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Why We Should Argue About How We Argue in Courts

Improved communication with the court during briefing can make the briefs, argument and results better. A halftime break may be productive in some cases. Better use of technology in the court room could include the use of mobile devices, and ways to communicate with others who may have a good answer. Change the process of questioning to allow at least some dialogue. And design courts and their computer access with all of this in mind.

By **Darryl M. Vernon** | April 05, 2019 at 03:40 PM

The Supreme Court Argument In the Affordable Health Care Case: A Good Decision But a Flawed Procedure? Imagine that a thoroughly prepared, highly seasoned U.S. Supreme Court appellate lawyer is unable to answer a question posed by a Supreme Court Justice during argument. Precisely this scenario unfolded in a Supreme Court case that would have significant impact on health care in the United States. At oral argument in the Supreme Court in the case challenging the Affordable Health Care Act, a case in which the lawyers on all sides were as prepared as anyone is likely to be, a question was asked by a Supreme Court Justice that the government lawyer did not expect. And he couldn't answer it. At least not right then and there. So the question went unanswered because there was no other opportunity to give the court an informed answer after argument had ended.

The lawyer was of course one of the best in the field of Supreme Court argument. Supreme Court argument, the way it is done now and the way most all oral being argued. You have to be good at anticipating what the court wants to know as well as good on your feet at argument.

But important decisions in our society, such as who gets lifesaving health care, who is protected from discrimination, and so forth, should not be decided like a sporting event with the quickest being the winner. Perhaps these important decisions should be done more like scientific research, or more along the lines of how academics study if housing policy laws are good for the public, or even like the heated exchanges in the British Parliament. Or are the pressures and time constraints of deciding countless cases just too overwhelming to allow for anything but shooting from the hip?

In short, while scientific methods, data sampling, and the like have advanced over the years, the method of arguing a case in court, particularly appeals where crucial issues are often decided, has changed very little. Nor has there been much discussion of alternative ways to argue cases.

The current state of argument in courts in the United States. Give me a Break: Providing Lawyers Time to Adjust During Argument. The tax appeals court in New York City is a specialized court that in many ways is like most other appellate courts. There are three judges. Both sides (the government and the taxpayer) submit written briefs in advance of argument. Both sides get oral argument of the case and arrive hoping each knows what the court will want to hear, what questions they will ask, and hoping to supply responsive and persuasive answers.

When I argued in this court I had similar expectations. Argument started as usual. Since I was appealing, I argued first. I was prepared and fortunately able to answer the questions. The government argued next, made good points, and gave reasonably informed answers. But often, even when argument goes well, both sides upon reflection think they could have given better answers. That is when the chief judge said something I never heard before.

Normally, when argument ends, the judge will typically say something ranging from "thank you for a well-argued case to simply "next case." Not this time. In this tax court the judge said (to the best of my recollection), "Counsellors, we asked you many questions, some of which you expected, some of which you may not have expected, and some of which you'd like some time to think about." This was unheard of—and why had I never heard this before? Was there no "next case" breathing down our necks? The chief judge was even more revolutionary when he added that they too, as judges, had listened to our answers and argument and wanted to think about and discuss our points to see what further questions they might have for us. We took a break of about 15 minutes. Not long, but longer than I ever had experienced.

When we went back in to the courtroom, we fine-tuned our points, discussed other points and ramifications, and quite simply took the argument and resulting decision to a more thoughtful level.

A 15-minute break is not a lot of time. If the government had decided whether to upgrade the safety systems on the railroads in that amount of time someone would be sued after the next crash. But even this amount of time was significantly helpful. Perhaps if the government attorney in the Affordable Health Care argument had just a 15-minute break he would have been able to answer the court's inquiry. Surely someone on his dream team of many lawyers would have simply told him the answer.

A collateral issue here is why courts almost always allow only one lawyer for each party to argue. Having another lawyer available for the one or two questions you may not know or understand seems simple, and with little downside. A court could limit this to allowing other lawyers to speak only when the lead lawyer defers to that lawyer. And as a more technological solution, the courts could consider allowing lawyers to have an earpiece so that a colleague who knows the answer could rapidly send it to the lawyer standing in court.

Didn't Know That Question Was Coming: Court Questions in Advance for Better Answers. When you argue in New York's highest court—the Court of Appeals—there are seven judges, one podium for the lawyer arguing, and a series of lights on the podium giving you warnings as to when your time is about to end. It works like a traffic light, except that you generally run red lights because a judge is still asking you questions.

At an argument I had at the Court of Appeals, my plan was to put my papers on the podium in a very organized way. My main notes—sort of a home page—would be front and center, the statutes on my left, the case law summaries on my right, and the key cases forming a top row. Before I could set up my great idea of podium design, I was asked a question by the chief judge for which I had to look up, of course, and answer. The next thing I knew my 30 minutes of argument was over and the podium looked like my college dorm room.

Fortunately, despite not having my court of appeals world organized like my desk, I was able to answer the questions and make my points. But should this really depend on some combination of on-your-feet skills and, quite frankly, some luck?

In a NYLJ article titled "Five Lessons from a 'Bizarre' Argument Over First Amendment" NYLJ (Jan. 19, 2016), examples of several difficult moments for litigants upon questioning the court are discussed. For instance, at argument in a First Amendment case discussed in the article, Justice Anthony Kennedy asked one of the lawyers "how would you define the right at issue in this case?" The lawyer, as the article points out, "made a halting try," but Kennedy was not satisfied and answered the question for him. The lawyer hastily agreed with Justice Kennedy's formulation of the question but that formulation got him into difficulties later. Of course, had the lawyer known that this question was coming, or that it was an important topic for argument, it is likely that the lawyer would have provided a better answer. In the same case, Justice Elena Kagan expressed her disagreement with one of the First Amendment arguments and told the lawyer that his argument was "one strange doctrine." All the lawyer could do to respond was say that "it may be that I have not persuaded you in this case." Although the article says "waving the white flag" might be the right thing to do, a better response for the argument may have been given had this lawyer known Justice Kagan's particular objections. More points like this are raised in the article and virtually all of them could be ameliorated to some extent by the changes to the method of argument.

While many lawyers do very well at argument, it takes a lot of preparation to make sure you think of every question that might come up. Someone pays for that time. If you knew ahead of time the key, or at least the likely questions that the court wants to discuss, the time preparing would be diminished. There will always be follow-up questions and issues that arise at argument, but far fewer using this method. Our current method of argument has inefficiencies for which clients pay.

Technology and Court Design: Why Must I Shut Down My Mobile Devices? One time when I argued in a Manhattan appeals court, long after the inventions of laptops, tablets, and smart phones, a lawyer waiting to argue sitting next to me had his iPad out. The court officer came over and told him that, like phones, iPads had to be put away (this has now changed at least in the First Department). The lawyer said his notes for argument were on it. The court officer looked at him like it was the first time he had ever heard that. iPads had been around for about five years. Yet the court not only didn't offer Wi-Fi, it didn't even have a procedure in place to allow arguing attorneys access to the benefits of notes on a device, let alone the ability to look up case law or, for example, depositions in a case. The point is that the method of argument has not evolved. It's true that some things are tried and true, but procedures should reflect technological progress.

There are also many courts where you go up to the bench where the judge sits, and argue without having any place to put your notes, case law, or even your bag. So there is also a physical aspect to argument, worthy of some thought as to the optimal court layout for argument. Newer court rooms often have bigger spaces to spread out your materials. Separation from noise and distractions in the area where argument occurs is helpful. Wi-Fi so lawyers and the judges can connect to quickly look up, for example, case law adds to efficiency. Some of these improvements have already been implemented.

The courts' dockets are often congested. Time is short for argument. Time is even short for deciding cases. Indeed, these facts have stood as an argument against allowing too much back and forth at argument, and certainly against allowing a break between argument or having more than one lawyer argue a side. But done right, certain changes can make the courts more efficient. If after a break the court gets better answers, and even answers to questions the court may have neglected to ask, that can cut down on the time it takes to ultimately decide the case by reducing the time the court needs to do further research. A lawyer who is quickly given an answer to a court question by a colleague will only speed up the time of argument. A lawyer who has her argument notes kept on a computer may access them faster at argument. In short, if used well, procedural changes and increased use of technology can help a court get through their often excessive workloads.

Dialogue Between the Court and Litigants: Encouraging It Versus Diminishing It. It may seem like heresy to even suggest that judges should also be subject to questioning. But why aren't judges asked questions? Often judges will say "we ask the questions." As Chief Justice John Roberts said when a lawyer asked no more than a rhetorical question "usually we have the questions the other way." But consider a recent Supreme Court argument in *King v. Burwell*. This was a complicated argument in a second Supreme Court case about the Affordable Health Care Act. Several times during argument Justice Samuel Alito argued (more than questioned) that the various references to state exchanges in the Health Care Act demonstrated that a federal exchange can't have the same benefits as a state exchange, effectively defeating portions of the Act. The Solicitor General rebutted the argument persuasively, arguing why Justice Alito's point was fairly baseless. It would have been beneficial to all if the Solicitor General could have followed up to ask Justice Alito what his response would be to the Solicitor General's rebuttal. Did Justice Alito have an argument in response? Was Justice Alito's point driven by a bias? All of this is reasonable inquiry for both the court and lawyers. It could be that some of the other judges, or the public, will change their mind if they see that a judge's point is either baseless and biased, or compelling and objective. An analogy is cross examination. It may seem inappropriate that a judge would be cross examined, but why not? It is a proven method to bring out the truth in many circumstances.

The goal of questioning is not, and should not be, to show up either the lawyers or the court. The point is to establish a dialogue between counsel and the court that will hopefully lead to a better understanding of the court's and counsel's positions. That would lead to better questioning, and ultimately better decisions.

Another example from the same Supreme Court case was when Justice Scalia quoted from the Affordable Health Care Act the words "set up by the State" to make his point that federal exchanges don't get the same benefits. But no one could ask Justice Scalia why he wasn't following his own "harmonious interpretation doctrine," that would have compelled him to consider the Health Care Act as a whole, including certain key words ("under 1311") that followed his quoted provision. Those words, the Solicitor General had argued, showed why a federal exchange should be treated just like a state one. Justice Scalia may very well have had an argument in response. But even if he did and remained unconvinced, you'd want to hear it. And if he didn't have a good response, you would surely want to know that too.

Now that it is much easier to communicate because of email, blogs, Facebook, and so forth, it is also easier to communicate with the court. We already have easier filing of court papers by which motions, briefs and all court submissions can be filed on the court's website. Upon filing, the papers are automatically given to counsel for all parties. Thus, when briefs are filed, it wouldn't be hard for the court to post on the court's website, or email counsel, questions that the court may have after reading the briefs, or reading a motion. Those questions could then be addressed either in reply papers submitted to the court, or at argument. This method would have avoided the problem of the Solicitor General not being ready for a question at oral argument.

Conclusion

Improved communication with the court during briefing can make the briefs, argument and results better. A halftime break may be productive in some cases. Better use of technology in the court room could include the use of mobile devices, and ways to communicate with others who may have a good answer. Change the process of questioning to allow at least some dialogue. And design courts and their computer access with all of this in mind.

Last, consider these ideas as a jumping-off point for improving the process of argument from methods that have far too long been accepted as the only way. The goal, of course, is to give our court system the best tools and processes to decide issues that will guide our society, help those that are unfairly treated, and improve commerce and regulation. The time to consider some change is overdue.

Darryl M. Vernon *is a founding partner of Vernon & Ginsburg.*