

This article is about oral advocacy. Actually, it is about the first rule of oral advocacy, which is “Know your audience.” To lawyers, know your audience means know your judge. For it is the judge to whom we argue and who will decide whether, in the words of Blockbuster Video, the client

will Go Home Happy.

Judges come in every shape, size and temperament, but the ones to beware of are the Seven Deadly Judges. These are the judges who can really ruin a lawyer’s day—that is, if the lawyer fails to grasp with whom he or she is dealing. Like running a Class-5 rapid,

The Seven D



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arguing before a Deadly Judge is not impossible, but it sure can be discomfoting if you approach from the wrong angle.

The Seven Deadly Judges are not real. I didn't sit down and label the various judges who gave me a hard time over the years. Still, if you've litigated for any period of time, some

of these judges may look a little familiar.

If you are a judge, rest assured that none of this applies to you.

Any resemblance to actual sitting jurists in the State of Arizona is purely coincidental.

With that disclaimer, let's meet the Judges.

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The Stone Wall

Our first Deadly Judge is the Stone Wall.

The Stone Wall sits quietly with a perfect poker face while you and opposing counsel make your arguments. She might well be interested in what you have to say, but you wouldn't know it by looking at her. You could be reciting brilliant legal theory or Shel Silverstein poems, and you'd still get the same unflinching stare.

The Stone Wall never asks questions, which is what makes her so deadly. If there is one thing oral argument is good for, it's as an opportunity to learn what the judge's concerns are so you can address them. Unfortunately, the Stone Wall robs you of this opportunity by giving you no clue what she is thinking—not even a single raised eyebrow or disapproving frown.

Your best strategy before the Stone Wall is to get in and get out. Presumably you've made your best and most cogent arguments in writing, so unless you recently came up with some brilliant new angle, nothing you add will be an improvement on what you wrote. And because you don't know what the judge is thinking, your chance of mucking

things up is greater than the chance of just happening to come up with the argument that sways the judge.

Of course, if your opponent raises something new or particularly damaging, now is the time to address it. But barring that, once it becomes obvious the judge has nothing to say or ask, hit the high points and then sit down.

The Inquisitor

The Inquisitor is very much the opposite of the Stone Wall.

Whereas the Stone Wall won't tell you what she's thinking, the Inquisitor tells you exactly what he's thinking—and he doesn't want to talk about anything else.

Before you can say, "May it please the Court," the Inquisitor jumps in with a question about the one issue that's bothering him. It may not be your best issue. It may not be an issue you think is important. It may not even be an



issue you want to talk about. But there you are, stuck in the Inquisitor's clutches with no place to hide.

There is a real simple way of dealing with the Inquisitor: Answer the question. If you dodge the question, the Inquisitor will either ask it again or assume you don't have a good answer. You certainly aren't going to persuade him to rule for you unless his concerns are addressed, so you might as well hit them head on. Only then should you steer the conversation back to the points you want to make.

As annoying as the Inquisitor may be—we'd all rather hear ourselves talk than answer some judge's immaterial questions—he has done you a favor. He has put his cards on the table and told you what will or will not change his mind. If you think the Inquisitor is dwelling on the wrong issue, tell him so frankly and respectfully.

But only after you've answered his questions.

The Stickler

The Stickler likes rules.

She likes the Rules of Court, and she likes her own special rules, written and unwritten. She likes when things are done by the book.

Play by the Stickler's rules and you'll be fine. Fail to do so and you risk incurring the Stickler's wrath.

As they say: When in Rome, do as the Romans do. Does the Stickler require 15-point font when the Rules require 13-point? Fifteen it is. Does the Stickler want you to recite your oral argument while standing on one foot? Better wear comfortable shoes.

Ultimately, you may or may not win on the merits. But as long as you follow the Stickler's requirements, you at least won't be detracted by unnecessary questions of form.

Besides, following the Rules is always a good idea anyway.



The Wanderer

As the song goes, the Wanderer's the kind of guy who likes to roam around.

Your motion may raise Issues A, B and C, but the Wanderer wants to talk about Issue D. The law may say one thing, but the Wanderer is sure it says something else. If the judge asks a question that sounds like it's from left field, you just might be in front of the Wanderer.

The trick to arguing before the Wanderer is to keep it simple. For one, the judge could be confused because your written product was not as concise and straightforward as it should have been. This is your chance to set things right by hammering on your one or two main points.

And even if your pleadings were as clear as Lake Tahoe, you will only distract the Wanderer by spouting a barrage of fine points. Even if your opponent recites the top ten list of reasons why the motion should not be granted, you have to bring the discussion back to the critical one or two points and keep the judge from getting mired in things that don't matter.

Of course, some judges are better at getting to the nub of the issue than others. But at the end of the day,

it is the lawyer's job to make sure the judge stays on track.

The Professor

The Professor is captivated by legal theory and sees your oral argument as a chance to have a fascinating scholarly discussion.

You may have rock-solid case law on point, but the Professor wants to talk about the subtle distinctions between the Corbin and Williston views of contract formation. Being in front of the Professor is like having a bad law school flashback.

When encountering the Professor, there is a Plan A and a Plan B. Plan A is to engage in the discussion—that is, if you're able. If the Professor believes critical legal studies has something to say

about your general indemnity clause, tell her why you agree or disagree. If you are in an appellate court, or if heady legal theory happens to be at the heart of the issue, you should have been prepared to discuss theoretical niceties anyway.

But if, as may happen, the Professor blindsides you with the latest law review blather, go to Plan B. Plan B is a concession that you aren't prepared to discuss that particular issue, coupled with an offer to follow up with a supplemental pleading.

Don't think you can b.s. your way through it. The only thing worse than not knowing something is getting caught faking it.

The Abuser

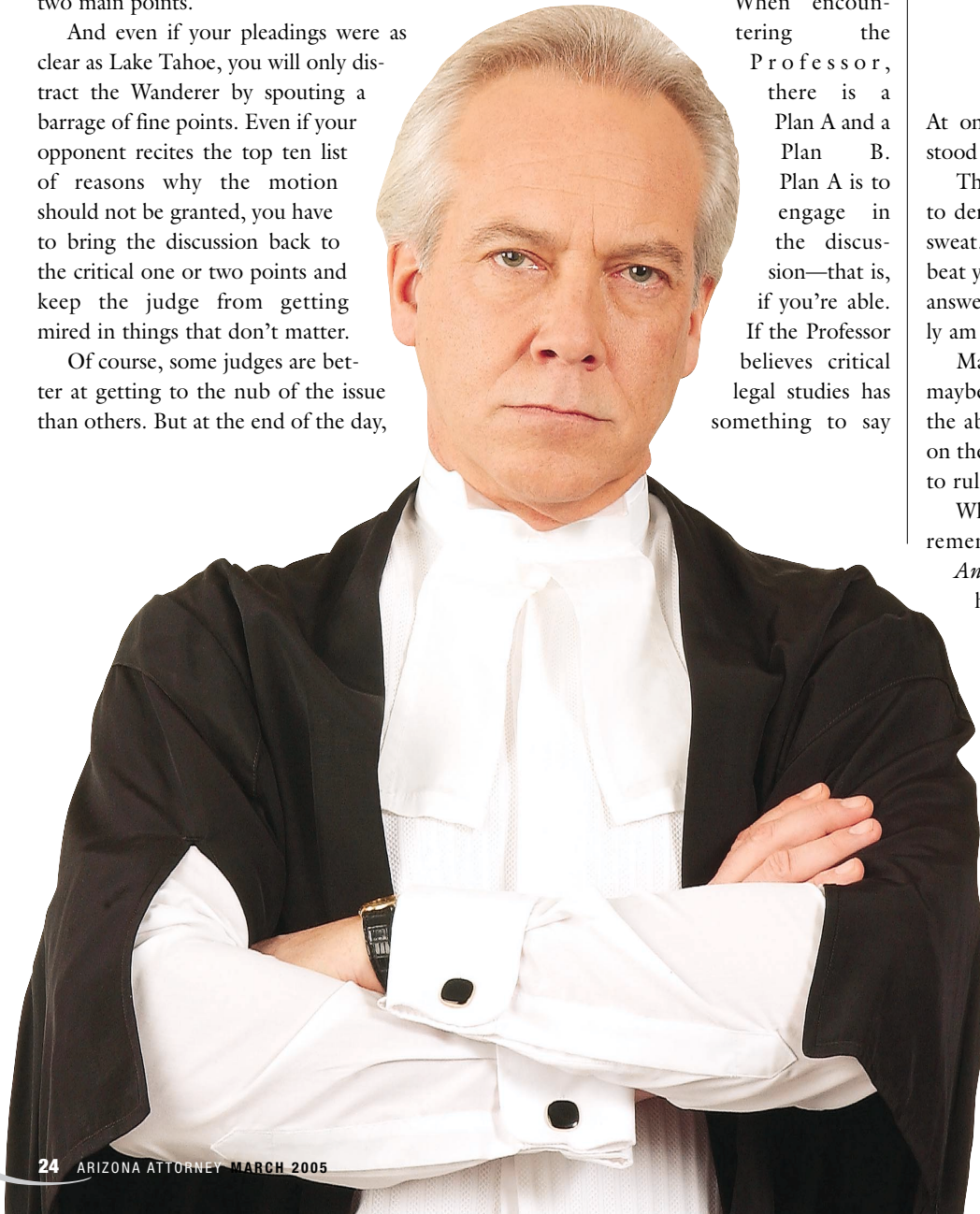
At one time or another, every lawyer has stood face to face with the Abuser.

The Abuser is that one judge who seems to derive peculiar joy from making lawyers sweat. The Abuser may shout at you, browbeat you or ask a question the only possible answer to which is "I agree, Honor; I really am an idiot."

Maybe you deserve to be dressed down; maybe you don't. But no matter how bad the abuse gets, you have to keep your eyes on the prize. That prize is getting the judge to rule in your favor.

When you appear before the Abuser, just remember what Kevin Bacon said in *Animal House*: "Thank you, sir, may I have another!" If the Abuser yells at you, don't yell back. Avoid the urge to give smart-ass responses to impossible questions ("No, your honor, I really don't expect you to do what the law requires."). Keep your calm. Keep your focus. And keeping hitting your key points.

When you're all done arguing, the judge is going to have to rule on the merits, and you'd rather he leave with a clear memory of your well-reasoned arguments than the pathetic vision of a lawyer who cracked under pressure.



The Innovator

Our final Deadly Judge is the Innovator. The Innovator is a fountain of good ideas about your case.

You've spent hours crafting your legal theories, raising all the right issues and making your best arguments, but the Innovator suddenly comes up with something you—or worse, your opponent—hadn't thought of before.

This could be good news, but it might not be. If you are absolutely sure the judge's new theory helps you, go with it. Maybe the judge really did think of a good angle that hadn't occurred to you.

But there are some serious risks of glomming onto the Innovator's theory. For one, the judge might be wrong. There might be a perfectly good reason why the theory doesn't work, and you might not think of that reason in the one and a quarter seconds you have to answer the judge's question. Or the argument might be a winner, but you waived it by not raising it in the pleadings. If you have any doubt at all about the judge's theory, you are better off dancing with the one that brought you.

If the argument clearly favors your opponent, the right approach will almost always be: "You raise an interesting question, your honor, but one that isn't properly before you." If all else fails and the judge continues to press her great theory, buy yourself some time to think by offering to file a supplemental pleading.

Know Your Audience

The Seven Deadly Judges are, as should now be clear, caricatures. No judge is always an Abuser or an Interrogator, though most judges will take on one or more of these styles at one point or another. The important point is that good advocates know their audience and tailor their arguments accordingly.

Judges come in all shapes, sizes and temperaments. But the advocate who fails to adapt to different judicial styles might as well be arguing to a Stone Wall. 