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Effective Telephonic Arguments before the Appellate Division

APPELLATE ANSWERS: Two former appellate judges offer suggestions for maximizing your effectiveness in the telephonic forum.

By **Marie E. Lihotz and Marianne Espinosa** | July 24, 2020



Photo credit: Gajus

In a matter of weeks, the legal community adjusted to presenting cases remotely. In consideration of pandemic public health limitations, the Appellate Division chose to primarily employ telephonic arguments until the end of the court year. Although there is great debate about whether available alternative processes provide the same impact as personal appearances, there is no question the strategy for effective telephonic arguments differs greatly from those delivered from the courtroom podium. But don't let the medium impede your advocacy. Instead, develop the appropriate skills for the telephonic forum. Here are our suggestions on how to adjust in order to maximize your effectiveness.

Appellate jurists universally agree that the best advocates are those who converse with the court. In doing so, advocates identify errors requiring review, candidly respond to posed questions, recognize appropriate relief, and articulate the impact if relief were granted. On the telephone, counsel and the court are deprived of nonverbal cues, such as head nodding, notetaking or facial expressions of confusion, disagreement or interest. Understand, the absence of visual stimuli makes it harder to sustain concentration as you listen on the telephone. It is counsel's job to keep the judges engaged.

Also, because interactions are limited, telephonic arguments tend to be shorter. So, spend more time deciding what you need to say to emphasize critical arguments. The best way to do so is state the problem posed and verbally outline the number and order of arguments. Listeners can follow along better when they recognize what they need to listen for. Consider this approach. If one or two issues among those presented in your brief are most central, limit your time to those and state your reliance on your brief for others. It is more effective to zero in on the most impactful issues raised on appeal and direct your efforts and, importantly, the court's attention to focus on what you believe is significant.

As you identify the most important argument(s) on appeal, consider whether to request if the judges have questions on the issues, either before you start or at a different point in your presentation. This will pinpoint everyone's attention and draw sharper focus to the panel's concerns early in the discussion.

Just because you are not in view does not allow you to read your argument. Reading to the court becomes painfully obvious within the first two minutes, and it tends to be tedious. Remember, Rule 2:11-1(b)(3) prohibits an attorney from reading "at length from briefs, appendices, transcripts or decisions." This rule signals your need to prepare an argument that succinctly articulates the reasons for the court's intervention or affirmance.

Vocal variety is one of the most important telephonic argument skills. Control the tone of your voice, alter the volume for emphasis when necessary, and vary the pitch. Remember monotone equates to monotony. Equally important, control the pace at which you speak. It is better to speak a bit slower. Be conscious of the need for clarity and change the sentence structure by incorporating questions and short pointed statements. The goal is to avoid the need to repeat yourself, be natural and measured, never caustic or agitated.

The process of asking and answering questions becomes more challenging on the telephone. Listening skills must also be heightened. A huge limitation posed by the telephonic format is if two individuals speak simultaneously, one does not hear the other and, more importantly, no one else understands who is speaking or what is being said. You listen more effectively when you are not talking, so judges may refrain from interrupting, allowing you to just barrel along. A panel avoiding an awkward interruption as you keep talking, loses the possible give-and-take and may not fully develop an issue of concern. A good strategy is to incorporate brief pauses in the presentation, purposefully inserting the opportunity for the judges to ask questions. Better yet, stop and invite the panel's requests.

A reason exists for each question asked by the court. Once a judge starts to pose a question, don't anticipate and jump in. Even if you correctly understand the direction of inquiry, let the judge finish, be certain you understand the question, then respond. Also, listen to the presentation and questions posed to your adversary, these highlight material for rebuttal.

Handling tough questions gets tougher on the telephone. When asked an unanticipated question, one you think inapplicable to your facts, or possibly an uncomfortable question where your answer may cast a negative pall on your position, don't overreact. Instead, stay calm and draw on your professionalism by seeking clarification to best understand the concern and develop your response. If taken completely off-guard, ask for a moment to gather your thoughts—don't just stay silent. Never respond in a manner that is dismissive or annoyed. Do your best to answer the question, then redirect the conversation to related arguments you wish to make.

Be very conscious as outside distractions more easily creep in to disrupt a listener's concentration during a telephone call. A personal preference of many judges prohibits the use of speaker phones because of the increased background noise. Also, while listening to your adversary, put your phone on mute. Cell phones are extremely sensitive and easily pick up noise from adjacent rooms. For example, in an early round of arguments conducted by the United States Supreme Court, a toilet flush was overheard. Such unnecessary interference completely sidetracks the conversation and everyone's train of thought.

Do not engage in argument while driving or even while parked. If you are home, do not succumb to informality: avoid eating, a quick click through your email, or shuffling papers. Some tell me they lay their notes on a towel to stifle noise!

Finally, be sure you prepare a two-sentence conclusion restating your points and the relief sought.

These preparations and presentation strategies will better able you to ensure the judges understand your position and its implications during telephonic appellate arguments. By the way, many of these suggestions may easily translate once court appearances resume.

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