THE ART OF THE ANSWER

How to respond effectively to questions at oral argument

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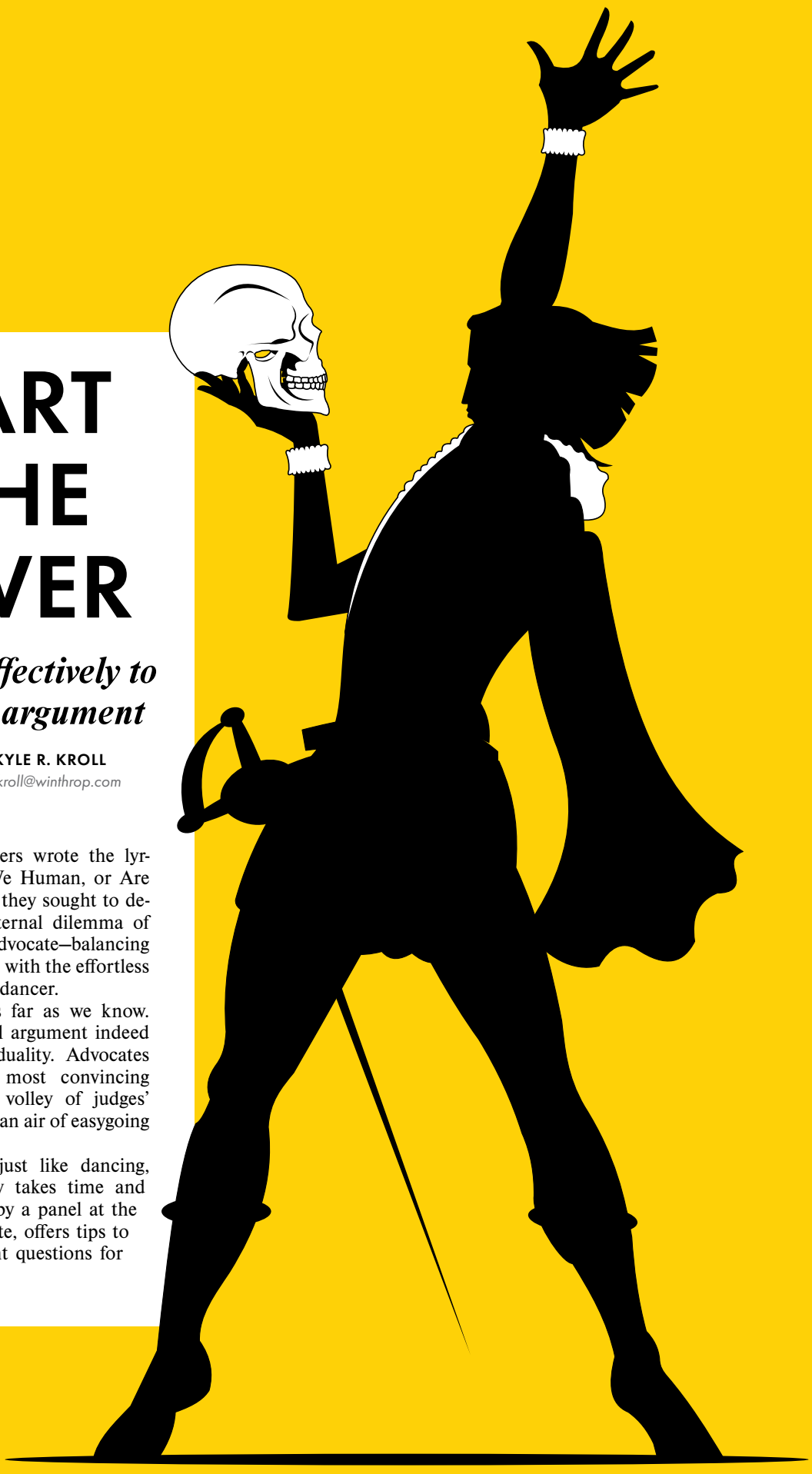

When The Killers wrote the lyrics to "Are We Human, or Are We Dancer?" they sought to describe the internal dilemma of every oral advocate—balancing imperfect, impromptu responses with the effortless grace required of a professional dancer.

Okay, not really—at least as far as we know. But answering questions at oral argument indeed reflects the difficulty of this duality. Advocates must seamlessly blend their most convincing arguments into an oncoming volley of judges' questions, all while maintaining an air of easygoing professionalism and command.

Sounds easy, right? Well, just like dancing, improving one's oral advocacy takes time and practice. This article, inspired by a panel at the 2023 Appellate Practice Institute, offers tips to effectively answer oral argument questions for new and veteran attorneys alike.

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Start with the right attitude

It's important to remember the overall goal of answering questions at oral argument. Your job is not to regurgitate arguments from your brief. Rather, "think of this as an opportunity to educate us," in the words of Minnesota Supreme Court Justice Margaret Chutich. The counselor is the expert, having worked on the case for so long. At oral argument, counsel's purpose is to clarify any ambiguities or concerns held by the judges. For that reason, former Minnesota Supreme Court Chief Justice Eric Magnusson noted at the panel, "You *want* questions." If you give an oral argument and aren't asked a single question, you should be worried—especially as the appellant—because it means they're not willing to engage your argument.

As First Circuit Judge William Kayatta Jr. has commented, "85 percent of lawyers who appear before the 1st Circuit do not understand that the purpose of oral argument is to engage the court in the same type of robust discussion one would have around a dinner table. You wouldn't deliver a 15-minute, uninterrupted monologue at family members, would you?"

Even if the appeal is lost, oral arguments still have purpose. As Justice Chutich noted, even if you don't convince the judges to rule in your favor, oral argument affects the *way* the judges write their opinion, which can still benefit your client or future clients. As proof, Justice Byron White once commented that oral argument operates as a preliminary conference for deciding the case. Further, oral arguments make the client feel heard, especially if they are present in the courtroom, which reinforces faith in the courts.

No matter what, "there's at least something you can do in every instance," according to former Chief Justice Magnuson. Even when newly published Supreme Court precedent contradicts your argument, something is better than nothing. In such a scenario, Magnuson recommended saying something like this: "We think the Supreme Court's decision was wrong, and we reserve the right to seek *certiorari* review to see if we can get the Supreme Court to distinguish this case or change its mind, but that's all I can say in the face of that decision" rather than "I have nothing else to say, good luck." Never give up if there is time left. After all, the client is watching.

Preparation is key

Regardless of the art form, excellent performances do not happen by accident. "When you see a good lawyer handle questions adeptly," Bryan Garner wrote in *The Winning Oral Argument*, "it may appear that [they] are simply thinking well on [their] feet, but usually that is misleading. [They have] spent several hours on preparation, anticipating those questions and formulating answers." Free-forming answers at oral argument "is a really, really bad thing," Magnuson noted.

Mastery of the case itself is "immensely helpful," said Minnesota Court of Appeals Judge Jennifer Frisch. As Garner observes, Supreme Court Justice Robert Jackson once said, "it may sound paradoxical, but most contentions of law are won or lost on the facts. The facts often incline a judge to one side or the other." And without that in-depth knowledge of the record, counsel forfeits this potential advantage.

While there is no right way to prepare for questions, here are a few judges' suggestions (the first two are from Garner):

- Chief Justice John Roberts of the United States Supreme Court: Take five minutes to explain your argument to a layperson. "In five minutes, if you can't explain what this case is about and why you should win, you've got to go back and practice again."
- Judge Roger Miner of the Second Circuit: For every case cited, be able to discuss both the facts and the law. In the days before oral argument, reread each case to refamiliarize.
- Former Chief Justice Magnuson: List all potential questions on notecards. Organize by similarity—maybe six or seven categories total—and synthesize each category into an overarching question. For each overarching question, write out full answers and memorize.

Answer the question asked

This seems obvious. But sometimes lawyers get so caught up in strategizing or avoiding an unfavorable response that they don't actually answer the question presented. In the words of Tex. Prac. Guide Civil Appeals §12:114-115, "The advocate should respond directly and honestly. Make the justice who asked the question feel that the question was answered directly.... When possible, begin your answer with a direct response such as a 'yes' or 'no.'" Or as Judge Jennifer Frisch of the Minnesota Court of Appeals suggests, try "yes and" or "no but." As Chief Justice Andrew Christie of the Delaware Supreme Court has emphasized, it is "more important" for the attorney "to address what seems to be troubling the court than it is to get into his or her prepared presentation."

This becomes an issue when hypotheticals exceed the scope of the case at hand. As Bryan Garner observed, "The inexperienced advocate too often responds to a hypothetical with, 'That's not this case,' which has to rank among the most insulting answers possible to a question from the bench. The questioner knows the hypothetical is not this case, but nonetheless wants to know." That being said, don't let hypothetical questions push you into defending an untenable position.

Of course, the ability to respond to the question asked requires listening. When asked what he might have done differently as an advocate, Chief Justice John Roberts said he would "listen a little more

carefully to what the questions are." And listening extends beyond just the question being asked—Justice Breyer once noted that "you're there to win the case. So listen to what the other side is saying" to formulate better counterarguments.

When in doubt, be professional

A choir teacher once advised, be like ducks; appear calm above the surface but furiously paddle below sight. The best oral advocates act composed and professional, yet possess a quiet intensity, directly answering questions while consciously navigating back to their main points. Make no mistake, this is difficult. Many things can disrupt your flow, including interruptions, unrelated questions, and misunderstandings. Still, maintaining composure is crucial.

Composure looks different on each attorney—everyone has a unique presentation style. Still, there are some universal taboos.

IF YOU GIVE AN ORAL ARGUMENT AND AREN'T ASKED A SINGLE QUESTION, YOU SHOULD BE WORRIED—ESPECIALLY AS AN APPELLANT—BECAUSE IT MEANS THEY'RE NOT WILLING TO ENGAGE YOUR ARGUMENT.

DO NOT:

- ***interrupt judges.*** Not only is it rude, but as Judge Frisch asked, "why would you want to [interrupt a judge]? You want to know what the judges are thinking, and what their questions are. So cutting off the decision maker from expressing their concern and giving you the opportunity to answer or address that doesn't seem like a powerful form of advocacy."
- ***ask judges questions.*** There is no need. Their job is to ask *you* questions; if they are confused, they will follow up. The notable exception is a clarification question; "If you can't understand a question, say so... Usually the judge will rephrase it, preferably in a more understandable form," says Judge William Bauer of the 7th Circuit.
- ***attempt humor.*** Too much is at stake; if a joke falls flat, you lose all momentum. Justice Chutich warns against "*planning* humor." She also points out, "There are some cases where you would never want to use humor: where it's a violent crime [...] or the victim or the victim's family are in the courtroom." If anything, follow the judge's lead—if they respond humorously, a quip in response could work.
- ***read a script.*** As Justice Chutich notes, it's harder for judges to pay attention when they see counsel reading. At that point, they could read your briefs instead.
- ***bluff or stall.*** It is okay to answer "I don't know" if you genuinely do not know. This is far better than bluffing or overcommitting. As former Chief Justice Magnuson remarks, "The worst thing to do is to BS the court. [...] Honesty is always the best policy." While law school moot courts teach the reply, "I am not sure, but I am happy to follow up with a supplemental brief," Justice Chutich advises saving your words; supplemental briefs are almost never granted.
- ***ignore weaknesses in your case.*** Don't be "the ostrich burying its head in the sand," warned Justice Chutich. Former Chief Justice Magnuson continued, "There are obviously things you have to concede, and I think it's better to deal with them right up front." In the hallway before argument, you want judges to say, "I like so-and-so because she admits when she's in a bad spot; she makes concessions."
- ***assume hostility.*** According to Garner, "An elementary rule of appellate advocacy is that lawyers should never assume that a question is hostile. An especially active judge may simply enjoy playing the devil's advocate." Even if one judge on a panel appears hostile, he advises, remaining calm and professional can win over the remaining judges.

Concluding thoughts

Quality oral advocacy, like any art form, takes time and practice. Consider accepting an appellate pro bono case or coaching a law school moot court competition to to gain experience and reinforce your techniques. Above all, be kind to yourself. There is no perfect answer, and advocates spend far too much time rehashing answers afterwards. The only thing you can do is keep dancing. ▲

RESOURCES

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