

Tread Carefully When Approaching the Bench

By Alex Kozinski SPECIAL TO THE NATIONAL LAW JOURNAL

When friends told Cicero that he was the greatest of orators, he replied somewhat as follows: "Not so, for when I give an oration in the Forum people say, 'How well he speaks!' but when Demosthenes addressed the people they rose and shouted, 'Come, let us up and fight the Macedonians!'"

—H. Weihofen, *Legal Writing Style* 5 (2nd ed., 1980)

WHEN IT comes to being a lawyer, persuasion is the name of the game. Sure, there are other skills that go into making a good lawyer—foresight, analytical ability and knowledge of the substantive law, to name a few. But the ability to bend others to your will distinguishes the great lawyer from the adequate one, and not just in the courtroom.

The power to persuade is crucial to all aspects of practice. There's a name for a lawyer who can't persuade: "Professor."

Figuring out how persuasion works is a challenge. As a judge, I've been quietly observing the process for the last 15 years, catching myself on the brink of

changing my mind, then trying to figure out what made the difference. It ain't easy; the process is subtle, and much of it goes on below the threshold of conscious thought.

Even without knowing exactly how or why persuasion works, it's possible to identify the conditions that make persuasion possible. A good argument counts for a lot, but directing the pitch to a receptive mind is just as important. Here are a few dos and don'ts:

■ **Find Common Ground.** It's hard to persuade anyone unless you understand how far apart you are in your thinking. Until you know how much you agree upon, you can't pick the right argument to present. Finding common ground also establishes camaraderie, and it is far easier to persuade someone who trusts you, if only a bit.

■ **Make Tactical Retreats.** Figure out the narrowest point on which you must prevail in order to win, and defend that point at all costs. But be prepared to relinquish everything else in order to achieve a tactical advantage. Lawyers often lose valuable argument time in quixotic defense of points not essential to their cause. Far better for the lawyer to say: "You may well be right, your honor, but I have a second argument you'll find

more persuasive." Letting judges persuade *you* (or seem to) not only gives you common ground, it may make judges feel they should show how reasonable they are by letting you persuade *them* of something.

■ **Leave Things Unsaid.** If the argument is going well, resist the temptation to push it too far. We're all reluctant to make up our minds under pressure, even more so to admit we were wrong. Far better for the advocate to set the forces of persuasion in motion by bringing out the key considerations and then let the judge's own intelligence finish the job. Just as the most important thing on a typed page is the white space, so often the best thing the oral advocate can do is shut up and watch the tumblers drop.

■ **Discombobulate Your Subject.** By the time they get to oral argument, most judges have read the briefs, looked at the record, considered the key authorities and formed views about the likely outcome. They want to give the lawyers a fair chance to persuade them, but it's very difficult to set aside the interlocking chain of facts, inferences and judgments that form their impression about the case. The lawyer's words bounce off the natural wall of resistance with which even the nimblest mind surrounds itself

after having thought about a problem. Before launching into the heart of the argument, therefore, the skilled advocate will probe the wall for weaknesses. The best way to do this is by turning to the record, since the lawyers are expected to know more about the record than the judges do. If you can find a place where the judge has misread the record—and point it out in a positive, nonchallenging way—you can usually see the look of disorientation in the judge's face. The wall is breached, and this is a cue for you to launch into your key argument.

■ **Listen.** The skilled advocate will look for a window into the judge's mind, but can only find it if the judge opens up a dialogue by asking questions. It is therefore surprising how often lawyers act resentful when they are interrupted with questions—as if the judge is stealing their time. A question from the bench should be grasped like an outstretched hand.

■ **Watch That Ego.** If you find yourself getting into an argument with the judge, step back and take a deep breath. You will never win a contest of wills with someone who has contempt powers; you will only damage your case. Use humor or a tactical retreat to lead the discussion to more fruitful territory. ■

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