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What to Know When You Don't Know

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The aphorism that the "lawyer well prepared for court never asks a question without already knowing the answer," is supposed to work both ways: The well-prepared lawyer should have an answer to any question asked by a judge or justice in court. But pithy maxims rarely reflect reality. At some point every lawyer will be placed in the uncomfortable position of being asked a question without having a handy answer. How should a lawyer best respond?

Preliminarily, of course, the careful lawyer already will have prepared for court by ruminating over all probable questions and planning appropriate responses. Thorough preparation and cogitation on the facts, the law, the weaknesses of one's case, and peripheral public policy concerns suffices to preconceive answers to most questions. And yet every day lawyers - even scrupulously prepared lawyers - confront unexpected questions to which they have no ready answer. Before addressing what a lawyer should do in that situation, there are three things a lawyer definitely should not do.

To quote Douglas Adams, "Don't panic." Although an unanticipated question will no doubt disconcert the lawyer in the spotlight, this predicament is more or less an ordinary occurrence and not worthy of provoking an apoplectic fit. Remaining calm before the bench at all times is an essential oral argument skill. The experienced advocate maintains a game face, never allowing physical manifestations or facial expression to reveal that something surprisingly unwelcome has happened. Effective advocates engage comfortably with the court - conversing, or at least displaying the appearance of conversing - with confidence and without visible agitation.

Never try to avoid the question. The playground rouse of misdirection rarely succeeds in court. There is no place to hide - neither behind the lectern or within the complexities of the issues raised in the case. Indeed, perhaps the most common judicial complaint lodged against lawyers regarding oral argument is that they too often fail (or downright refuse) to answer questions from the bench. When a question is posed, a direct answer is the polite, professional and expected response. As much as the lawyer may wish to respond, "Your honor, that's the wrong question," evasion will not work. From the court's perspective, there is no such thing as a "wrong question," because oral argument exists for the benefit of the judges and the whole point of allowing lawyers to speak at all is specifically for the purpose of answering questions. If the question truly is irrelevant, cautiously explain why that is so - but only after answering it first.

Thus, attempting to steer oral argument in a different direction, or even attempting to delay a direct response by promising to answer "in just a moment," cannot succeed. Dodging questions makes judges unhappy, and lawyers wishing a favorable result should avoid upsetting the decision-maker. Judges are not easily misdirected, do not take kindly to obfuscation and simply will repeat the question - perhaps with rising annoyance - until an answer emerges.

Never bluff. Like anyone else, judges do not appreciate being lied to. The proverbial silver-tongued lawyer, able to facilely talk a way out of any problem should not draw on that dubious ability in court. This should go without saying. Yet surprising numbers of lawyers apparently fail to adopt truthfulness as the underlying foundation for oral presentations in court. Many lawyers, not wishing to appear unprepared before the court, their peers and their clients, seem to believe that any answer is better than an embarrassing, "I don't know." This false bravado leads them down the destructive path of either making up an answer (i.e., lying)

or - just as ruinous - guessing at an answer asserted as truth. Losing credibility with the court is notoriously fatal to both the case at hand and one's precious professional reputation. It also, of course, may subject counsel to sanctions. In *Mammoth Mountain Ski Area v. Graham*, 135 Cal. App. 4th 1367 (2006), for example, "[a] serious mischaracterization of the record occurred, at oral argument." The court explained that, "whether it is to try to gain some advantage (on the assumption that judges will take what [counsel says] at face value) or perhaps simply because they are reckless with the truth, [lawyers' misrepresentations of the record] places an additional burden on the court."

The *Mammoth* court addressed this problem, in part, by forwarding its opinion to the State Bar to consider disciplinary action against the lawyer under Business & Professions Code Section 6068, subdivision (d). That statute requires lawyers to "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." Or in plain English, lying in court is against the law.

Having explored items to avoid, here follow some points of affirmative advice. Think carefully to make absolutely sure the answer is not readily available, and if that is true, then candidly admit an inability to answer and seek an opportunity to answer later.

Under the pressures of judicial questioning, lawyers too often fail to pause and consider questions carefully. Stop and think. A moment of thoughtful contemplation might reveal that an unexpected or seemingly unanswerable question is not so difficult to answer after all. It is quite possible that the answer actually is known or can be formulated from counsel's pre-argument preparation. And while the time taken to pause to ponder a question may seem like an eternity, in fact short pauses are often imperceptible or at least unobjectionable to those watching or participating in an argument.

Most importantly, the lawyer truly stuck without an honest answer to a question in court must have the integrity and confidence to forthrightly admit to being stumped. Admitting ignorance to a fact or precedent may feel momentarily mortifying, but the best answer really may be "I'm sorry, but I don't know." Yet this is only the first half of such an answer.

While an honest "I don't know," may earn marks for candor, it may prove unsatisfying to the inquisitive judge. Therefore, expressing an honest lack of information is not enough. Think about why the answer is not readily available, and use that to conceive the second half of an "I don't know" answer.

For example, perhaps the answer to the question is unknown because it is outside the record. This provides justification for a non-answer, and therefore should be part of a complete response (i.e., "I'm sorry, your honor, but nothing in the record answers that question"). Perhaps the answer is buried somewhere in the record, not readily accessible. Or perhaps the inquiry relates to a case counsel did not study before argument. In such situations, the second half of the answer should be a request to file a response with the court promptly after the argument. This approach has many benefits. Such an offer portrays counsel favorably as trying to be as helpful and eager as possible to answer the question. Requesting permission to file a post-argument letter also may reveal the importance of the question. If the court denies the request, then it may be that the question was not crucial anyway, and therefore may safely remain unanswered.

Finally, obtaining additional time to provide an answer to an important question has the double-benefit of first being able to provide an answer at all, and second, providing possibly a better answer than one made during the heat of oral argument.

When stumped from the bench, recall the words of Federal Circuit Judge Daniel Friedman: "There is nothing wrong with saying 'I don't know' - provided you do not have to say it too often." Further, heeding the theory "better late than never," an effective strategy often is to offer to supply a short and prompt supplemental brief or letter.

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