

Others Who Were Battered and Bruised

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I wrote an article titled [“Twenty Tips from a Battered and Bruised Oral Advocate Veteran”](#) that was published in *Litigation, The Journal of the ABA’s Section of Litigation*, Vol. 37, No. 2, Winter 2011. I offered some random musings on hard lessons learned over many years. In response, I heard from many lawyers who passed on their own war stories. Some are set forth below. One of my tips was to have a mock oral argument in front of folks cold to the case who will ask hard questions of you. Bruce Rogow has a wonderful story that makes this point. Bruce had his law school constitutional law class moot his argument to the United States Supreme Court in a habeas case. His issue was ineffective trial counsel. One feature of Bruce’s argument was a motion for continuance that the defendant’s trial counsel had filed, taking an earlier motion filed by the State and editing it by hand, with arrows and interlineations. During the moot, one student asked, “Why isn’t that just an efficient way to proceed and what is the matter with that?” Bruce thought that was a pretty stupid question and he still thought it was a pretty stupid question when Chief Justice Burger asked it at the outset of Bruce’s argument. But at least now Bruce was prepared to answer it. The point is, there is no such thing as a stupid question if a judge might ask it. A mock oral argument gives you a chance to hear what may seem to be off-the-wall questions before you get them in real life. It also forces you to confront the weaknesses in your case, including weaknesses your opponent may not have exploited. If you tell your mock judges to be as hard on you as they can, that is the best preparation you can do, after you know your facts and the law cold. Noting my story illustrating the kindness and humanity of Justice Stevens, another lawyer sent me a story about his first appellate argument as a newly minted prosecutor:

"My esteemed adversary had spilled water on the table by the podium. It formed a pressure ridge at the sharp edge of the table, as water will do. Of course, I didn't notice, so focused was I, and I leaned right up against the podium and the table, proceeding with my 20 minute argument answering all manner of questions from the "hot" panel. So totally absorbed was I that only when I was finished did I feel very wet and cold below my belt and realized my pants were soaked. The panel maintained its composure as did I, but my fellow prosecutors did not."

Confirming my tip to learn in advance any customs of the court in which you are appearing, Dennis

Suplee and Nancy Winkleman sent me a story about their partner Ralph Wellington's first argument in the Delaware Supreme (a story Ralph confirmed to me). When Ralph and his partner Jon Stern arrived at the anteroom outside the courtroom, they found a sign cautioning that male lawyers had to be wearing a white shirt in order to argue or sit at counsel table. Jon was wearing a very light blue shirt. He asked the Clerk whether it would pass muster and was told no. Jon did not, however, have a white shirt with him. Ralph remembered that he had picked up laundry the day before which was in the trunk of his car. He gave Jon the keys and told him there were shirts in there. Jon ran out to get one, while Ralph got things ready for their impending argument. As Jon arrived and sat down next to Ralph at counsel table, he was huffing and tugging at the "shirt," saying he was surprised that it was so tight. Argument proceeded. Following court, Ralph said he could change back and Ralph would take it with him, but Jon insisted he'd get it cleaned and send it back. When the package arrived in Ralph's office a few days later, Ralph opened it to find his wife's lovely, lacy blouse. My partner [Wendy Lumish](#) had a different experience from that. I described an argument when my partner's opposing counsel arrived at court in the middle of my partner's argument. In Wendy's instance, her opposing counsel had gone to the rest room and missed the calling of her case. It flustered her severely and she never got on track. Remember your mother's instructions to always go to the restroom first, but allow plenty of time to get back to the courtroom. Hard questions sometimes cannot be anticipated even with the best preparation and moot court. Wendy Lumish tells of sitting at counsel table and hearing one of the members of her panel ask her opposing counsel why she had not filed a motion for sanctions as to the argument Wendy had advanced on appeal. While Wendy was thinking about what she could say on that question in rebuttal, opposing counsel saved her by saying, with great candor, that since the court had accepted amicus briefs on the issue, she thought the court was interested in it. My partner Jack Reiter had the same judge ask him a hard question in a case involving construction of an insurance policy provision. He represented the insurer on the issue of whether an exclusion applied so as to preclude coverage. The judge was aggressively questioning him regarding the trial court's summary judgment in our favor, and after several minutes of spirited back-and-forth dialogue with the panel, the judge interrupted him and said, "Mr. Reiter, I want to ask you a question and I know that you'll give an honest answer because that's what you always do when you are in this Court." Jack said, "Of course, judge." He then said, "I want to know in your personal, honest opinion whether you believe that the policy provision at issue is clear and unambiguous." Jack took a moment and replied, "Judge, that is an unfair question." The judge said, "Unfair? What do you mean unfair?" Jack replied, "Your Honor, I am not here to provide a personal opinion. I base my analysis on the statute at issue and principles of contract interpretation that guide my view that this policy provision is clear and unambiguous." Jack's time was about to expire, the judge interrupted him and said, "Counsel, I don't want you to answer, but I know what you're thinking!" Keep those war stories and tips coming! We will post more such musings from time to time.

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