Schneider looked around and asked the Court in general, "if the Court has any questions about our jurisdictional argument, I would be happy to answer them." No justice rose to the occasion, and Schneider sat down.

OK, so trying to turn the tables and grill the Supreme Court may not have gone well for Schneider. But that doesn't mean that trying to ferret out whether a court is interested in and wants to hear more about a particular argument is always a bad idea.

Despite the temptation to "fill the room with your intelligence," as the crotchety professor commands the hapless 1L in the opening scene of "The Paper Chase," the point of oral argument is to address and hopefully resolve the judges' concerns. What better way to do that than to find out what those concerns are?

Of course, judges prepared for argument will usually let counsel know where their interests lie. The odds that the Supreme Court wanted to hear about the reviewability argument but simply hadn't gotten around to inquiring into it were pretty low.



Indirect Approach

How then to handle the secondary argument the panel hasn't mentioned? The choices are to forge ahead and burn precious argument time even if the judges aren't interested, skip it altogether for lack of time and hope the brief does the trick, or try to determine whether the court would like to hear it.

The last of these is preferable. Yes, there is always a chance that devoting substantial time to the point might suddenly trigger interest where none existed previously. Perhaps a judge's mind will change. It is far more likely, however, that this approach will waste valuable time when there is very little of it to spare. The better course is to run it quickly up the flagpole and see if anyone salutes.

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This can be done more effectively than by asking the judges point blank. Distill the secondary argument to two or three punchy, summary sentences, then conclude with something along the lines of, "This point is covered more fully in our brief, and if the court has no questions about it we will rest on what we said there."

Wait a moment or so and, if no one bites, proceed to a conclusion or return to something raised earlier in the argument worthy of elaboration now that time permits. This will ensure that the less important argument does not vanish entirely, give any judge with latent curiosity a chance to flesh things out, save crucial argument time and avoid the uncomfortable specter of having to directly interrogate the interrogator.

Above all, do not shy away from seeking feedback. Lawyers must unearth the weak points in their arguments and create the opportunity to bolster them. Oral argument is not a set-piece battle where all will go as planned, or an occasion to deliver a prepared speech come what may. It should be a fruitful exchange where questions and issues left open in the briefing are aired and put to rest.

Success demands being loose, creative, at least somewhat improvisational and fully responsive. The direct approach may have fallen flat in *Hertz*, but the idea was right. Accomplished with a little more subtlety, divining the judges' concerns and adjusting the presentation midstream will make for a more productive oral argument, even if it lacks some of the glory of that brilliant oration envisioned all those months ago when the podium still lay on the far horizon and the red light was barely a gleam in anyone's eye. TXL

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