Pet Peeves - Oral Argument

1. Lack of preparation. Frankfurter on Roman Law. Moot court practice. Examples: Unfamiliarity with facts in trial record ("I didn't try the case"). Facts often more important than law and Judge is put off if not mastered. Unfamiliarity with law - unable to discuss cases cited in brief. Failure to check recent cases affecting the case at bar before oral argument. Example of Supreme Court decision handed down between filing of brief and oral argument. Use Lexis or Westlaw.

2. Lawyers who try to "wing" it. If answer to question is not known (law or facts) offer to furnish responses after oral argument.

3. Reading of oral argument. Use notes and outlines. Tempted to ask that it be handed up. Also shows unfamiliarity with case. "Casey Jones" -- rapid reader. We are afraid to interrupt because he might lose his place. Converse is just as bad -- unstructured argument. Make 2 or 3 good points and leave the rest to the brief. After floundering argument, received note: "Isn't this Godawful?"

4. Prolonged discussion of basic legal principles. Assume that Judges know that proof beyond a reasonable doubt is necessary to convict. Pick up at point of intermediate legal difficulty and Judges can grasp.

5. Lengthy explanations of our own recent decisions. Collective institutional memory sometimes needs refreshing, but lawyers may presume we are familiar with what we have written recently. Also, asking us to overrule the Supreme Court is a no-no.


7. Answering Judges' inquiries by giving page numbers of the brief or record. Questions should be answered in language rather than by the numbers.

8. Answering questions with questions. Only if a Judge's inquiry needs clarification should a question be directed to the Court. Avoid rhetorical questions. Example: "Why do you ask that, Your Honor?" "You wouldn't want to know that, Your Honor."

9. Failure to answer questions posing hypothetical factual situations. "That's not this case" is not a good answer. All inquiries should be answered immediately and directly.
10. **Responding to questions by saying, "I'll get to that."** A promise often not fulfilled. Leading attorney said he would get to my question but never did.

11. **Emotional appeals.** No place in appellate advocacy. Visceral approach doesn't work. Judges get emotional as anybody else. Lawyer who screamed: "I have a most unfortunate client."

12. **Unctuous flattery of Judges.** Unnecessary and wasteful of time. Judges have a high enough opinion of themselves. Ten minute argument used up in flattery and client not served.

13. **Co-counsel who passes up notes or tugs on clothing of attorney at podium.** Argument stops and then there is a shift in emphasis in the argument. The new response is often as unsatisfactory as the original.

14. **Distracting mannerisms -- playing with pencil, tapping microphone, hand in front of face, walking.** These all distract from argument. Speaking in monotone also should be avoided.

15. **Overspeaking.** Repetition. Rebuttal argument. "I shall finish my argument in 5 minutes, my Lord." "I know you will have finished, but will you stop?" John W. Davis -- Tenth Commandment. When finished, sit down.
How to bother the bench

Judges air peeves with lawyers

By Tim Beidel
Staff writer

ALBANY — A panel of distinguished jurists assembled at Albany Law School Thursday to tell prospective lawyers their pet peeves.

The program ran overtime.

While the judges — from Roger Miner of the U.S. Court of Appeals’ 2nd Circuit to Albany City Court Judge Madonna Stahl — were expansive, their admonitions were offered with humor and boiled down to these: be prepared and be courteous, or more succinctly, be professional.

The judges had no shortage of anecdotes to illustrate their points.

Miner remembered a time when a lawyer was offering an oral argument so muddled that it prompted a colleague on the bench to hand him a note that read, “Isn’t this God-awful?”

Miner also listed a number of common sense strategies, such as not to answer judge’s questions with questions or with “I’ll get to that.” And, Miner said, it is safe to assume that judges do not need long explanations of basic legal principles, including, but not limited to, the fact that proof beyond a reasonable doubt is necessary to convict in criminal trials.

And, Miner pointed out, “the unctuous flattery of justices is unnecessary and wasteful of time.”

“Justice (Robert) Jackson, who attended this institution, said that judges have a high enough opinion of themselves,” he said.

But there was a serious side as well. Sondra Miller, a justice recently appointed to the second judicial department of the Appellate Division of state Supreme Court, said that unprepared lawyers can wreak havoc with justice. She told of having to sit “passively by, watching what may be a grave injustice in progress.”

She also talked about an appeal of a clear-cut denial of a motion for summary judgment, in which four lawyers showed up with briefs several inches thick. Suggesting that it may be a case of accumulating billable hours, Miller said the appeal was “meritless for sure, frivolous, I would think so.”

The judges also participated in some scripted skits demonstrating lawyers’ rudeness, improper discussions with judges, sexism in the courtroom and debating with judges after decisions are final.

Despite the long list of don’ts, the judges offered some hope: they praised the technical knowledge of law school graduates and urged them to get as much courtroom experience as possible, without fear of failing at times.

“We look forward to you coming in every January and practicing law,” said Vincent Bradley, a state Supreme Court justice from Kingston. “We were all lawyers once ourselves, so there’s no magic to it. Just be yourselves. We like to watch you develop.”