

The Appellate Strategist

INSIGHTS ON APPELLATE ISSUES, TRIAL CONSULTATIONS, AND EVALUATING APPEALS

Learning to Love Oral Argument (and Persuade the Court While You're At It) -- The Bryan Garner Interviews III

June 16, 2011 by [Kirk Jenkins](#)

My favorite part of my job is oral argument. A well-prepared oral argument with a hot bench is everything that draws a lawyer into appellate practice -- a fast-paced but thoughtful give-and-take about what the law is, and where it should go. As Justice Scalia told Bryan Garner, "I think good counsel welcomes, *welcomes* questions."

Still, nothing in appellate practice has more capacity to keep lawyers pacing the floor at night.

As you might expect, [Bryan Garner's Supreme Court interviews](#) contain detailed advice for preparing for oral argument, enjoying the process, and even persuading the court to your client's point of view while you're at it.

One of the most difficult skills to learn in appellate argument is how to stay on message despite a hot court. Inexperienced advocates tend to become wedded to a speech, or at least an inflexible outline. When the questions start flying, they can't adapt their presentation, and sometimes they wind up committing the cardinal sin of responding to a question with "I'll get to that in a moment." You're there to answer the court's questions, nearly to the exclusion of all else. Evade, stall or equivocate, and you try the court's patience and risk your credibility. Answer the question. Immediately.

Chief Justice Roberts offers a great suggestion for mastering the skill of adjusting your argument on the fly to fit the flow of questioning. He points out that every argument breaks down to just a few points -- call them A-D. Put each point on an index card. During your practice sessions, shuffle the cards as you're introducing your argument, then look down and take your points in the order you see -- if the first card says point "C," then begin there. That way, if a judge interrupts in the first two minutes and wants to move straight to your final point, your presentation will flow smoothly from there through your other points.

[As Jay O'Keefe argued on his appellate blog *De Novo* last year](#), moot court practice sessions are an absolutely essential part of preparing for most cases. Today, more cases than ever are resolved on the briefs; oral argument doesn't change the result. But you can never predict whether your case will be one of the exceptions, so you have to be ready. Know the record and know the cases: "as a lawyer," the Chief Justice told Garner, "you've got to be prepared to answer a thousand questions. You might get eighty, you might get a hundred, but you've got to be prepared to answer more than a thousand." Although predicting the hard questions the court might ask is an indispensable skill for an appellate lawyer, you'll need help from your colleagues. The Chief Justice recalled:



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I would do countless moot courts early on. For a Supreme Court case, certainly five, maybe as many as ten. I'd do them over and over again, and it paid off enormously in terms of generating familiarity with the types of questions people would ask and also developing a comfort level with answering.

The Chief Justice reminds us to resist the urge to staff your moot court with people who might be expected to be sympathetic to your client's position. If your client is a criminal defendant, find three former prosecutors for your sessions. If you're representing a corporate defendant, find a former plaintiff's lawyer. Answering the easy questions doesn't do you any good; you want the hostile ones. Strive to walk out of your argument thinking it was easier than your moot courts.

I'll conclude with my own tip: listen and learn. Become a fan of the great oral advocates. Check out the oral argument audios at the [Oyez Project](#). Pick up a few of Peter Irons' *May It Please the Court* book-and-audio collections and listen during your commute (just hope nobody asks what's on your iPod playlist).

Join us back here tomorrow for the conclusion of our four-part series on Bryan Garner's SCOTUS interviews in LawProse.