The art of the argument

Oral presentations give lawyers appearing before Florida's highest court a critical chance to press key points, clarify issues and resolve lingering doubts. Sometimes they even turn things around.

BY MARY HLADKY
Review Staff

VETERAN appellate attorney Joel S. Perwin knew he had a tough sell as he stood before the Florida Supreme Court.

The issue was whether a state law that imposes liability on bars and restaurants for serving habitual drunks also applies to stores that sell liquor. The law uses the term "serves;" it doesn't specify sales.

So Perwin, representing a young man injured by a drunk driver, was asking the court to reverse lower court rulings and make the world tougher for commerce, based on a law that could easily be interpreted more leniently.

Several of the justices peppered him with questions, especially Leander Shaw who, typically, cut to the practicalities of the rule Perwin suggested. How could a cashier — unlike a bartender — know his customer was a drunk, and how could his employer be expected to know, Shaw asked. "Can I expect Albertsons is going to know something about me because I come in and buy a six-pack?"

What was worrying Shaw, Perwin decided, was that if liability weren't confined to bars, "How often will package stores be hauled into court? Is Perwin advocating something that will flood the courts?"

No, he replied, the statute still requires proof the store had reason to know the customer was a hard-core drunk.

"My response was to convince him [Shaw] no, I wouldn't win if ... all he did was buy a six-pack. I would have to prove much more than that. It will not draw every package store into court," Perwin says.

Good point, perhaps, and one that Perwin believes satisfied Shaw. But Perwin lost decisively, 7-0, in May. The court based its decision on a close reading of the statute involved, rather than the broader policy issue that informed Shaw's question.

Chances are the case was lost even before Perwin stepped up to the lectern. The justices had read the briefs that summarize the arguments and relevant law that are, all agree, their touchstone.

But Perwin and 22 others who frequently appear before the court emphasize the importance of oral argument, the 40-minute dialogue — or, sometimes, sparring match — between court and counsel permitted in 96 cases last year, or just under 50 percent of the 206 cases the court accepted for review. That doesn't include death penalty and other types of cases which the court must hear and automatically allows oral argument.

Orals, when quick wordplay is the only skill that matters, provide a last shot at pressing key points, engaging issues that justices find problematic, and resolving lingering concerns. And always, there is the tantalizing possibility that what is said will prove decisive.

"Ten percent of the time, you can really make a difference. You never know which case falls within that 10 percent," Perwin says. "If they want to talk, to be persuaded, then the better advocate has the edge. ... Sometimes you can actually change the justices' minds."

Minds can be changed

That's true, says Chief Justice Stephen H. Grimes. "I have literally had cases where, going into oral argument, I had made up my mind, and I ask the opposing lawyer how do you get around whatever, and the answer was so good it changed my original view of the case."

Orals also give justices a chance to lobby each other. "It was not infrequent for us to ask a question of a lawyer really to argue with another justice," says ex-justice Parker Lee McDonald. "You argue with each other through the questions to get the lawyers to buttress the view you are leaning toward at the time."

With so much potentially at stake, the game of trying to divine where the justices are coming from, give them what they want, and predict whose votes were clinched and whose lost preoccupies advocates until the opinion is published.


ANA MONTES-GREEN

Lawyer Joel S. Perwin, a veteran at presenting oral arguments before the Florida Supreme Court, says that '10 percent of the time, you can really make a difference [with a presentation]. You never know which case falls within that 10 percent.'

To illustrate just how far a practitioner will go, Perwin says eminent Harvard constitutional law professor Laurence Tribe once said he spent eight hours a day for three weeks preparing to argue before the U.S. Supreme Court.

"He said, 'I start from scratch,'" reading the arguments, refining the issues, studying how justices have ruled on related cases. "The whole argument changes. It evolves. So by the time I get up there, I am not regurgitating the argument in the brief ... I am coming in with an evolution of the argument beyond anything advanced in the briefs."

Less experienced lawyers tend to stick to familiar ground by hitting all the high points in their briefs, so

ALEX MONTERO-GREEN

Miami lawyer Parker Thomson says, 'The worst argument is one where you do all the talking and they [supreme court justices] do all the listening. You might as well have just left them with the briefs.'

they are vulnerable to being thrown off balance by questions. But veterans eagerly anticipate interruptions as opportunities to overcome doubts.

"I want to find out what questions are concerning them so you can address them," says Miami lawyer Parker Thomson. He represents the state in two high-stakes fights, one against the U.S. government to recoup money spent on illegal immigrants, the other against tobacco companies for money spent on indigents with smoking-related diseases.

"The worst argument is one where you do all the talking and they do all the listening," Thomson says. "You might as well have just left them with the briefs."

Grimes concurs: "If all a lawyer does is just sort of repeat his brief, it isn't very useful."

Appellate lawyers also must regain control of the argument when, fielding questions, they stray from core points. And if a justice who is hostile to a lawyer's case dominates the questioning, the lawyer needs to extricate himself.

Fort Lauderdale lawyer Bruce Rogow, who frequently argues high-profile cases before the Florida and U.S. supreme courts, recalls a time the conservative McDonald battered him with questions as he defended a client facing the death penalty.

Rogow said, "I'm sorry I'm not able to convince you, Justice McDonald, but I'd like the opportunity to try to convince the other members of the court." The justice withdrew from the debate, but Rogow still lost the post-conviction appeal.

McDonald doesn't recall this moment, but former Justice Raymond Ehrlich does. "What Mr. Rogow was saying was 'You made your point. Let me talk to the other folks'," he says.

Analyzing what questions reveal about the questioners is a favorite sport of appellate lawyers. But they ruefully concede it's often a waste of time.

"That is one of the most dangerous practices in the world," says Thomson, with Thomson, Muraro, Razook & Hart in Miami. "Sometimes you think you can try to anticipate what they're thinking, but then you're wrong. Never assume you know whether a question is a testing question or a friendly question."

Ehrlich says that's deliberate, especially when it comes to the justice assigned to write the majority opinion. "I may have more questions than other people, or the point might pique my interest," says Ehrlich, now with Holland & Knight in Jacksonville. "That doesn't tell you a damn thing about the outcome."

Looking at the records

While justices' questions can be a poor barometer of their thinking, their records are a better indicator. So appellate lawyers refining their strategies make it a priority to examine voting in similar

SEE ARGUMENTS, PAGE A12

Former Florida ACLU lawyer Nina E. Vinik presented an oral argument on behalf of two gay men challenging a law that prohibits gays from adopting children. She chose a strategy that stressed scientific data over the hot-button issue of privacy.

Arguments

FROM PAGE A11

cases. "Nobody goes before the court without some sense of whom they have to persuade or appeal to," says former justice Arthur J. England, now with Greenberg Traurig in Miami.

Nina E. Vinik had that in mind when she argued the controversial *Cox v. Florida Department of Health and Rehabilitative Services* on behalf of two gay men trying to adopt a child. They were challenging a state law that prohibits gays from adopting.

Vinik, then legal director of the American Civil Liberties Union of Florida, knew state high courts typically shy away from activism in expanding protections. That holds true for the Florida court, Vinik says, especially since activist Rosemary Barkett, the justice most likely to be receptive to her arguments, left in 1994 for the federal appeals bench.

HRS lawyer Anthony N. DeLuccia Jr.'s attack on Vinik's position was less compelling than his exchange with one of the justices.

So rather than argue for an expansive reading of the constitution, "we made a decision to seek the most narrow ruling we could in our favor from this court," says Vinik, now with the Lawyers Committee for Civil Rights under Law in Chicago.

Accordingly, she did not stress the hot button issue, privacy. Rather, she emphasized scientific articles and other materials she had compiled which concluded gays make good parents. The state, therefore, had no valid basis for the law.

"All the scientific evidence came to the conclusion that there was no reason to believe gay parents were any different than heterosexual parents," Vinik says.

It fell to her courtroom opponent, HRS senior attorney Anthony N. DeLuccia Jr., to defend the statute. He attacked the relevance of Vinik's data, arguing that the literature concerned gays' and lesbians' natural-born, not adoptive, children, and that most of the material concerned lesbian mothers, not gay fathers.

Justice Harry Lee Anstead asked DeLuccia if HRS can inquire into the sexual habits of heterosexuals who want to adopt. DeLuccia said it could, but usually doesn't.

DeLuccia's attack on Vinik's record proved less compelling than that exchange with Anstead, which confirmed a difference in HRS treatment of gays and heterosexuals who want to adopt. In April the court remanded the case to the trial court to determine whether the statute violates equal protection. (Plaintiff Cox and his partner later separated and dropped the suit, but the ACLU is going forward with a similar case in Broward Circuit Court.)

In the end, then, Vinik was proved right in seeking a narrow ruling, although her strategy for achieving it arguably didn't work. The court upheld the 2nd District Court of Appeal's decision that the law does not violate privacy or due process. But it didn't dismiss Cox's claim, either, and made sure the narrower, equal protection issue received further attention.

Rethinking a defeat

Having a factual record to rely on, however, proved to be decisive when solo practitioner Thomas M. Pflaum of Micanopy appeared before the court to defend the city of North Miami's policy against hiring smokers.

The city's data showed that each smoking employee cost the city, which covers all employee health care costs, as much as $4,611 more per year (in 1981 dollars) than a non-smoker.

Pflaum says he was surprised by the vigor with which two justices, Ben Overton and Grimes, repeatedly challenged plaintiff's lawyer Pamela A. Chamberlin to respond to the cost data.

EILEEN CONNORS/SILVER IMAGE

Orlando lawyer Roy B. Dalton faced a justice with a record hostile to his position when he argued the case of a client who had wrongly been diagnosed as having the AIDS virus.

She had come to talk about how the policy invaded a jobseeker's privacy. Chamberlin, a partner with Mitrani, Rynor & Gallegos in Miami, didn't rebut the city's data because, she said at oral argument, she felt it was irrelevant and inconsistent.

Since the court upheld the policy 5-2 in April, Chamberlin concedes her approach didn't work. She could have disputed the city's cost-savings numbers, which she believes were too high.

But the bigger problem was not focusing the justices on the stakes of the trade off. "I did not ... force the court to view the case as being a possible choice between a minimal cost savings and a severe constitutional deprivation," she says.

"If I had it to do again, I would have focused more on the economic side," she adds. "I am not sure I needed to build a different record. I think the record was not bad for us on that issue. I just did not focus on it."

Roy B. Dalton of Martinez & Dalton in Orlando faced a justice with a record of hostility to his position when he argued *R.J. and P.J. v. Humana of Florida Inc.* He said the impact rule — a personal injury plaintiff can recover damages for emotional distress only after suffering physical injury — should be abolished, or the court should create a new exception to the rule.

Dalton's client, misdiagnosed as having the virus that causes AIDS, had suffered for 19 months until he learned the truth. Justice McDonald, then in his last days on the court, had written the 1985 opinion in *Champion v. Gray,* in which the court reluctantly granted an exception to the impact rule for a mother who saw her daughter killed.

Mindful of that, Dalton argued it was possible to grant damages in this case without disturbing precedent. He proposed an exception based on the duty of a doctor to avoid inflicting emotional distress on a patient because of their significant relationship.

"I knew McDonald and [the conservative] Overton were the hardest sells on the court," Dalton says. "I wasn't speaking to [McDonald], but I was sensitive to where I thought he was on the issue, which was one reason I tried to push this significant relationship. It would give the rest of the court an out."

But Overton had his doubts. "I think he had a concern about opening up floodgates for people who were, for example, diagnosed with cancer and it turns out they didn't have cancer. What about the mental anguish they suffered?" Dalton says.

"I tried to draw a distinction between cancer, which may be fatal, but it is treatable ... and a diagnosis with AIDS. You have been given a death sentence."

His opponent, former Justice Alan C. Sundberg, agreed with Overton that revising the rule would lead to "a slippery slope" of expanded liability. And with a bow to McDonald, Sundberg quoted from *Champion*. He segued from that to a policy statement helpful to his client: impact rule exceptions are narrow because society, with finite resources, has to draw the line on some emotional distress claims.

"Don't depart from a rule that has served this state and this society well," concluded Sundberg, now with Carlton, Fields, Ward, Emmanuel, Smith & Cutler in Tallahassee. In its March 2 unanimous opinion, the court agreed. ■

Daily Business Review staff writer Judy Plunkett-Evans contributed to this report.