Oral Advocacy in Connecticut's Courts

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The day is long gone when most cases were decided after trials in which evidence was presented and challenged in open court. Now, the vast majority of cases are either decided based on motion practice or settled through some form of mediation. As a result, our success as litigators (and our clients' success as litigants) depends on our ability to speak and write for the court as much or more than it does on our ability to speak and write for the jury.

In our written work—motions and briefs, letters, and position statements—we have the opportunity to provide a full, detailed exploration of the issues involved in our cases. Our written work should be the product of careful and deliberate thought, each word or sentence carefully considered in the context of the overall presentation. Oral advocacy is different. While we must prepare for oral argument with the same diligence we devote to preparing written submissions, ultimately we cannot predict the questions the court will ask or how we might need to change the argument on a moment's notice. Oral argument is interactive. It requires you to think on your feet. It is a conversation with the court, and sometimes with your adversary. It is an opportunity to address questions left open in the written presentations, to clarify points that have been obscured in the briefing, to focus the court's attention on those things that are significant, and to impress upon the judge why the case is important (or why it may not be so important).

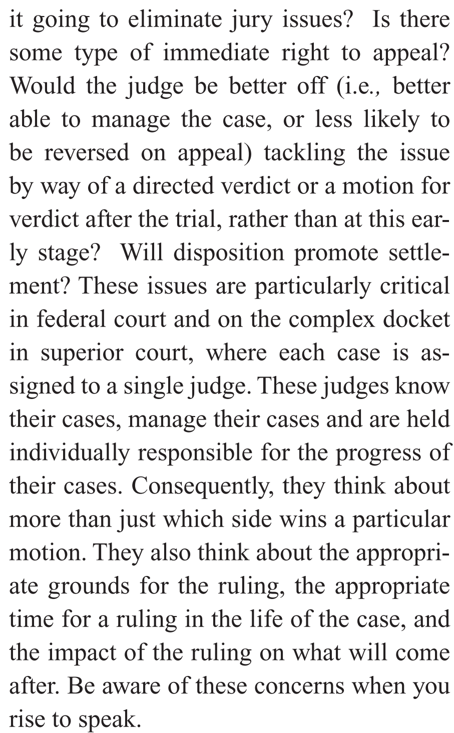
Like any art, oral advocacy demands practice if you are to perform effectively and persuasively. We offer the following points you may want to consider and techniques you may wish to employ to perfect your craft.

Oral argument is not always a right. District of Connecticut Local Rule 7(a)1 instructs litigants to indicate in the lower margin of a motion whether they request oral argument. A similar indication is to be placed in the lower margin of a memorandum opposing a motion. The Rule also provides explicitly that the court may, in its discretion, deny a request for oral argument, and you should be aware that the judges often disregard these *pro forma* requests. If you think the matter really is something which would benefit from oral argument, you should so advise the court by letter or by filing a formal request for argument. Note in this regard that some judges seem consistently to find oral argument useful, while some do not. Determine the preferences of the judge to which your case has been assigned and proceed accordingly.

Most dispositive motions in superior court are entitled under Conn. Prac. Book § 11-18(a) to an automatic right to oral argument, provided one of the parties complies with the procedural requirements set forth in Section 11-18(a). That having been said, the oral argument in superior court may be a more truncated proceeding than it is in federal court and the state court judge, unlike her federal counterpart, may have little familiarity with the file. So, when planning for your oral argument, consider how familiar the court is with the claims and defenses in issue and the procedural history of the case, and calculate how long you have to present your position.

Prepare, prepare, prepare. Oral argument of a significant motion—perhaps a dispositive one—is not the time to wing it, or to assume that you can ignore aspects of the case that may or may not be particularly germane to the motion. Assume, instead, that your arguments will be tested and probed, and that you will be questioned about the factors that may distinguish the cases on which you rely from the case at hand. Assume that the court has fully reviewed your briefs, has had a law clerk summarize the cases you cited and update your research, and knows the issues as well as you do.

Understand the significance of the motion at hand in the context of the entire case. You may think a Rule 12(b)(6) motion to dismiss (in state court, a motion to strike) two out of seven counts presents the most important issue in the world; but the judge may view it as only an insignificant step in what will become a lengthy piece of litigation and wonder why you are bothering to waste his time with it. Educate the court as to why the partial motion to dismiss is important—what will it do to the scope of discovery, how will it affect a jury trial, how will it shape summary judgment motions? When arguing a partial summary judgment motion, consider how it impacts the case. Is



it going to eliminate jury issues? Is there some type of immediate right to appeal? Would the judge be better off (i.e., better able to manage the case, or less likely to be reversed on appeal) tackling the issue by way of a directed verdict or a motion for verdict after the trial, rather than at this early stage? Will disposition promote settlement? These issues are particularly critical in federal court and on the complex docket in superior court, where each case is assigned to a single judge. These judges know their cases, manage their cases and are held individually responsible for the progress of their cases. Consequently, they think about more than just which side wins a particular motion. They also think about the appropriate grounds for the ruling, the appropriate time for a ruling in the life of the case, and the impact of the ruling on what will come after. Be aware of these concerns when you rise to speak.

Organize your argument to focus on those very few points that you want to emphasize, clarify, or otherwise bring to the court's attention. Know the cases you cited and how they relate to the issues in play. Update your research. If there is a relevant case that has been decided since the briefing was concluded, point it out to the court. If it is inconsistent with your position, be prepared to distinguish it. Know your record. If you are seeking to dismiss the complaint, know the precise allegations that have been made by the plaintiff. If you are arguing a summary judgment motion, know the material facts that have been put into issue, if any. Never mislead the court about the law or the facts. You will be discovered. The damage to your credibility, in this case and others you will have before the same judge, may be irreparable.

Keep in mind that you have an opportunity to shape not only how the motion at hand will be decided, but how the case proceeds afterward. For example, the court may grant your motion to dismiss (in superior court, to strike) the complaint, only to receive an amended (revised) complaint shortly thereafter. So, this may be the time to start explaining to the court why an amendment would be futile.

Anticipate what your adversary's arguments might be, but remember that you will usually have a chance for rebuttal. If there is something important, the court will usually raise the point. So don't plan to spend time talking about your adversary's position unless the issue is a defining one.

Consider the use of demonstrative exhibits, a PowerPoint presentation, and/or documents on electronic media. If your case depends upon arguments that require the court to refer to documents, such as an argument about the proper construction of an agreement, offer the court a user-friendly electronic or physical way to handle those exhibits, or display them with an ELMO or some display software and a projector. Exhibits help you to engage the court in your argument. You want the court awake and interested.

Work through logistics in advance. If you are new to the particular courtroom, arrive early to get comfortable. (If you are not new to the particular courtroom, arrive early anyway.) Some courtrooms are large and intimidating; others are claustrophobic. You need to know where the microphones are, where to stand, and how to position yourself so that you can make the most effective presentation, particularly if you are going to use exhibits or otherwise direct the court's attention to something besides yourself. Understand the acoustics of the courtroom so you can speak clearly and with the right tone of voice.

If you are using any type of electronic support for your presentation, make sure it is set up and tested in advance. Always have a Plan B in case the electronics fail. If your argument will be lengthy, bring water with you to the podium; but bring it in a cup, not a bottle. You are a member of the bar, you are not in a bar.

When you speak, be confident, but not cocky. Be firm, but not disrespectful. Take command of your argument, but understand that the courtroom belongs to the judge. Refer to the court with respect, either as "Your Honor" or by name (e.g., "Judge Smith"). Avoid nervousness (or at least avoid showing that you are nervous), avoid fidgeting, avoid shuffling papers or jingling keys or coins in your pocket. Avoid anything that distracts from your engagement with the court. Do not, under any circumstances, interrupt the judge when he or she is speaking, no matter how eager you are to respond. Arguments have been lost for no

better reason than that counsel was rude to the court.

Understand also that many judges entertain oral argument with a specific agenda in mind, either announced at the outset or hinted at through questions. This is your time to address the points the court raises. In rare instances, it may be appropriate to ask the court to defer a question until later in your argument, if you think that putting the question in a different context will help your cause, but this is a temptation to which you should succumb only rarely. When the court makes an inquiry, it means the court is engaged with your presentation. Therefore, answer the question. Then weave that issue and that answer back into your argument. Do not insist on addressing points that the court has implicitly or explicitly suggested are not important.

Less can often be more. Know how much time you have been allotted to argue, and think about how best to use it. Be strategic about what arguments you make and what arguments you don't. Appreciate that when the court stops taking notes, the court probably is no longer listening. Make your point and move on.

Body language and demonstrative gestures can be helpful, but only if used tactfully. Slamming your fist on the podium to make a point when only you, your adversary, and the judge (and perhaps counsel waiting to argue in the next case on the calendar) are in the courtroom doesn't really make a great impression or accomplish very much. But the proper hand motion or tone of voice may highlight a point that needs to be highlighted. The court needs to understand what, in your forty-page brief, demands its attention. You need to make that point clear.

Be careful with analogies or metaphors unless you have fully vetted them with others. An argument that turns on a clever phrase or reference that doesn't hold together will quickly be exposed and exploited by your adversary.

Don't get so caught up in your brilliant legal argument that you forget to emphasize the facts of your case. Even though judges try to be dispassionate, like most people they can be engaged by a good story. More cases are won on the facts than on the law, so take the time to explain, from your client's perspective, what the case is really about, and show the court why fairness demands the result you seek. Then show the court why the law also commands that result.

Do not read. Oral argument is your time to impress upon the court why the points you made in your written submission are those which should convince the court to find in your favor. If you cannot do that without reading your brief, you should let someone else make the argument.

If you don't know the answer to a question, don't guess. If you are the movant, ask the court to save two minutes of rebuttal time and try to find out the answer while your adversary is arguing. If you are the opponent, ask the court to give you time either to figure out the answer or to address it in a supplemental brief to be filed very promptly—i.e., that day or the next. If you have prepared properly, you shouldn't find yourself in this position.

Consider the hypothetical questions posed by the court and be prepared to concede where concessions are appropriate. Keep in mind that while the court may posit a scenario that suggests you will lose, that doesn't necessarily mean that you will lose on the actual facts. You can concede that in the hypothetical circumstances offered by the court, one result would be appropriate, and then explain why on the actual facts, a different result is required.

Listen closely to the questions the court asks your adversary and weave them into your responsive presentation, provided they weren't "straw man" questions that were not actually important. Be careful not to take the bait offered by your adversary as to how an issue should be defined or how a rhetorical question should be answered. When you stand up to speak, it is your argument, not your adversary's. If the court wants to pursue the line your adversary suggested, it will.

If you are offering rebuttal, be direct, be brief, and do not repeat.

Do not personalize the dispute or attack your adversary personally. The court has no desire to referee a fight between lawyers; it is there to resolve a dispute between litigants. It is appropriate to identify "Ms. Smith's argument." But if you intend to say next that the argument is disingenuous, pinning that accusation to the name of your adversary is looking for trouble. It is better in that instance to simply say "the Plaintiff's argument is disingenuous."

Lastly, be yourself—in perhaps a more refined and polished version. While you may want to copy someone else's style, the argument will likely end up sounding contrived. If you aren't comfortable, you will be less credible.

Oral argument is a challenging, but thrilling experience. It may represent the culmination of months or years of work. It calls upon every aspect of a lawyer's education and training. Prepare yourself well and you will soon realize why so many in the profession long for a "good argument." **CL**

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