Appellate Practice
American Bar Association Litigation Section

Friendly Reminders for Appellate Advocacy

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At my most recent appellate argument, I had a moment that every oral advocate dreams of: A judge asked me a "friendly question." It started skeptical, but I listened and did not interrupt. Slowly, word by word, sentence by sentence, the judge started talking himself into my position. When he finally paused, I started my answer: "You're absolutely right." After a few sentences, the judge interjected again—explaining how the other side's position "cannot be right." Another pause. "Yes, your honor. It would create a massive loophole."

With that experience fresh in mind, I offer three (friendly) reminders for any advocate about to take the podium.

1. Remember to listen to the judges' questions and let them complete their thought. If I had interrupted the judge partway through his talking-out-loud thought process, he might not have arrived at exactly the thought I wanted him to arrive at, when he did.
2. Be on the lookout for friendly questions, where a judge is giving you an opportunity to reinforce or clarify your arguments. Don't miss the moment.
3. When the friendly question is teed up for you, and you recognize it, knock it out of the park. Don't just agree with the judge's framing. *Pile on*. Restate or elaborate on the point from your client's perspective. Or use the moment to transition to another critical point you want to emphasize.

If you listen, you will notice. And if you notice, you can seize the moment. Your colleagues will be impressed (or at least relieved), and your clients will thank you.

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