

As an Advocate, Welcome Questions From the Bench and Use Them to Win Your Appeal

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Everyone fears getting a question during oral argument that they don't know the answer to or that only has an answer not helpful to their position on appeal. But experienced appellate advocates fear even more the cold panel with no questions, because then they don't know what may be bothering the judges about the arguments advanced on appeal – by either side.

The best oral argument is a conversation with the judges, not a monologue by you, and questions always advance a conversation. Questions from the bench tell you where the court wants to go and you want to go where the court wants to go.

So welcome questions and use them to advance your argument. Indeed, some accomplished appellate lawyers begin their oral arguments by saying “I'm going to address three points” and then stating them, with the hope the court will start with questions where it's most interested while also knowing from the start that there's more to come.

Here are some tips from the CF appellate group on how to deal most effectively with questions from the bench.

1. Have people cold to the case moot your oral argument and ask you their hard questions. Then you will be as prepared as much as possible for questions from the panel.
2. But if you still get a question to which you don't know the answer, don't try to fake your way through it. If it's something like a record cite, ask if you can provide it to the court immediately after the argument. If not, admit you don't know the answer and just move on with your argument.

3. Always answer the question. Don't dodge it. Don't say "I'll get to that." Don't say "That's irrelevant" – if the judge asks a question, then the judge wants an answer. "Yes but ..." always is an acceptable answer.
4. Don't always assume a question is hostile. Sometimes a judge will use a question to the lawyer in order to make a point to a fellow judge on the panel.

One of our partners, who was a former appellate judge, loved to tell the story of being on the bench and watching a young lawyer squirm over a question from another judge on the bench that the lawyer clearly thought was in some unknown way harmful to his cause. Finally, our partner told him: "Just say 'yes.'"

5. But sometimes there's no doubt that the question is really and truly hostile – sometimes to the point the judge will not even let you get your answer out before you are hit with another equally hostile question.

There usually is nothing to do but grin and bear it - and hope the other panel members will listen even closer to what you're saying. That happens sometimes, so keep on going. In fact, the other judges may have the same concerns. You need to address them as fully as possible.

6. What if one or more of the judges persistently questions you about your weakest argument in your brief rather than the particular, stronger argument you're making orally?

Here too, you simply have to try to answer as quickly and succinctly as possible and move back to the argument you were making. This danger, however, always should be kept in mind when selecting issues/arguments to be advanced in the brief – you may be called upon to defend weaker arguments in open court, at a cost to your better arguments.

7. What if all of your time is consumed by the court's questions, so you don't ever get to make the argument you were prepared to make?

Hopefully, you worked the important points of your argument into your answers to questions. But you always can ask the court for two extra minutes to sum up, and then if the court allows you some extra time, give the two minute drill you prepared in advance.

8. What if you don't hear the question or didn't understand it?

Say you couldn't hear it or don't understand it – maybe someone else on the bench will repeat / rephrase it and help you out. But sometimes there's nothing to do except to say you don't understand the question and accordingly can't answer it.

Hypothetical questions – especially long, convoluted ones – are especially tricky. Some lawyers just say “That's not this case.” But the judge knows that and likely is testing how far the result the lawyer advocates in the case would affect the law. Accordingly, the judge may press for an answer and failing to receive one, assume the worst.

9. Take advantage of questions to the other side. Answer them yourself when you take the podium. It can be devastating advocacy, especially if the other side didn't answer the question or didn't do it well.

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