

Oregon
State
Bar

CLE
Seminars

Mastering the Art of Persuading Trial Judges *featuring David B. Markowitz and Matthew Donohue*



Friday, May 20, 2016

1 p.m.–4:30 p.m.

3.5 General CLE or Practical Skills credits

MASTERING THE ART OF PERSUADING TRIAL JUDGES
FEATURING DAVID B. MARKOWITZ AND MATTHEW DONOHUE

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SCHEDULE

Presented by **David B. Markowitz and Matthew Donohue**, *Markowitz Herbold PC, Portland*

12:00 Registration

1:00 How to Win at Oral Argument

- ◆ Create the perfect oral argument
- ◆ Deliver the perfect oral argument
- ◆ Design visual and audiovisual presentations that enhance oral arguments

Elements of Trial Judge Persuasion

- ◆ What impairs persuasion
- ◆ What enhances persuasion

Why the Same Words May Have Different Persuasive Impact

- ◆ Who speaks the words
- ◆ How the words are spoken

Developing Credibility

Courageous Arguments

Winning the Right Way

4:30 Adjourn

One 15-minute break will be taken during the session.

FACULTY

David B. Markowitz, *Markowitz Herbold PC, Portland*. Mr. Markowitz is the cofounder of the Markowitz Herbold law firm and considered by his peers to be among the finest trial lawyers in the Northwest. He has received numerous awards and recognition for his outstanding trial work and efforts in mentoring and educating attorneys at all levels. He is a Fellow and former Oregon State Chair of the American College of Trial Lawyers, a Fellow of the International Academy of Trial Lawyers, and a member of the American Board of Trial Advocates. Mr. Markowitz frequently acts as a mediator and arbitrator to resolve commercial disputes, served as a pro tem judge in Multnomah County, and is an expert on attorney fees.

Matthew Donohue, *Markowitz Herbold PC, Portland*. Mr. Donohue maintains a national trial practice, trying some of the firm's most complex and challenging cases. He has represented companies ranging from startups to Fortune 500 companies in a wide variety of business cases, including antitrust, class actions, contract and licensing disputes, partnership and shareholder disputes, real estate, and intellectual property litigation. Mr. Donohue has first-chaired jury trials, bench trials, and arbitrations in state and federal courts across the country. A significant portion of his practice is spent defending complex class actions.

A series of horizontal lines for writing.

Introduction: Challenges to Oral Persuasion of the Trial Judge

- **Time**

- **Judge's capacity to process new information presented during oral argument. The judge must:**
 - **Understand the information**

 - **Decide whether to keep or discard it**

 - **Determine relevance**

 - **Integrate new information with existing knowledge**

 - **Apply the information to decision making**

- **Judge's tendency to make quick, intuitive decisions**

- **Opponent's efforts to contradict, distract, and confuse**

- **Interference with judge's attention**

- **Extent of judge's preparation**
 - **Totally unprepared**

 - **Decision completed**

- **Variance in judge's experience**

I. Credibility

A. Importance of credibility - most potent form of persuasion

- 1. “If he says it’s so, it’s so”**
- 2. In close cases, judges rule in favor of lawyers they trust**
- 3. Judges exercise discretion in favor of attorneys they like and trust**

B. Established credibility

- 1. Judge’s prior observations**
- 2. Reputation**
- 3. Written materials submitted before oral argument**

C. Demonstrated credibility - courtroom performance that will establish credibility for this argument, the rest of this case, and for future cases

- 1. Credibility must be perceived by the judge**
- 2. Conduct which is professional, courteous, and civil toward everyone**
- 3. Demonstrated expertise (rather than asserted expertise)**
 - a. Selection of important matters**

- b. Knowledge of relevant legal authority**
- c. Knowledge of case facts**
- d. Strong sense of organization**
- e. Word selection - vivid descriptions that create a complete, clear visualization v. the opponent's hazy, incomplete picture**
- f. Educational tone**
- g. Goodwill. You have the judge's goals at heart**
- h. Never:**
 - (1) Overstate the facts or law**
 - (2) Misrepresent case holdings**
 - (3) Misstate opponent's position**
 - (4) Use sarcasm**
 - (5) Make personal attacks on opposing counsel**
 - (6) Mislead the court (e.g., inference v. established facts)**

- (7) Advance unsupportable positions**
- (8) Demonstrate dissatisfaction with a ruling**

i. Always:

- (1) Be prompt and ready**
- (2) Be courteous and respectful**
- (3) Be concise and targeted**
- (4) Answer court questions directly**
- (5) Be candid**
 - (a) Describe what you don't know**
 - (b) Concede when appropriate**
 - (c) Acknowledge weaknesses and gaps**
- (6) Promptly correct misstatements**
- (7) Know when to quit and move to next issue**

- j. Be well prepared – you cannot convey the truth without first discovering it; good argument is the product of lengthy thought**

II. The judge

A. The judge's goals

- 1. Right answer for this case**
- 2. Just and fair**
- 3. Effective use of court's limited resources**
- 4. Speedy case resolution**
- 5. Serve the public's interests**
- 6. Improvement of process**
- 7. Consistency**

B. Know your judge

C. Assume the judge needs to be educated

- 1. About the case**
- 2. About the law**

D. Judges believe they decide unemotionally, so don't make obvious appeals to emotion

E. How do judges judge?

1. Deliberative: judges apply the governing law to the facts of the case in a logical, mechanical, and deliberative way

or

2. Intuitive: judge's follow an intuitive process, reaching fast conclusions that they only later rationalize with deliberative reasoning.

3. Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, "Blinking on the Bench: How Judges Decide Cases" 93 Cornell L. Rev. 1 (2007):

Judge's generally make intuitive decisions, but sometimes override their intuition with deliberation

4. Intuitive processes occur quickly; deliberative processes require effort, concentration, and time

5. Intuitive responses emerge from repetition

6. If an intuitive decision is likely adverse, lawyer must explain that the intuitive (quick and likely) decision will be erroneous, and convince the judge to engage in time-consuming deliberative analysis to be accurate

a. Need to explain that answer is not obvious or ordinary; not routine

III. Content

A. Goals

- 1. Focus attention**
- 2. Organize for maximum persuasion**
- 3. Explain**
- 4. Build credibility**
- 5. Persuade**

B. Focus attention: nothing unnecessary is said, and everything necessary is provided

- 1. Remove clutter to allow concentration on the issues, arguments, and support that will make a difference to the outcome**
- 2. Simplify issues**

“One expression of true genius in oral argument is seemingly effortless condensation of complicated issues into a simple form, without any compromise of the substance.” Hon. Michael Donson, USDC Mass.

3. **Use visual aids to focus attention**
 4. **Avoid distractions**
- C. Organize for maximum persuasion**
1. **A good argument is rarely organized like a good brief**
 - a. **A brief is logical and sequential; the amount of space devoted to each point has more to do with its complexity than its strength**
 2. **“The gift of arrangement is to oratory what generalship is to war.” Quintilian – Roman teacher**
 3. **Perfect argument is like a perfect machine: each part is essential and in the right place**
 4. **Generally, organize to place most important issues, argument, and support to the front**
 - a. **Then, as appropriate, organize chronologically, logically, or by typical judicial decision-making process**
 5. **Communicate your organization**
 - a. **Give the judge a roadmap to signal what will be covered**
 - b. **Aristotle: forensic speakers must state their case and then prove it**

D. Explain

- 1. Animate the law and the facts**
 - a. Explain why a rule is reasoned, practical, provides certainty, or supports important policy**
 - b. Give life to cases - author, court, facts**
 - c. Give detail - use vivid language, add color and context**
- 2. Emphasize and explain the key decision points**
- 3. Don't read or repeat the written briefs**
- 4. Be candid - share the judge's goal of finding the correct answer**
- 5. Use visual devices to explain**

E. Persuade - utilize techniques and style of persuasion

- 1. Persuasive communication goes beyond being informative by attempting to change the listener, to change actions, beliefs, and opinions**
- 2. Aristotle on rhetoric: The art of finding in any given situation the available means of persuasion**

3. Techniques of persuasion

a. **Have a sense for the judge as the audience - what the audience is thinking, feeling, waiting for, needing**

b. **Narrative – tell the story; if applicable in a powerful persuasive style**

c. **Metaphor - one thing is described in terms of another, usually comparison from one category to another**

“Clause 1.02 is the engine of the contract; 1.03 is the emergency brake.”

d. **Personification – human qualities are given to non-human things**

“Clause 1.02 is the heart and soul of the contract.”

e. **Balance – two clauses or phrases of matching rhythm and length are brought together for effect**

“The contract is clear: deliver on the first, or pay on the second.”

f. **Rhetorical questions - speaker expects no response; used to organize thought or to force the judge to draw a conclusion**

“Wouldn’t the Johnson court have mentioned the Stone Mountain case if it intended to overrule it”?

g. Challenge and defeat fallacies:

- (1) Something (usually a case) is true or good simply because it is old**
- (2) *Post hoc ergo propter hoc* - because one event follows the other, the first causes the second or the second results from the first.**
- (3) Division - assumes each of the parts contains the qualities of the whole, e.g., every lawyer's style is consistent with the law firm's style**
- (4) There is a simple answer to a complex question**
- (5) Straw Man – attacks a fabricated or collateral argument, then declares victory over issues that were not addressed**

4. Persuasive style

a. Keep language pure

- (1) Simple vs. complex**
- (2) Specific vs. vague**
- (3) Incisive vs. ambiguous**
- (4) Well chosen – expresses thought best**

- b. **Vivid and lively imagery**
 - (1) **Words that give color and detail to the picture**
 - (2) **And then set the picture in motion**
- 5. **Do not overuse persuasive techniques and stylistic devices**
 - a. **If adornment does not serve a function, it is superfluous and distracting**
- F. **R. P. Jones *Tips from the Bench* - regarding content of oral argument to judges**
 - 1. **“Judges are a quick study – hit hard and fast.” First impressions are the most important**
 - 2. **Contrary to the normal educational process of building on established information to explain additional information**
 - a. **Roadmap - immediately show final conclusion and how the result is achieved**
 - b. **Front load issues, arguments, support - most important first, regardless of chronological or logical analysis**
 - 3. **Detailed descriptions are more convincing than generalities**
 - 4. **Superlatives weaken – descriptive words add strength**
 - 5. **Above all, be brief, Oh God, be brief!**
 - a. **Redundancy – don’t**

6. **Regurgitation of the written brief lowers the judge's perception of sincerity**
 7. **Prepare an ending remark, so it doesn't sound like an engine running out of gas**
- G. Building the perfect motion arguments (both opening and rebuttal)**
1. **Start with a blank slate**
 - a. **Make the most important argument and use the most convincing supporting case or fact**
 - b. **Each item added distracts focus from more important**
 2. **Read everything that may be important to the judge's decision**
 - a. **"If I had 8 hours to cut down a tree, I would take 7 hours to sharpen my ax." A. Lincoln**
 - b. **Read for presentation, response to judge's questions, and response to opponent's arguments**
 - (1) **Goal of preparation: never be surprised by opponent's arguments or judge's questions**
 3. **Identify the issues to argue**
 - a. **Not every issue requires oral argument**

b. Bases for selection

- (1) Importance of issue to outcome of case**
- (2) Outcome of the issue is uncertain**
- (3) Important supporting argument missed in briefs**
- (4) Mistakes in either side's briefs on the issue**
- (5) Opponent's written arguments on the issue appear more persuasive**
- (6) Opponent had last written argument on the issue and it requires a response**
- (7) Judge will want to hear argument on the issues**

c. Strategic assumptions

- (1) Judge is smart**
- (2) Judge is busy**
- (3) Opponent is smart**

4. **Determine the best arguments for each issue**
 - a. **Not every written argument requires oral discussion**
 - b. **Discuss arguments that are most likely to be relied on by the judge (reason for victory or defeat)**
 - c. **Add important arguments that were missed in the briefs**

5. **Select the legal and factual support for each argument**
 - a. **Select only the support that is most likely to be outcome determinative**
 - b. **Select supporting cases**
 - (1) **Factually similar**
 - (2) **Highest authority**
 - (3) **Recognized leading case on subject**
 - (4) **Ruling precisely supports the argument**
 - (5) **Trial judge connection to case**
 - (6) **Most recent**
 - (a) **Update all authorities**
 - (7) **Recognized author or panel**

- c. Select short excerpts from cases to display and/or read**

- d. Discuss opponent's cases that are**
 - (1) Most relied on by opponent to support position**

 - (2) In actuality, the most important case**

 - (3) Subject to attack**

- e. Fact support**
 - (1) Most important fact support**

 - (2) Actual factual controversy**

 - (3) Clearly determinative of argument**

- f. Opposition cited facts**
 - (1) Most relied on by opponent**

 - (2) Judge may believe to be important**

(3) Subject to attack

(a) Misquoted

(b) Out of context

(c) Rebutted by better evidence

(d) Inadmissible

(e) Equivocal

6. Edit for length – shorten

a. Assume two-thirds of scheduled time, at most

b. Eliminate everything unnecessary

7. Select the words to speak

a. Precisely what will be said about each issue, argument and support (law or fact)

b. Remove words to allow slower pace

8. Create visual and audio visual presentations

9. Add persuasion - what else can influence judge's decision

a. Inferences – but be clear that inference is being argued

“from opponent's silence, can infer - ”

b. Logical extensions of opponent's arguments

“if rule x, result will be y”

c. Flip side of opponent's arguments

“if A is true, B must also be true”

d. Common sense

e. Policy (judicial, legislative, public)

f. Justice

g. Avoid risk of reversal

h. Easiest way to rule in your favor; narrowest holding to dispose of the matter before the court

i. Fairness (wherever possible, supported by a “venerable legal maxim”)

10. Organize

a. Order and re-order issues, arguments, support

- b. Change organization of briefs to improve the**
 - (1) Focus**
 - (2) Intuitive decision making**
 - (3) Use of limited time**
 - (4) Logical progression and ease of understanding; describe issues before discussing facts to put facts in context**

Once the motion argument has been built, it will be improved through the following process:

- 11. Present alone, checking for**
 - a. Organization**
 - b. Length – need to cut**
 - c. Gaps**
 - d. Quality of visuals**
 - e. Clarity and strength of argument**
- 12. Edit, revise, shorten, rearrange**

- 13. Present with friendly audience, checking for**
 - a. Length**
 - b. Understanding**
 - c. Quality of visuals**
 - d. Strength of argument**
- 14. Edit, revise, shorten, rearrange**
- 15. Practice presentation – focus on delivery and content**
 - a. Friendly audiences**
 - b. Mock judge, with and without questions**
 - c. Video and review the video**
 - d. Professional consultant**

IV. Delivery

A. Be eloquent and persuasive

1. Demonstrate reason and candor

2. Choose words carefully

a. Omit filler words and sounds

b. Make every word worth understanding

c. Vivid, specific, simple

d. Don't assume more of a burden than you must

e. Memorize the opening and closing paragraphs

3. Volume

4. Tone and timbre

a. Be educational, knowledgeable, authoritative, interested

(1) "Respectful intellectual equality with the judge"

(2) Imagine a junior partner explaining the case to an intelligent senior partner

- b. Not arrogant, argumentative, condescending, egotistical**

- 5. Avoid parenthetical expressions - take a sentence from start to finish without self interruption**

- 6. Limited use of notes; don't read your argument; don't memorize a prepared speech except opening and closing paragraphs**

- 7. Pace and pauses for emphasis and understanding**
 - a. Don't speak fast**

 - b. Slow down when reading**

 - c. Adjust to the judge's note taking speed**

- 8. Formal posture and presence; dignified appearance**

- 9. Avoid closed posture**

- 10. Gestures should represent meaning**

- 11. Make eye contact with the judge, not opposing counsel, client, gallery**

- 12. Refer to the judge as "your honor"**

- 13. Professional, civil, courteous, and likeable**
- 14. Don't let your opponent control your behavior**
- 15. Don't attempt humor or sarcasm**
 - a. Appreciate judge's humor**
- 16. Don't interrupt opposing counsel**
 - a. Exceptions**
 - (1) Protect your time**
 - (2) Rare valid objections**
 - b. Misstatements of record – save for response**
- 17. Don't tolerate interruptions by opposing counsel - ask the judge for relief**
- 18. Don't argue to or with opposing counsel**
 - a. Argument is presented to the judge**
- 19. Don't feel compelled to fill up open time with unnecessary, insignificant, or repetitive argument**

20. Know the judge’s practices, standing orders and rules

- a. **Where to stand**
- b. **Stand unless instructed to sit**
- c. **Permission to approach clerk**
- d. **Marking demonstratives as exhibits**
- e. **Submission of additional authority**

21. Don’t demonstrate dissatisfaction with rulings

B. Presenting the Responsive Argument

- 1. **A well prepared argument anticipates an opponent’s good arguments, so it should rarely need to be restructured during oral argument**
- 2. **If your opponent has made unexpected compelling arguments that render your principal arguments academic, you must “make space” for your argument by eliminating prior impediments, then return to your planned approach**

C. Tips from the Bench – regarding delivery of oral argument

- 1. **R.P. Jones**
 - a. **Be crisp, not tentative**

- b. Hit hard and fast**
- c. Sincerity is the trait of greatest appeal**
- d. Judge's attention span narrows under fatigue and boredom**
- e. Eye contact is critical**
- f. Incivility is a sign of weakness; shows need to obstruct rather than present the case fairly**
- (1) Never make personal comments about opponent**
- g. Reading excerpts - hold to a minimum, paraphrase to shorten, and watch speed**
- h. Visual aids are effective**
- i. Prepare, rehearse, edit, evaluate. Lawyers are not exempt from preparation.**

2. Judges John Wittmayer, Don Ashmanskas, Daniel Harris, John Acosta:

“It would be impossible for me to say that I hold against lawyers who are rude to my staff – I hope I don’t – but judges are only human.” Hon. J. Wittmayer 2004

“The jurors tell me the number one factor in evaluating attorneys is courtesy. And I am the same way; it is a human reaction even if judges try to overlook rudeness.” Hon. D. Ashmanskas 1993

“Professionalism will make you a more effective advocate.” Hon. D. Harris and Hon. J. Acosta 2007

D. Judge’s questions

1. Questions are your friend

- a. Shows interest, what the judge is focused on, and what is concerning or bothering the judge**
- b. Demonstrates preliminary conclusions that need to be enforced or contradicted**
- c. Questions are a roadmap to refocus your argument**

2. Always answer the judge’s questions

- a. Listen to the question and answer the question that was asked**
- b. Be direct and responsive; never evade**
 - (1) Never refuse information you think is unimportant**

- c. **Answer first, then explain, if necessary why**
 - (1) **“not this case”**
 - (2) **Unimportant to decision**
 - d. **Rarely delay the response - answer immediately**
 - e. **If the question isn't answered, the judge assumes the most damaging answer applies to the question**
 - f. **If the judge repeats the question, don't simply repeat the answer**
 - g. **Don't guess; admit uncertainty if you are uncertain; offer to find the answer**
3. **Don't appear annoyed by interruption**
4. **Never insult the judge**
- a. **Don't suggest judge's questions are stupid**
 - b. **Correct judge's mistakes deferentially**
5. **Never interrupt the judge, *never!***
- a. **Let the judge fully express thoughts**

- 6. Don't be combative with the judge**
 - a. Don't respond in kind to a hostile judge**

- 7. Don't worry about judge's consumption of time:**
 - a. Questions are more important**

 - b. More time can be requested**

 - c. Don't look at your watch or court clock when questions are asked**

- 8. Confirm the judge's correct statements**

- 9. Don't make concessions just to appear agreeable**

- 10. Follow the judge's directional signals**

- 11. If the judge indicates agreement – stop arguing the point**

- 12. Remain respectful, regardless of the judge's conduct or demeanor**

V. Visual Presentations

A. Goals of PowerPoint and other visual demonstrations

- 1. Focus – emphasizes and calls attention to the most important information**

- 2. Memory – assists the judge in remembering the important parts of the argument; can also be a memory aid for the speaker**

- 3. Understanding – assists in explaining complex information**
 - a. Chronological**

 - b. Relationships/comparisons**

 - c. Calculations**

 - d. Compilation of mass quantities of data**

- 4. Validation – seeing is believing**
 - a. Demonstration**

 - b. Visual proof**

5. Appreciation – gain a complete appreciation/understanding

a. Size or number

b. Beauty

c. Destruction

d. Difficulty

e. Speed

f. Color

g. Comparison

B. Creating visual presentations:

1. Well designed presentations

a. Enhance credibility through clarity of ideas and crispness of message

b. Complex ideas communicated with clarity, precision and efficiency

c. Clear portrayal of complexity, not complication of simple

d. Tell the truth about the information

2. **Key – simplicity of design, despite complexity of data**
3. **Effective displays of information often have a narrative quality: a story to tell**
4. **In sum, the visual presentation must help the judge reason, not be entertained by artful design**
5. **Displays can be designed to have at least three viewing depths**
 - a. **What is seen from a distance; overall structure**
 - b. **What is seen up close; fine structure of data**
 - c. **What is seen implicitly – behind the graphic; the story it tells**
6. **Five principles of data graphics**
 - a. **Show the data**
 - b. **Maximize the data - to ink - ratio**
 - c. **Erase non-data ink**
 - d. **Erase redundant data ink**
 - e. **Revise and edit**

- 7. Creating meaningful and persuasive visual presentations**
 - a. Place different forms of information within a common visual field**
 - (1) Show comparisons, contrasts, and differences**
 - b. Design should assist judge's thinking. What is the judge's decision that this display is supposed to assist and how will it assist it?**
 - c. PowerPoint bullet point lists benefit the bottom half of the attorneys - forces them to have points and organize. But visual displays can do much more to**
 - (1) Describe sequence of information**
 - (2) Make comparisons**
 - (3) Integrate a diversity of information**
 - d. Lengthy PowerPoint bullets require the judge to rely on visual memory to make a contrast or comparison between information spread over multiple pages**
 - e. Visual demonstrations work best when information is shown within one eyespan**
 - f. Clutter and confusion are failures of design, not attributes of information**

g. Cosmetic decoration distracts and detracts. If the information is boring, you have the wrong information. Find information that has an important message, then design the visual image to communicate the message

(1) Keep out everything that does not convey the message

C. Presenting visual displays:

- 1. Set up in advance, test equipment, and check judge's view**
- 2. Give the judge, clerk and opponents copies of all projections**
- 3. Use the dark button to clear the screen when not discussing the display**
- 4. Don't turn your back on the judge; maintain eye contact**
 - a. Position yourself to be within the judge's eyespan when looking at the screen**
- 5. Keep the pointer steady and use it sparingly**
- 6. Don't read lengthy bullet points**
 - a. Learning decreases when judge is forced to read what is being spoken; additional load on the listener**
 - b. Just as you wouldn't simply read your brief, don't simply read your PowerPoint bullet points**

- c. Explain, expand, utilize what is on screen**

- 7. Modify timing of spoken words to allow judge to hear what is spoken and read what is shown, and understand both**

- 8. Summarize where you are and where you are going; set the context for what is coming**

ORAL ARGUMENT EMPATHY CAN MAKE A DIFFERENCE

While the fundamental principles of persuasion apply in oral argument before Judges, constructing a winning argument is not solely a matter of logic and carefully selected words. The lawyer faces an audience of one. In such a situation, knowing your audience carries more weight than usual. The lawyer who makes the effort to step into the Judge's shoes and take into consideration what he or she may be feeling or experiencing at that particular moment has an advantage. An oral argument cannot be set in concrete. It should be fluid enough to adjust to the circumstances and the audience to which it is delivered. The ability to consider the listener, as well as what one wants to say, is called empathy.

Empathy has several definitions, but all rely on the human capacity to imagine the state of another person:

Heinz Kohut: Empathy is the capacity to think and feel oneself into the inner life of another person;

Roy Schafer: Empathy involves the inner experience of sharing and comprehending the momentary psychological state of another person.

Why does empathy matter in oral argument? How can it make a difference? Frequently, Judges and lawyers find that the time for argument is not happening in the circumstances one might wish.

Just one example – imagine a tired, hungry Judge listening to oral argument after the Jury has gone home for the day. The testimony has been intense, the lawyers have objected repeatedly and there are at least ten issues to be decided before tomorrow's session. It can happen on any day. Every lawyer has been in this situation and will be there again. A tension can arise for the lawyer between the demands of his argument and those of the moment. Having worked hard to prepare a compelling argument, or maybe even a brilliant one, it is difficult to shift gears. Take a moment to consider the options. Is the Judge someone who runs a tight ship? Is the Judge flexible, even when tired and grumpy? Would a suggestion to delay argument until the next day be perceived as arrogant or welcomed? Is the motion one that could be important for an appeal? When is it worth it to make a suggestion that might not be well received, but could afford one a better atmosphere in which to offer the argument?

If you sense that the Judge likes to wrap it up at the end of the day, follow your instincts. Be flexible enough to modify and shorten the argument. How hard to push your own agenda when it conflicts with the Judge's needs depends on how well you know the Judge and how well the Judge knows you, by reputation or by experience.

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Powerful Speech Delivery

Credible Speaking Cues

A speaker's credibility is derived from the verbal and nonverbal cues presented in the speech. The verbal cues are the words the speaker chooses to use. The nonverbal cues are how you look and sound when you speak. An important step in powerful speech delivery is knowing which cues lower and which cues enhance your credibility.

Verbal Communication

1. *Clear Language*

- a. Clarity is perhaps the most important aspect of verbal communication. It is essential for a speaker's words to be understood by the listeners at the time the speech is being made, because listeners, unlike readers, cannot seek on-the-fly definition. Although judges do often stop an attorney, your credibility will be hurt if an interruption is due to a failure to understand language choices rather than a clarification of a case fact.
- b. Ways to make language clear include:
 - i. *Simple language* promotes clarity and reduces ambiguity more than impressive vocabulary words. Consider the difference between "ambulate" and "walk," "prevarication" and "lie," "sanguine" and "optimistic."
 - ii. *Concrete and specific language* can make the difference between being vague and clear. Your audience should not have to guess what you mean by a term. Rather than "male" use "47 year old Caucasian man." Rather than "residence," use "inner-city apartment." Rather than "vehicle" use "1997, red, four-door, Toyota sedan." The goal of concrete language is to provide a one-to-one correlation of what's in your audience's head with what's in your head.
 - iii. *Defining key terms* – Although the audience may be well-informed on the topic (as is often the case with many judges), they may not know everything about your topic. Greater clarity comes when key terms that are not part of the audience's everyday understanding are defined for the listener.

- iv. *Less formal style* – Speechmaking is often more clear than the written word because a conversational style is typically used. Written language tends to be more formal and stiff. Use a conversational style.
- v. *Examples and Illustrations* – both verbally (“This is what I mean...”) and visually (in the form of demonstrative exhibits) helps provide clarity.
- vi. *Comparing and contrasting* is useful in making points clearer. Sometimes *analogies* can be effective in adding clarity.

2. *Use of Repetition*

- a. In written language, the reader can re-read paragraphs. In spoken language the speaker must provide that “re-reading” through repetition.
 - i. *Signposting, internal previews, and internal summaries* are ways to make strengthen your message. By introducing the “three main reasons why you should rule against the opposition’s motion for summary judgment,” then providing the supporting case law for each, you build in an organizational level of repetition that brings clarity to your argument.
 - ii. *Enumeration*, which occurs in the body of the speech, is the numbering of each point as it is introduced, “First... second...third... finally.”
 - iii. *Repeating important ideas* can help the audience remember a point. Often this is done by stating the point, inserting a 1-2 second pause, looking the audience directly in the eye, and restating the point. Sometimes a speaker will even say, “Let me repeat that.”

3. *Vivid Language*

- a. Your audience should be able to see, hear, feel, taste and smell what you are describing. The audience should be able to vicariously experience what you are trying to describe. Vivid language is most useful in the “story” portion of a speech rather than the “evidence” portion.
 - i. Vivid language also provides the audience with an image in their head, which is more memorable than pallid language.

4. *Absence of Vocal Fillers*

- a. Many speakers, without realizing it, incorporate vocal fillers (or non-words) in their speech. Examples of fillers include *disfluencies* such as “um,” “uh,” and “ah,” and *hesitancies* (or the addition of actual words that do not add meaning) such as “so,” “well,” “and what not,” and “you know what I mean.” These words are often sprinkled throughout the speech and are used in lieu of a more credible pause.

- b. The more a speaker practices, the less likely he or she is to use vocal fillers.

5. *Absence of Qualifiers*

- a. Qualifying statements are often needed, but when they do not actually provide meaning to a speech they lower a speaker's credibility. Examples of qualifiers include, "I think," "I guess what I'm trying to say is..." "perhaps," and "really, really."

Nonverbal Communication

1. *Eye Contact*

- a. Eye contact is the number one indicator of credibility. This is why we tell witnesses it is so important to look at the jury when they testify.
- b. Look your audience directly in the eyes.
- c. Eye contact enhances trustworthiness – speakers with less than 50% eye contact are considered unfriendly, uninformed, inexperienced, and dishonest.
- d. Eye contact permits the speaker to monitor audience feedback and adjust the speech accordingly.

2. *Paralinguistics (voice quality)*

- a. *Pitch* – Lower pitched voices are more credible than higher pitched voices. Women have to work harder at lowering the pitch of their voices to achieve higher credibility assessments.
- b. *Rate* – A moderately fast speaking rate is more persuasive than a slow or quick pace.
- c. *Volume* – Most speakers speak more quietly than they realize. This is because we hear ourselves louder in our heads than we are actually speaking. A louder speaking volume is perceived as more credible, not only because the audience can hear you, but because you sound confident and in control.
- d. *Intonation* – A varied intonation is more entertaining and credible than a flat intonation speech.
 - i. Use a *rising intonation* at the end of a sentence to indicate a question. Many nervous speakers end every sentence (even those that are not questions) with a rising intonation, which lowers credibility because it sends the message that the speaker is unsure of what he or she is saying.
 - ii. Use a *latent intonation* to indicate an ongoing thought or list of ideas.

- iii. Use a *dropping intonation* to indicate the conclusion of a thought or to emphasize very important points.
- e. *Dynamism* – Vocal variety is more credible than monotone speech. Use a variety of pitch, volume, rate, and intonation.
- f. *Use of Pauses* – Many speakers use a rapid pace, which impedes the ability to incorporate pauses. Speakers often feel like a dramatic pause (or a pause due to a moment’s inattention) is longer than it actually is, so they try to eliminate pauses by moving immediately to the next thought. A credible use of pauses is important to every speech. Try counting 1-2 seconds between major transitions or after a very important point to ensure that an adequate pause is used.
- g. *Articulation* – Articulation is key to credible vocal quality. Note the difference between “let me explain,” and “lemme explain,” or “he did not do what he is accused of,” and “he dint do it,” or “you’re gonna wanna read the case law on this matter,” and “you are going to want to read the case law....” One way to develop some of the muscles in your mouth that help with precise pronunciation is to practice elements of a speech with a pencil lengthwise between your teeth.

3. *Body Language*

- a. *Open body positions* are more credible than closed body positions. Avoid standing with arms and legs crossed. Stand with feet shoulder width apart, and arms free to gesture meaningfully.
 - i. If standing at the podium, stand with one leg in front of another.
- b. *Upright body position* is rated as more credible than a hunched posture.
- c. *Avoid the head tilt.* The head tilt, along with averted eye contact, is one of the least credible nonverbal cues. Women tend to tilt their heads more than men. Head position should be upright and strong. The tilt sends a message that you are unsure or questioning your thoughts. It is an inquisitive look, rather than a look of confidence.

4. *Meaningful Gestures*

- a. Use gestures that add meaning to your words. Examples of meaningful gestures include:
 - i. Pounding a fist into the other flat hand to emphasize a point;
 - ii. Holding both hands up in a “T” formation to indicate that someone stopped;
 - iii. Raising one arm over your head when describing someone’s height;

- iv. Using your hands (with palms facing together) to show how short or long something is; and
- v. Moving both arms from one side of your body to the other to indicate a transition from one point to the other.

5. *Meaningful movement*

- a. Movement should add meaning to a speech, not be random and chaotic. Many speakers pace back and forth or move out of nervousness rather than for meaning. Examples of meaningful movement include:
 - i. Walking closer to the audience when you want to intimately engage them in your speech, or when you want to make an important point;
 - ii. Stepping back when you are moving from a narrow topic to a broader topic.; and
 - iii. Moving to the left or right when you transition from one idea to another.

6. *Facial Expressions*

- a. Use facial expressions that show your confidence. Credible facial expressions include: open vs. squinted eyes; smiling; and direct eye contact.
- b. Don't give "tells" that show your lack of confidence, anger, or disappointment (e.g, the eye roll, averted eye contact, a frown, biting lip, nose scrunching, etc.).

Modes of delivery

When deciding how to present an argument to a judge, you have several modes of delivery from which to choose: **Manuscript** (writing your argument word-for-word, and then reading or “performing” it); **Memorized** (essentially a memorized manuscript); **Impromptu** (aka, “winging it,”); or **Extemporaneous** (creating a key word outline to organize your thoughts, and then presenting your argument in a natural but organized manner). Most of the time, the extemporaneous approach is preferred.

1. *Manuscript Speech*

- a. In the manuscript form of delivery, the speaker prepares a speech word-for-word and then reads the speech directly from notes (in some cases, a teleprompter).
- b. Manuscript speaking is appropriate for a narrow range of speeches – primarily a speech that requires careful attention to language choice and sentence structure, and when the speaker must be accountable for each word. Teleprompters are usually used in these formal speeches (e.g., a Presidential address to the Nation).

- c. A disadvantage of delivering a manuscript is that *reading* the speech can lower a speaker's credibility:
 - i. Speakers must rely on a script when delivering a manuscript speech, which can cause the speaker to lose sight of the importance of communication. The speaker is focused on reading and not on building rapport with the audience through nonverbal cues such as eye contact, body language, and gestures.
 - ii. Manuscript speeches also reduce a speaker's naturalness because it forces the speaker to *read a written* speech. Writing is inherently different than speaking, so when people try to deliver a manuscript, often it sounds unnatural.

2. *Memorized Speech*

- a. A memorized speech, much like a manuscript speech, provides the speaker with the advantage of a carefully thought-out and well-worded speech.
- b. A benefit of manuscript speeches is that when the speech is completely memorized (and no notes are used), the speaker is able to have maximum eye contact with the audience.
- c. The primary disadvantage of speaking from memory is, of course, that the speaker risks forgetting parts of the speech, which reduces credibility.
 - i. Memorized speeches also tend to be more mechanical than impromptu or extemporaneous speeches.

3. *Impromptu Speech*

- a. An impromptu speech is one that is delivered with little to no preparation. In a courtroom, impromptu arguments may be required when a question is posed by the judge and the attorney must provide an "off the cuff" argument.
- b. Unless a speaker has practiced the "art of impromptu" speaking, winging an opening remark with little to no preparation is not advised.
 - i. Most impromptu speeches are not well organized, lack specific language, and more often than not the speaker thinks of points that should have been made when it is too late – after the speech is over.
- c. If a speaker finds him/herself in a situation where an impromptu speech is to be given, care should be taken to ensure overall organization of the argument. The speech should have the following components:

- i. *Introduction* with a compelling attention getter – in the legal setting the attention getter is often in the form of a 1-2 minute “snap shot” or “story” of the case;
- ii. *Overall organization* – 2-3 main points which are previewed and summarized for the judge. (“There are three main reasons why we believe this case should be dismissed on summary judgment...”);
- iii. *Internal organization* – signposting and transitions between main points. (“That’s the first reason why this case should be dismissed. The second reason is...”); and
- iv. *Summary* – the argument should end with a summary statement, compelling action step or reason to remember your argument. (“For the three reasons given today, each supported by numerous case law, we believe the defendant has proven its case to dismiss this case”).

4. Extemporaneous Speech

- a. Extemporaneous delivery is often referred to as the “middle ground” approach.
- b. For most speaking events, including arguments to the bench, the extemporaneous approach is preferred.
- c. An extemporaneous speech is defined by the following characteristics:
 - i. The topic is researched;
 - ii. The argument is outlined;
 - iii. The speech is practiced; and
 - iv. The speech is delivered in a conversational manner.
- d. The extemporaneous approach allows the speaker to make maximum use of feedback from the audience. The speaker can gauge the interest of the audience, and in the case of a bench trial, the extent to which the judge is “buying” the argument. The speaker can adjust the presentation according to the nonverbal cues of the audience.

MASTERING THE ART OF PERSUADING TRIAL JUDGES

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THE CHALLENGES:

For over thirty years I have seen scores of attorneys try to make persuasive arguments to trial judges with mixed success. Audience-based communication is the concept that the audience is the given and the speaker must accept the responsibility of adapting his or her message to the audience. Some of the challenges judges present to attorneys include the following: inattentiveness, interrupting, unpreparedness, forgetfulness, inexperience, a high need for control and a lack of understanding of the relevant points of law or of the area of expertise involved in the case.

SOME OBSERVATIONS:

An uncertain demeanor while communicating with a judge is the single most common denominator I have observed which predicts an unsuccessful argument. That includes such things as a soft, weak, tentative voice, an upward inflection at the ends of declarative sentences, a lack of direct eye contact with the judge, a slow halting rate of speech, shuffling papers on counsel table, self-touching such as covering one's mouth, tugging at a tie or playing with a pen and a less than erect posture. Sometimes a shift to a more confident demeanor can signal that the attorney's search for a good idea may finally hit pay dirt. Knowing you have a weak argument often causes several symptoms of uncertainty to appear.

While working on trial preparation issues, I have observed that attorney research on who the judge is and how he or she operates is often not done early enough nor is it done in a systematic manner. It takes time to understand the challenges you face and to design a strategy for meeting them head on. As an example, when a judge is inattentive and possibly lacks experience in the type of litigation you are trying, using a few high-impact demonstrative exhibits can make the difference between success and failure. Issues of a judge who often interrupts can be addressed by having a short focused and well-organized argument, by promising you will only take two minutes and then by sticking to your promise.

A FEW SUGGESTIONS:

1. Be well-prepared and well-organized with a clear introduction, obvious transitions and a final conclusion.
2. Practice important arguments so you are confident and you look and sound like you truly believe in your position.
3. If you know you have a less than commanding or authoritative voice, get professional help.
4. Learn how to quickly and confidently organize your thoughts. Practice impromptu situations until you can do this easily. Think, for example, of those candidates who always know how to answer any question in three parts.
5. Ask judges for their evaluations and suggestions regarding your courtroom performance. Many of them love teaching. You may save yourself from some bad moments by using their wisdom.

Many of my comments below emanate from conversations with friends on the bench as well as from my own observations over the years. While some may appear simplistic or superficial, they are nevertheless frequently ignored.

1. **KEEP YOUR ARGUMENTS SHORT.** Judges are human beings and human beings have a very limited attention span. Most people, including judges, find it difficult to pay attention to a talk, speech, or argument for more than about 20 minutes. Unless the listener is *intensely interested*, he or she will drift off onto other thoughts: where is dinner tonight, when would be a good time for our vacation, what about the agenda for the next judicial conference.
2. **MAKE YOUR ARGUMENT TIGHT AND STRUCTURED.** Minimize the number of issues you have to communicate to the court. If you can keep it to 3 or 4, all the better. Tell the judge what the 3 or 4 issues are and then structure the presentation around each issue. Conclude with a restatement of each issue.
3. **AVOID JARGON OR TECHNOSPEAK.** It is easy to fall into the habit of using the language or vernacular of the client or the client's experts. While well educated, the judge probably majored in liberal arts rather than engineering, chemistry, or mathematics in college. Don't make him lose the major point of your argument by having to learn new language, terms, or concepts.
4. **PRACTICE.** Winston Churchill practiced every speech he ever gave in front of a mirror. Today, we don't need mirrors. We have video cameras. Become your own best critic by giving and watching your argument until you are satisfied.
5. **USE DEMONSTRATIVE EXHIBITS.** Juries need visuals, judges don't--**BALONEY!** If your argument is anything other than perfunctory, use a well designed chart showing your 3 or 4 major arguments. If your arguments are technical, use a chart showing designs, spatial relationships, organizational structures, or diagrams. The judge will appreciate it

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My one pointer that I would recommend, for judges as well as juries, is to comfortably admit and acknowledge even damaging facts, to make concessions without arguing or sweating or getting defensive, and to avoid kicking and screaming and arguing when you're fighting a losing battle with a judge. Judges are just as susceptible as jurors to drawing conscious and subconscious conclusions about the importance of the issue (and how damaging it may be to your case) based on your demeanor when admitting something or arguing against something.

Here are some thoughts from previous articles of mine on the subject, tailored to your topic:

Just like jurors, judges expect the stereotypically dishonest, defensive lawyer to OBJECT and ARGUE a lot. They expect you to object every time the other side says something damaging to your case that worries you, and they expect you to complain and argue and drag your heels when they're ruling on something that you consider to be damaging and crucial to your case. In fact, most judges probably believe that every time a lawyer objects or argues with a ruling, it's BECAUSE they are worried that their case has just been weakened.

As painful as it may be to hold back a third and fourth swing at an argument when your judge seems to be ruling against you, weigh the benefits of arguing with the risk of convincing your judge that you have a weak case. Learn to carefully argue your motions without becoming too obviously intensely invested in the outcome. By giving judges the impression that you're not particularly concerned with a bad ruling, you can convince your judges that your case and your other motions and evidence is still strong.

Believe it or not, judges are just like jurors—they appreciate frank honesty and trust you when you happily make concessions and make honest admissions that seem to be detrimental to your case. Just as with jurors, judges can't help but subconsciously get a sense of how much faith YOU have in your case, and their sense of how confident you are in your case influences how they tend to rule.

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