Oral Arguments In Appellate Courts: Some Do's And Don'ts

In over 30 years of doing appellate work, I've learned some things do, and not to do, regarding oral arguments on appeal. Here are three of each, in no particular order:

DO's:

1. Recognize the real purpose of oral argument. Oral argument is for the judges, not for the advocates. It is a chance for the judges to pose questions in order to sharpen their understanding of the issues and the effect that a ruling for one side or the other will have on the case before them, and on future cases. Oral argument is not an opportunity for advocates to dazzle the panel (or their clients, if clients are present) with their oratory or theatrics.

2. Answer the question that is asked. Since the purpose of oral argument is for judges to get their questions answered, an advocate's goal should be to answer the questions asked in a manner that is most favorable to his or her side, while maintaining candor and credibility. Ducking or dodging a tough question does an advocate's client no favors. Worse, it is fruitless. Appellate judges will simply say "you didn't answer my question. Let me ask it again."

3. Welcome the questions. This is where "DO's #1 and 2" ultimately lead. Judges' questions are a window into the judges' thinking, and a chance to persuade those judges on the issues that bother them. That chance to persuade is why advocates want to present oral argument. A silent, unresponsive panel gives advocates no clues as to what the judges' concerns might be, and no chance to overcome whatever doubts or skepticism the judges may have. So take the questions head on and give your best answer.

DON'T's:

1. Don't read or regurgitate your brief. Appellate judges in New Jersey state courts and the Third Circuit have read the briefs. They do not want or need an advocate to tell them again what is in those briefs. Find a fresh way, or a different "spin," to present the argument, one that enhances the briefs without merely repeating what is in them.

2. Don't say "I'll get to that later." When a judge asks a question, respond to that question when it is asked. Oral arguments on appeal can't be scripted. An advocate needs to be able to deviate from a prepared outline in order to address a question when it is asked. One of the skills of appellate advocacy is then to be able to segue back to the points that the advocate wishes to make. But it is always wrong to tell a judge, in effect, that his or her question is out of order.

3. Don't overstay your welcome. In the Third Circuit, where there are strict time limits (enforced by green, yellow, and red lights at the podium), advocates are told expressly when their time is up. New Jersey's Appellate Division and Supreme Court have no colored lights. That requires advocates to recognize if the judges have heard enough. Often, the presiding jurist will signal that the panel is ready to stop listening by saying something like "We understand your argument" or "Is there anything
else you wish to say?" But even before that, watch for body language that says the judges have had enough. Once that point is reached, the advocate is wasting his or her breath. When that time comes, briefly make one final important point (if you don't have an important point left to make, don't even bother) and sit down.