

ARGUING BEFORE A COLD COURT

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Some courts are hot, some courts are cold. “Hot courts” are those where the judges know the case in advance of argument. They may have read the briefs before hand and have zeroed in on the important issue which is the basis for the appeal. They may even have received a bench memo from their clerks summarizing the major points of the briefs so the judges can ask the key questions at oral argument. Oral argument in front of a hot court can be a joy for everyone involved since the attorneys and the court are on the same foot and a meaningful exchange can take place between them which is what oral argument is supposed to be.

Then there is reality. And the reality of appellate advocacy may mean arguing your case on appeal to judges who have no idea what your case is about until your argument begins. Or they may have read the briefs but they just do not ask any questions during argument. In short, a “cold court.” But argument before the cold court is not all bad and in fact, if handled the right way, it can not only be effective but even something approaching a pleasure.

First a disclaimer. I sit on the coldest “court” in the land. As a Commissioner on the Workers’ Compensation Appeal Board in a large industrial state such as Pennsylvania, I hear a lot of cases. There are approximately one hundred Workers’ Compensation Judges across the state issuing decisions and eight of us to hear the appeals of those decisions statewide. During argument sessions it is not unusual for me to hear eighteen cases *before lunch*.

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Administrative law in general (and workers compensation in particular) certainly is not sexy and the Commonwealth is not in the position to devote the resources to this board (even if it wanted to) to enable us to be up to speed with the facts and issues of every case by the time of argument. At any given time we can be tackling a pension offset case, a subrogation issue, a fatal claim or the more garden variety occupational disease appeal. But we do the best that we can and believe it or not, there are not too many dull moments. As a result, when I refer to “courts,” I include any administrative body that follows the same appellate standard of review employed by the judicial branch.

At the appellate level the cold court is becoming more and more rare. Under Rule 34(a)(2) of the Federal Rules of Appellate Procedure, the decision to grant oral argument is made after the court has examined the briefs. As a result, the fact that you have the opportunity to argue your case at all means that the panel has reviewed it prior to hearing and determined that oral argument is merited. In my home state of Pennsylvania, the two intermediate appellate courts advise that, “Counsel should prepare for oral argument consistent with the policy of the Court that judges participating in a panel or en banc argument have read the briefs in advance of oral argument.” See, *Internal Operating Procedures of the Superior Court of Pennsylvania*, Section 65.33; *Internal Operating Procedures of the Commonwealth Court of Pennsylvania*, Section 231 [210 Pa.Code Section 67.18]. Needless to say, in any case in which the Supreme Court of Pennsylvania has granted *allocatur* or the United States Supreme Court has granted *certiorari*, counsel can expect a hot court.

This is not to say that the cold court is a thing of the past. Given the crowded dockets of the intermediate appellate courts and administrative agencies, having a panel who has read your

brief in advance does not guarantee that the members will be able to fully recall the details or the issues involved in your case during argument and counsel needs to be prepared for this. There are degrees of “coldness,” so to speak.

One of the benefits of arguing before a cold court is that counsel truly has a golden opportunity to frame the issues at argument. Because this may be the first time that the court is learning about the case, counsel has a brief window in which to shape the court’s initial impression of the case before the judge’s reflexes kick in. All judges have notions of how they decide cases and where the court has had a chance to be briefed about the case in advance, the judges’ positions may have solidified by the time they actually hear the case and at this point the argument may just have become a formality. By having the chance at argument to tell the court what the issue is in the first instance, the judge is now thinking along the lines of your argument when he or she goes back and reads your brief.

Sadly, this opportunity to favorably shape the court’s initial impression is often missed. It is missed because many attorneys forget the first rule involved in giving any presentation: know your audience. A cold court by definition has not been living with your case like you have, so in order to make an effective presentation, you must put yourself in the court’s shoes and tailor your presentation accordingly. The following tips should help to make your presentation before a cold court more effective.

1. Start with the issue involved. I know what you’re thinking, “If the court doesn’t know anything about my case, shouldn’t I begin my argument with the facts?” Logic would dictate so and according to Justice Brandeis, the most important part of a brief is the statement of facts. But this is an oral argument before human beings who are trying to get through a crowded docket. No matter how wise and learned they are, they still have limited attention spans. Usually

there will be a burst of attention from the court when the next case is called and the appellant begins his argument and another when the appellee's argument starts. At each of these intervals the judges will usually make a fresh start in taking notes. You want the first thing that the judges write down in their notes of argument to be the issue as you have framed it since that is what they will look at when they (or their clerks) begin drafting the opinion. If you begin with a convoluted fact pattern it will be harder for the court to spot your issue and your chance to make that initial, positive and lasting impression on the court at argument will have passed. Once you have framed the issue and explained how the judge erred below, you can then add the salient facts which will serve to bolster your argument. Remember, the court is also looking for the issue involved on which to base their affirmance or reversal of the case. By making their job easier you can hope to persuade them in the process. If it is a case of first impression, telling them up front will also help you to keep their attention.

2. Do not be afraid to give the court some law. If the judges have not had the chance to review the briefs before argument (and even if they have) there is nothing wrong with giving them citations to what you consider to be the most important cases, statutes or rules involved in your case. The worse thing that can happen is that they will tell you that they are already familiar with the authority that you are citing (which is a good thing). Most likely they will be pleased to take note of the controlling cases and any judge worth his or her salt will address them in the decision. Be careful not to overwhelm the court with citations at argument since this will have diminishing returns and will distract from your main points at argument. These citations should already be in your brief.

3. Focus on the standard of review. Is it an error of law? Did the lower court's disregard of relevant evidence rise to the level of an abuse of discretion? Are the trial judge's

findings of fact not based on substantial evidence of record? Telling the court up front will give the judges a road map as to where you are going in this appeal and will do wonders in helping a cold court keep up with your argument. It is no coincidence that both Rule 2111(a)(3) of the Pennsylvania Rules of Appellate Procedure and Rule 28(a)(9)(B) of the Federal Rules of Appellate Procedure require that the appellant's brief contain a statement of the standard of review since this defines how a court can address an issue on appeal.

4. Remember the scout motto: be prepared. The only thing worse that a cold court is a cold counsel. Know your case whether it is "yours" or not. If you are there to make the argument, it is your case. That means preparation. You must know what is in the record. Telling the court on appeal "I did not try the case below" or "this isn't my case" does not advance your client's position. The appellate court didn't try it below either.

5. Spare the court your indignation. As mentioned previously, a cold court is at a disadvantage. The members are trying to sort out the issues involved in the case, grasp the pertinent facts and figure out the applicable law as the argument is progressing. Your outrage at the judge below, your opposing counsel or the other party is more than a distraction, it is an irritation that does not advance your client's case. Keep in mind that everyone who is an appellant is there because they think something about the lower court's decision in their case was wrong. Once you have covered the issues involved, the operative facts and applicable law, then the "injustice" in your case should be obvious. If it is not, then it is an error of law or an abuse of discretion but most likely not "the greatest travesty of justice that I have ever seen, your honor." Please, you only have a limited amount of time to try to make your point and as much as the court might want to share your outrage, it needs to know what the case is about first.

6. Tell the court the relief that you are seeking. You have already gone to the trouble of taking an appeal and briefing and arguing the case. The court wants to know what it is you want them to do. Spell out whether you are seeking to have the decision below reversed, vacated, remanded, etc. For as obvious as this may seem, counsel often are unclear as to the relief they are seeking on appeal. It is important that the order that the court hands down on appeal addresses your issue and in the event of a remand, that the order provides sufficient guidance to the lower court in order for it to take appropriate action and hopefully bring finality to the matter.

If the above approach sounds familiar, it may be because it loosely follows the old law school legal writing method for drafting memos known as IRAC- Issue, Rule, Analysis and Conclusion. (Don't confuse it with the Persian Gulf country or you may be giving the "question presented" at the end of your argument.) In any event, outlining your argument in advance to cover the above items will allow you to give an effective argument even in front of the coldest courts. And it will certainly be appreciated by the hot courts too.