

SIXTEEN

**FIELDING DIFFICULT
QUESTIONS FROM THE BENCH**

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**A sudden bold and unexpected question doth many times surprise a
man and lay him open.**

Sir Francis Bacon (1561-1626)

Appellate judges enjoy asking questions. It is our lifeblood. It is how we seek to understand a case, eliminate ambiguity, and test a proposed rule of law. We do not purposely think up difficult questions to put appellate advocates on the spot. Nevertheless, many of our questions are difficult to answer because we are testing or probing in an effort to solve complex legal problems.

Most good appellate advocates welcome difficult questions because they know that these questions allow them to engage in a meaningful dialogue with the court. They know that it is only through such a dialogue that they and the court can jointly explore the nuances of complex legal issues. But not all appellate advocates appreciate difficult questions; many view them as an inevitable burden. Why is there this difference? Generally speaking, it can be characterized as a difference in attitude, anticipation, expectation and preparation. By using the foregoing attributes properly, an advocate is able to significantly change the dynamics of oral argument so that even the most difficult questions are welcome or at least palatable. Fortunately, some principles and practices

enable an advocate to successfully field the difficult questions. What follows are a few of these principles.

JOINING THE COURT'S DIALOGUE

The Gift

Every question from an appellate judge should be regarded as a gift, even the most difficult question. Perhaps you may find this concept hard to accept, and, admittedly, it may be a concept more readily endorsed by appellate judges and law professors than it is by appellate attorneys. Nevertheless, if you view these questions as gifts, you can create a positive attitude and become a more effective advocate because you will use the information gleaned from the questions to make a persuasive argument.

The following exchange between two attorneys following successive oral arguments before the same court illustrates this point. As the two attorneys leave the courthouse, the first attorney, exhausted and drained by the experience, complains about the number and complexity of the questions asked by the court. He says how much he dislikes questions and wonders why the court would not just let him present his case as he had planned. The second attorney, who also faced numerous, complex questions, responds by saying that she was energized and pleased by her exchange with the court. She states how much she appreciated the court's questions because they provided her with important insights into what the court was thinking, and, as a result, she was better able to address the court's concerns. She says that she finds it more difficult to deal with a "cold bench" than a "hot bench" because the former is so stingy with its insights. The second attorney has the proper attitude toward questions. If you adopt a similar attitude, it will provide you with

an excellent foundation for developing a high level of confidence when responding to even the most difficult question.

Another step in developing a positive attitude that will make the most difficult questions palatable is to understand the objective of oral argument. Simply stated, it is an educational process by which the court seeks additional information to enhance its knowledge about the facts and law of your case. An effective oral argument not only increases the court's understanding, it also provides an opportunity to clear up any possible misunderstanding the court may harbor. The court will seek to obtain this information from you. When you do your job well, you will feel welcome in the courtroom because you are a key participant in the process the court uses to reach the correct outcome.

When you appreciate the court's objective for oral argument, you know that your argument should not be a mere recitation of what was in your brief. The court already has that information. The court is looking for something more and will seek to find it by entering into a dialogue with you. Questions are the fuel that powers this dialogue. How effective you are in establishing this dialogue depends upon how well you answer questions, especially the difficult ones.

Moreover, how you answer questions is essential to establishing your credibility. Never underestimate the importance of establishing and maintaining your credibility. The court wants to engage in an honest, forthright dialogue with you. Once you lose your credibility with the court, expect the dialogue to end because the court will have concluded that you have nothing of merit to bring to the conversation. The credibility of your

dialogue with the court will depend upon how well prepared you are and your knowledge of what the court expects of you.

Listen and Respond To The Question Asked

When the court poses a question, you should realize that, for the most part, the court is asking the question because a particular judge or the whole court wants to become more informed about a particular aspect of your case. As previously noted, questions are gifts, so treat them accordingly. Listen carefully to understand what is being asked. Do not interrupt the judge by anticipating what the rest of the question may be. Be patient enough to get the complete question. Then, answer the question and do so directly.

Too often an attorney will say, “I will answer that question shortly.” There are many dangers inherent in this response - the most obvious being that you will frustrate the court by not answering its question. By putting off the answer, you pass up the chance to shape the argument when the opportunity is presented or, even worse, you may never get back to the question. Under both scenarios, you have wasted an opportunity to respond to an issue that is on the court’s mind. The preferred response is to answer the question even if it means a change in your planned case outline. Always remember that this is a conversation that you have been asked to join, not an opportunity to make a speech. Respond to the question that is asked, but attempt to weave an advocacy argument into your answer.

The Courteous Conversationalist

Because the question is your invitation into the court’s discussion, you never want to send a negative, demeaning or hostile message to the court. Your nonverbal communication can be as important as what you say. Be aware that the court will pick up

on nonverbal communication such as eye, hand and body movements that can either enhance or interfere with establishing an effective dialogue. If you put both hands firmly on the podium and assume the stance of a middle linebacker, it is a sure sign that you are defensive and that you do not welcome questions, and, if you do get a question, you will throw it right back at the court. Instead, you should assume a more relaxed stance that sends the message that you want to engage in a constructive dialogue.

Some nonverbal communication can be as explicit and disparaging as verbal communication. On one occasion, an experienced criminal appellate attorney appeared before a panel that was composed of a number of recently-appointed appellate judges. Two of the judges asked questions that were basic and general in nature, but nevertheless were relevant to the case. The words the attorney used to answer the questions were appropriate, but through his impatient tone and body language, the attorney sent a very disparaging message to the court. It was as if he had made a sign of exasperation and said “What do I have to do, teach you a course in Criminal Law 101?” The panel noted and commented on the attorney’s conduct and found it offensive. You should be aware that nonverbal communication can take you to and beyond the bounds of proper conduct. Consider, as the attorney here did not, that sometimes the most basic questions are the most difficult to answer, but their basic nature does not render them irrelevant or unreasonable. Finally, as an advocate, remember there are no stupid questions by the court.

PREPARATION AND ANTICIPATION

How The Court Prepares

As in most endeavors, preparation is the key to success. The properly prepared attorney is able to take potentially difficult questions and turn them into responses that work to his client's advantage. Part of your preparation should be to understand how the court prepares for oral argument. This information will provide insight into what the court expects from you and the questions that will be asked. Chapters 14 and 15 provide detailed insights into how some appellate court justices/judges conference and communicate with each other.

Some courts only engage in a limited review of a case before oral argument and use oral argument to form a general outline of the case. Only after oral argument will these courts delve deeply into the record and case law. While this approach is limited to a minority of courts, if you know that this is how these courts prepare, it will enable you to anticipate the type of questions that they are likely to ask. Most questions may be broad in scope and oriented toward establishing a background on what the case is about. Be prepared to answer these questions in a way that will focus the court's attention on the issue that is at the heart of your case. On the other hand, always be ready for the follow-up question that has a laser sharp focus on an essential aspect of the key issue. Here, lack of anticipation or being lulled into a sense of complacency can turn a helpful question into a difficult question.

Most courts, especially those where review is discretionary, will have engaged in an extensive review of your case before argument. The court will have reviewed the lower court's decision, read the briefs, examined the relevant parts of the record, and will have had the benefit of a bench memo prepared by either a law clerk or staff attorney. If done properly, the bench memo will not merely repeat what is in the briefs; rather, it will be a

value-added document. The value the bench memo adds is an independent arms-length analysis of your case. It will include a comparison of the facts in the record with the facts as briefed by you and opposing counsel. It will also include a detailed review of the case law cited and an independent analysis of whether this case law supports the position you want the court to adopt. A good bench memo will point out to the court omissions and improper or inconsistent factual representations. It will also disclose improper or ill-founded citations to case law. At oral argument, you will most likely face well-informed judges prepared with questions geared to reveal any flaws in your case theory.

The foregoing judicial preparation will lead to a number of difficult questions if you are not as well or better prepared than the court. Your preparation should include submitting a brief that is correct about both the facts and the law. Candor with respect to the record is crucial. Avoid the temptation to believe that when there is a voluminous record, you can omit some essential fact or slip some facts by the court. Never improperly “massage” or “play” with the facts. An appellate court has little patience with such endeavors and they can quickly undermine your credibility as an advocate.

No question is more difficult or embarrassing to field than a question from the court that points out an error in your factual statement or in your legal citations. You can avoid these difficult questions by doing your homework. If, however, you do make a mistake that leads to such a question, do not compound that mistake by attempting to dodge the question or further mislead the court. Do not squander your credibility; own up to your error, cut your losses, and move on.

At this point, it is important to add a note of caution. As important as it is to own up to a mistake, it is just as important not to concede too much. Conceding too much can

turn a difficult question into a disaster. Insufficient preparation or an inability to master the issue at the heart of your case can lead you to concede more than is necessary. Be mindful that there are often nuances to facts that should and must be pointed out to the court, misunderstandings that need to be clarified, and subtle aspects of the prior case law that distinguish it from your case. An imprudent concession in response to a question can turn out to be the death knell for your position when the court conferences your case.

How The Court Views Your Case – The Three Categories

How does the court view your case? To achieve a reasonable degree of comfort when confronted with difficult questions, you should understand how the court views your case. Broadly speaking, there are three categories of cases that come before appellate courts, and the category of case often drives the types of questions that the court will ask.

Cases in the first category often cause judges to wonder why the case is before them on appeal. In such cases, the facts have been sorted out and are unalterable given the record and the standard of review. In addition, the applicable law is generally well-established. In essence, an appellate court can or should do nothing but affirm. At oral argument, the court may have only a few questions or perhaps none at all. If you are the appellant, you will likely be asked, either explicitly or implicitly, “Why are you here taking up our valuable time?” You should have a good answer for this question or you should not have appealed the case in the first place. As Elihu Root said: “About half the practice of a decent lawyer consists of telling would-be clients that they are damned fools and should stop.”¹

¹ *The Quotable Lawyer*, p. 189, edited by David Shroyer and Elizabeth Frost. New England Publishing Associates, Inc. (1986).

The second category of cases is more challenging. The facts are established by the record below and the applicable law is also well-established; but, for some reason, the attorneys or the lower court have not sorted out the facts or the law. Here, the appellate court must dig into the facts and the law, sort them out, and then juxtapose them. Essentially, the court involves itself in a sophisticated version of the game where you put the square peg in the square hole and the round peg in the round hole. Once this sorting is completed, the result comes into focus and the outcome is obvious.

The court's opinion in this second category of cases will necessarily devote significant time to sorting out the facts and articulating the law so that everyone can see how the connected dots make the outcome readily apparent. Oral argument will be part of the process. Therefore, you are likely to get probing questions that attempt to sort out both the facts and the law. You will be able to answer such questions if you have done some sorting out of your own between the time the lower court rendered its decision and oral argument. If not, you face the prospect that the court will confront you with questions about a case or line of cases that you have overlooked and, with some chagrin, you will be left wondering "Why didn't I think of that?"

The third category of cases also may need some sorting out of both the facts and the law, but even when this sorting is done, the answer still is not clear. There may be a statute with ambiguous language or the parties may even dispute whether the language is ambiguous in the first place. When the statute is ambiguous, the ultimate outcome may turn on a question of policy and intent. If so, legislative history may be an important part of any analysis. These cases are the most arduous cases for appellate courts to decide and they are usually the most closely contested.

Oral argument in the third category of cases can be intense when the court seeks to sharpen its focus. Questions can be probing, wide-ranging, and sometimes peppered with hypothetical questions, some of which will be well-constructed, while others may be lengthy and lacking in focus. You may get philosophical questions on policy which ask you to state what is good and bad public policy. Think about the policy that both supports and undermines your position so you can answer the court's questions in a manner that makes the strongest statement in support of your position.

You should be prepared to respond quickly, clearly, and candidly to questions about the general rule of law you advocate and the implications of applying that rule not only to your case, but also to other cases in the future. Ordinarily, an attorney should have no difficulty answering a rule of law question, but if you fail to anticipate such a question, your answer will most likely be inadequate. You should never let yourself be put into a position where "Counsel, what is your proposed rule of law?" becomes a difficult question to answer.

In all three case categories, there is no sure way of eliminating all potentially difficult questions. But if you take the time to sort out what general category your case fits into, you will have taken a major step toward anticipating difficult questions and turning them to your advantage.

ANSWERING PARTICULAR TYPES OF QUESTIONS

The Premature Question

Some may say that there is no such thing as a premature question from an appellate court. Support for this proposition comes from courts that have a reputation for asking the first question even before you get to the podium and introduce yourself. Nonetheless, a

good appellate advocate is always prepared for what can be characterized as the premature question. This question usually is directed at a key issue in your case and is asked by an anxious judge before you get a chance to establish the essential factual or legal foundation of your case. It is the timing of this question that makes it so difficult.

You must answer the premature question. It will do you no good to dodge it. When you respond, do so in a manner that weaves crucial contextual background into your answer. Anticipation and preparation can be of help here because a well-designed strategy can get you through this difficult stage in your argument.

Be prepared to have your answer to the premature question interrupted by a second judge. Anticipate that just as you are about to reach an important aspect of your legal argument, you may be interrupted by a second question from another judge who is seeking more context and thus directs her question at a specific factual aspect of the case. This second question may soon be followed by a third question from another judge who wants you to elaborate on yet another factual aspect of your case.

At this stage, you may feel like a juggler with too many balls in the air. Keep your sense of balance and attempt to answer each question, even if it means reordering them. After you have dealt with the factual questions, do not be afraid to indicate to the court that you now wish to complete your answer to the initial question, but this time you can do so with more contextual background.

Often, a premature question from the court will cause your dialogue with the court to become disjointed and incomplete. Be prepared to return to the key issue later in your argument when you can give a more complete answer with the proper context. This approach requires preparation, focus and discipline. Remember, many arguments fail

because the attorney does not give the best argument on a key issue. Sometimes a member of the court is willing to help you out by bringing you back to your key point. Be prepared to recognize this help when it arrives.

The Softball Question

Some questions will arrive neatly gift wrapped and with friendly overtones. Therefore, it is a mistake to assume that all questions are adversarial or even hostile. Appellate judges ask you questions to inform themselves and their colleagues, or sometimes to convey a specific message to their colleagues. In some aspects, oral argument is really the first stage of the court's conference. Sometimes a judge knows the answer to her question, but wants you to provide the answer for the rest of the court. The judge knows that the proper answer will take a potentially contentious issue off the table at the court's conference or cut the foundation out from under a position that one of the other judges is inclined to adopt. Most likely the questioning judge favors your side of the issue, but realizes that you did not get an opportunity to fully answer an earlier question that is essential to your argument. The judge is providing you with a second chance to get it right - take it.

You must anticipate friendly questions and recognize them when they come. When preparing yourself to respond to these questions, you should see yourself as a batter in the batter's box with your intellect, skills, and knowledge of the facts and law as your bat. The judge asking the question is the pitcher. But instead of throwing a sharp breaking curve low and away, the judge sends a pitch over the center of the plate with enough speed to contain substance, but slow enough so that with a proper swing, you can hit it out of the ballpark. If you are unprepared or too defensive, you may leave your bat on your

shoulder, thus letting a marvelous opportunity go by. The well-prepared advocate will recognize the pitch, swing and hit it out of the ballpark. Seek to touch all the bases with your own response and persuade the court on the point the questioning judge wants to make. Sometimes you may swing, but only get some wood on the ball. Then, you get the equivalent of a base hit. You partially make your point, but not as well as you could or should have. Nevertheless, you did recognize the softball question and got a piece of it. The essence of this analogy is to always look for this type of question and be prepared to swing for the fences. Never leave the bat on your shoulder.

The Stupid Question

There are no stupid questions from an appellate court. If you accept this proposition at face value, it will help you to abide by a cardinal rule of appellate advocacy: never disparage the court. Remember, the court holds the power over the outcome of your case. Your response when faced with what you believe to be an uninformed or stupid question can probably best be described by a comment of Judge John Rawls who said “[Y]ou can think it, but you better not say it.” *Vandenberghe v. Poole*, 163 So.2d 51 (1964). You are well advised to never respond to any question as though it is meritless.

However, you may confront inarticulate questions that by their nature are difficult or nearly impossible to answer. When confronted with such a question, take a deep breath, pause a moment, and do your best. Never show your frustration or take out your frustrations on a court you are trying to persuade.

If you cannot answer the question, seek clarification or admit your dilemma to the court. Alternatively, carefully rephrase the question in a manner that you believe is consistent with its intent, and then answer that question. When you take this approach,

always do so in a respectful manner so as not to offend the court. Always attempt to keep the dialogue going and never burn your bridges with the court. Remember there is always the chance the court's question was neither stupid nor inarticulate, but rather it just went over your head because the court is exploring an aspect of the case you had not considered. Be willing to accept responsibility for any failure to receive the court's message clearly. Most courts are willing to accept an inquiry about whether you are correctly understanding its questions. Failure to follow these principles can turn a question into a hostile relationship with the court.

The Nasty Hypothetical Question

Hypothetical questions always rank near or at the top of the list when appellate attorneys talk about difficult questions. From an appellate advocate's point of view, they are fraught with potential problems. They can lead to unwarranted concessions and an ill-conceived response can destroy the credibility of your argument. Often, hypotheticals are not a model of clarity; frequently they are long and can be convoluted. But they are an essential tool for appellate courts.

Understandably, you want to win the case for your client, and you have developed a theory that you hope will achieve this goal. Part of your theory is a rule of law that you want the court to adopt. But appreciate the fact that the court is less concerned about whether you win or lose than it is about adopting a solid rule of law that has broad integrity and makes good policy. The court will test the integrity of your proposed rule of law by using a hypothetical. Therefore, anticipate and plan for tough hypothetical questions.

When you get a hypothetical question, answer it. If you do not, you most likely will offend the court and implicitly concede that it is not answerable in a manner favorable to your cause. As stated earlier, do not concede too much and be prepared to distinguish your case when presented with an unfavorable hypothetical. The court is testing a possible holding and is exploring the outer edges of your proposal. If you push your argument too far, a hypothetical can box you in so that you wind up with no place to go. Once again, proper preparation and an understanding of the court's objective will reduce the difficulty of responding to the court's hypothetical questions.

Opposing Counsel's Questions

As the respondent (appellee) and as an appellant anticipating rebuttal, you must listen carefully when the court questions opposing counsel. These questions frequently provide clues that will reduce the difficulty of the subsequent questions you will face. A court frequently will ask the same question of both sides. When the court asks the same question the second time, it anticipates that you will not only answer its question but also address the points raised by opposing counsel. To be forewarned is to be forearmed, so take advantage of this early warning device.

Sometimes the court will ask a question of one side when its real intent is to get an answer from the other side. In these circumstances, the court anticipates what the first party's response will be, but knows that the other party's answer may well determine the case's outcome. In essence, the court is giving a heads-up to be prepared to answer a key question. The court is seeking a well-thought-out answer and is willing to signal its intent. Listen for, hear, and act on these signals when they are given. They offer the opportunity to answer the toughest question to your advantage.

A FINAL WORD ABOUT PREPARATION

At oral argument, you can reduce the number of difficult questions and even eliminate them if you anticipate and prepare properly. As you prepare, visualize the court walking down a hallway lined with many doors and behind one of the doors is the route to the correct outcome. To be properly prepared for oral argument, you need to walk down this same hallway. You need to explore what is behind each door.

Often what is behind one door appears promising, but further exploration reveals that there is yet another promising door to be opened. Only after opening a number of doors does it become apparent that the route taken does not lead to a good outcome and may even lead to a bad rule of law. As a result, you must backtrack to the original hallway and continue to explore each set of doors until you ultimately come to a route that leads you to the right result. The court will explore the same hallway in search of its conclusions and holding. If you hope to assist the court as it explores its alternatives, you must explore that hallway before the court does. Your exploration will put you in a position to discover the answers to the questions the court is likely to ask. Thus you can with comfort, confidence, and ease answer the court's most difficult questions about what route it should take.