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Responding Effectively to Judges in Court

What should you do when you are on your feet in court and encounter some of the more challenging characteristics of our learned judges? I tread cautiously into this delicate subject to provide some food for thought and some practical suggestions.

THE PREREQUISITE: BE PREPARED

Thorough preparation is your safety net in court. I have seen junior counsel who, nervous and ill at ease and tripping over words read from notes, still succeed in getting the attention of the court as it becomes obvious that they are well-prepared. Similarly, I suspect that judges can pick out an unprepared counsel moments into that counsel's oral submissions, at which point the judicial interest in those submissions immediately starts to plummet.

Being well-prepared will allow you to respond effectively to the challenging judicial phenomena discussed below.

JUDICIAL QUESTIONING (SOMETIMES CALLED INTERRUPTIONS)

The complaint is sometimes made (privately, in the gowning room) that the presiding judge did not even "let" counsel make their submissions. So frequent were the questions from the bench that counsel could not get through their prepared notes. The judge peppered counsel with questions, including questions that seemed to have nothing to do with the key issues in the case. Et cetera.

While I empathize with counsel in this scenario, I maintain that judicial questioning is good. Bring it on. The more the better. Here's why.

- You can learn what is troubling the judge from those "interruptions." That information is gold and is not available in any other way. Those judicial questions provide an opportunity for counsel to directly address what is on the judge's mind. When a judge wants to hear from you on a point, take it on.
- If you do not address what is on the judge's mind reasonably promptly, the judge will remain preoccupied with his or her question. Your brilliant, carefully prepared submissions will go unnoticed while the judge privately ponders the unanswered question.

Answer the question as soon as possible. If you had planned to address the point in your submissions, tell the court that this is your plan. But if you are not going to get to it right away, give the court a preview of your answer immediately. You can then continue with your submissions with more confidence that the judge is focused on your submissions rather than wondering how you will answer that question. If the question is raised again, answer it immediately.

Above all listen – really listen – to the judge. Stop to think about what the judge is saying and then respond, rather than sticking to your notes.

COMING OUT OF LEFT FIELD

Sometimes, judicial questions can seem to come out of left field, raising issues that you have simply not considered despite thorough preparation. The judge might raise a case you have never heard of or raise a seemingly tangential issue: *What do you say, counsel, about Justice X's recent decision on [whatever topic]? What impact does that case have here?* The answer may be *none*, but the first step is to ask the court for an opportunity to consider the case before replying: *Your Honour, could I review that case at the upcoming break and then reply?*

THE "HOT BENCH"

At the Ontario Court of Appeal, we have the quintessential hot bench. The judges are prepared and ready to move straight to the core of the case. It is as if the bench has already warmed up and is off on a sprint as soon as court is called. Years ago, I was told this is called a "hot bench" because the court knows the material and likely already has a preliminary view about the disposition of the case.

While it is the dream of some counsel that they might have, in oral argument, a fresh unencumbered chance to persuade the court, it is rarely, if ever, true. Even if the judge has had no opportunity to review all the written material, his or her own experience and expertise provides a frame of reference for any case.

If you are not sure if you have a "hot" bench, you may need to gauge how familiar the judge is with your case. In a busy motions court, with lists constantly changing, it is unrealistic to expect that the motions judge has had an opportunity to read everything. Counsel can ask some polite questions of the judge to gauge the level of preparedness (e.g., *Would you like me to take you through the evidence/law in detail or provide a high-level summary?*). In my experience, judges who have read the material readily volunteer this fact, and, for the rest, you will get something like this: *Counsel should take me to those portions of the record and cases that they think important to their argument (i.e., I haven't had an opportunity to read anything but your notice of motion and really wish you had filed a factum).* Adapt your oral submissions to the signals you get from the judge, and take the court to the key pieces of evidence and key authorities unless you are certain that the judge is already familiar with them.

THE SILENT JUDGE

In my view, the silent judge is more challenging for the advocate.

With the silent judge, you will have the opportunity to make your submissions with no signals other than, perhaps, the judicial pen and highlighter. I would imagine that many people would wonder why counsel get excited about these matters: *Did you see that the judge was highlighting that case, or taking notes during that part of the argument, or not taking notes during opposing counsel's argument!* As counsel, we are desperate for any sign that our submissions are being taken in.

As always, the best first step in dealing with the silent judge is to have a well-prepared and focused oral argument. It is also reasonable to ask the judge whether or not he or she wants you to address any points

in more detail or has any questions. But take care not to get ahead of the silent judge. If you move to another case, wait until the judge turns to that tab too. That pause will also catch the judge's attention, if need be.

FACING HEAVY WEATHER

When you find yourself facing a storm from the bench, it is helpful to remember that aggressive or persistent questioning does not necessarily mean the judge is against you. Sometimes the judge is inclined to find in your client's favour and needs you to answer the issues that must be dealt with for your client to win. There are days, however, when it seems perfectly clear that the judge is on a firm course against your position. Either way, the key is to continue to answer the court's concerns as persuasively as you can and to remain resolute.

It is important not to be deterred. I have seen junior counsel who, faced with a persistently unconvinced judge, concede a point after apparently concluding that nothing more can be said in support of the position. Do not concede the point just because it appears you are about to lose it. Instead, once you have done your best to persuade the judge, simply say that you have nothing further to offer on that point. Then the issue will at least survive to be considered for a possible appeal.

THE LAST WORD

Always remember that judges have the last word. T

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