1) Introduction of Panelists (5 minutes)
   a) **Chief Barbara Lynn** of the Northern District of Texas has been on the bench since 2000. Prior to that, she was a trial partner at Carrington Coleman and Sloman, which she joined immediately after graduating first in her class from SMU Law School.
   
   b) **Geoff Gannaway** is a partner at Beck Redden, where he focuses his practice on professional liability, products liability/personal injury, commercial litigation and energy.
   
   c) **Grace Ho** serves at counsel at Vinson & Elkins in the Labor and Employment group. Her practice involves representing clients before state and federal courts as well as administrative agencies.
   
   d) **Teresa Garcia-Reyes** serves as Senior Counsel in the Litigation group for GE Oil & Gas. Prior to joining GE, Teresa was an associate at Morgan, Lewis & Bockius LLP and Mayer Brown LLP.

2) Preparation for Oral Argument in Various Courts/Handling Questions from a Hot Bench/Misstatements (20 minutes)

Myriad Genetics, Inc. (“Myriad”) obtained several patents after discovering the precise location and sequence of two human genes, mutations of which can dramatically increase the risk of breast and ovarian cancer. The Association of Molecular Pathology (“the Association”) sued Myriad to challenge several of Myriad’s patents related to its discovery, on the grounds that patenting those genes violated §101 the Patent Act because they were products of nature. The Association also argued that the patents limit scientific progress. §101 limits patents to "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof."

   a) The Association’s counsel filed a lengthy motion for summary judgment on the issue of whether Section 101 of the Patent Act allows patents on human genes. The judge is unlikely to be familiar with the scientific terms and complexities of this case. Carlos will have 10 minutes to argue his motion for summary judgment. What advice can you give Carlos, Chief Judge Lynn? [Back-up panelist – Geoff]
Because this dispute is highly technical, it is crucial that Carolos present the evidence and legal arguments in a comprehensive way without bogging down in technical details.

1) **Identify central points** focused on the precise issue that the judge must decide and his strongest reasons for a favorable ruling. Do not get side-tracked on issues that do not matter.
   a) Determine which points may be conceded and which may not and how to argue those points

2) Do this well enough in advance that you have time to digest and incorporate constructive advice.

i) Start with a **strong beginning**. The judge should be able to listen to the first minute of his argument, and understand the case or issue in a manner that reflects his basic points and theme.

ii) His oral argument and brief do not need to follow the same structure, but should follow the same theme. When preparing for oral argument, he should choose best two to three points and have direct support for those contentions that ties in to thematic, logical structure.

iv) Using written and oral “**signposts**” will allow his audience to understand where specific points fit into the overall structure, and is integral to persuasion.

v) Bring highlighted copies of his best cases (including a copy for opposing counsel). Be prepared to point out language in his favor from the other side’s best cases.

vi) Test the technology if he is going to use it, and have a backup. Consider not using – just bring paper.

vii) **Mock exercises** may be helpful for Carlos to practice explaining complicated concepts to lay people. Do a moot court with your colleagues/friends/family/whomever. Figure out your weak spots.
   1) Have at least one person be a “hostile” judge
   2) Don’t have your audience prepare; they should be told only a brief summary of what the case is about and the procedural posture. This will help you assess whether you are presenting your facts (and the law) clearly.
   a) Grace, can you share your anecdote re: arbitration over “best efforts” clause with summer associates

b) **The trial court ruled in favor of the Association. Myriad’s counsel, Melissa, and is appealing the district court’s decision to the Federal Circuit. Melissa will have 15 minutes for oral argument to split between her opening and rebuttal. As soon as she gets to the podium, the bench is hot, smoking hot. The judges here are experts in patent law, they know the briefs, and the record. The questions come so fast that they seem to overlap. Teresa, what tips do you have for managing a hot bench? (Back-up Chief Judge Lynn)**
Welcome questions. Listen carefully, and if necessary, ask for clarification.

Know when to start/stop talking

(1) Think before you speak in response to a question
(2) Do not go on and on addressing a point purely for the sake of covering prepared remarks or checking off an outline.
(3) Do not overstate your case – be honest and accurate. Your credibility is everything.

Begin your answer with “yes” or “no”. Answer every question directly.

Never postpone an answer. It is never appropriate to tell the judge you will get to that later. Answer it immediately, even though it will interrupt your flow. The best course, if possible, is to weave your answer into your argument.

Answer questions the court asks of opposing counsel when it is your turn, especially if your answer is different.

Listening/observing is as important as speaking

(1) Listen to the judge’s questions to you and answer them directly; don’t talk around the questions.
(2) Listen to the judge’s question to opposing counsel and their answers – pick up on the issues that the judge finds important, potential areas you need to address.
(3) Watch the judge’s body language and expressions.

Listen to opposing counsel, and decide what is important to address during the hearing

(1) Take notes
(2) Have they misstated a material fact? Have they conceded points? Have they failed to answer something?

Be prepared to address your weakest point(s).

(1) Make a list of questions you hope the judge will not ask you about your argument and answer them.
(2) Do they pass the smell test? Do they make sense? Are they clear? Are they succinct?

What do you do if things go off the rails? What should you NOT do?

(1) If you don’t know, say so. Never give a categorical answer you are not sure of.
(2) Offer to brief the issue you weren’t prepared for.

Knowing the material facts, the record, and applicable law (good and not good for you) is “table stakes”. What else should Melissa do to prepare for her appellate argument, Grace?

(1) Have a two-minute drill of what she must tell the court in order to win, the core of what the court itself would write to explain why her client wins. Ideally, she will be able to get out her two minute summary before the questions start flying. Alternatively, she will be able to use it in her rebuttal or summation.
e) **Thomas Jefferson once said, “The most valuable of all talent is that of never using two words when one will do.”** Chief Judge Lynn, why is brevity important in oral advocacy?
   i) Highlighting your argument requires that balance brevity with just enough detail to sharpen the judge’s memory about the key aspects of your client’s position.
   ii) Choose only the relevant, salient details and avoid rabbit holes.
   iii) Don’t rehash the whole brief. This wastes the judge’s time and may be harmful to your client.
   iv) Tailor the strong points of your brief which are most applicable to the issue before the court.

f) **Grace, when Melissa and Carlos are preparing, how can they improve their awareness of and control for quirks?** Back-up panelist – Geoff
   i) When you are nervous, do you talk faster, get dry mouth, fidget, etc.? Does setting make a difference (e.g., a court room versus a conference room for an arbitration). Take precautionary measures to mitigate the impact of those kinds of issues.
   ii) Personal presentation
      (1) Record yourself talking, giving the opening statement, making the argument, etc.
      Watch yourself; critique; work on improvements; redo.
      (a) This will help you (1) assess your qualities and presentation tendencies; (2) become comfortable making the presentation and (2) practice/refine/become very familiar with what you are going to say and weeding out extraneous words.
      (2) Memorize a short introduction and a brief conclusion that ends with the relief you are requesting based on your key arguments
   (3) Demeanor and mindset
   (4) Professional, civil, formal
      (a) Geoff, how can an attorney prepare for and maintain professionalism when a misstatement is made, or another attorney makes the accusation that the opposing counsel has misstated facts or the law?
   (5) Wear professional clothing that fits well and permits range of motion to suit your presentation style
   (6) Be yourself – authenticity goes to credibility

h) **Teresa,** after the oral argument is over, what do you do to improve? Back-up Grace
   i) Debrief with colleagues who were present, if any, or just go over it yourself.
   ii) Analyze what went well and what did not. Come up with a list of what could be improved, how preparation may have been done differently to potentially better results, and apply these to the next argument – this is preparation for next time, too.

Scenario based on:

https://www.oyez.org/cases/2012/12-398
Sources:
https://www.carltonfields.com/files/Publication/23a08c36-a271-4fb3-ba69-f0158086163c/Presentation/PublicationAttachment/d29682ea-4d81-4bdc-95e1-f35a5d27d4f8/Twenty_Tips_Battered_Bruised_Oral_Avocate_Veteran.pdf
3) **Know Your Audience (10 minutes)**
Jamal, local counsel, and Leila, national counsel, planned to divide oral argument between the two of them, with Jamal starting and Leila finishing. Leila will be traveling from the corporate headquarters in San Francisco to attend the hearing, which will be held in a rural county in Texas.

a) **Geoff, what tips do you have for Leila? Back-up Grace**
   i) **Learn in advance any customs of the court in which you are appearing.**
      (1) Some judges are tired of arrogant, conceited lawyers marching into their courtroom and explaining how things are done in Dallas, Los Angeles, or New York. The local judge does not care. He has a courtroom to run and a docket to manage, and has done just fine without the bright lights of the big city.
   ii) **Know the Judge. Ask around. Attend court. Read their opinions.**
      (1) Although knowing the law is important to any practicing attorney, it’s only part of the equation to litigation success.
      (2) The personality of the judge or jury may perhaps be the most important factor in how your case will be decided, particularly at the district court level.
      (3) Studying your audience will allow you to adapt your argument to the judges’ or jury’s attitudes.
      (4) Become familiar with the court’s oral argument procedures, typical practices, and the personalities of the judges. If you can, sit in on oral argument before your appearance, or ask colleagues for insight into the particular judge’s style.
      (5) Look up the judge’s history: previous roles and prior written opinions.
   iii) **Audience. Consider the temperament, pet peeves, sensibilities of your audience –**
      (1) Jury, judge, arbitrator(s), administrative law judges?
      (2) If you have the chance, go observe or at least ask trusted colleagues about their experiences.
      (3) [Grace’s Anecdote re case scheduling conference with a federal judge who was known for seeking out detailed information about the parties’ positions during the initial case management conference;
      (4) Grace’s Anecdote re hearing before California DLSE]
4) Using Demonstratives Effectively (10 minutes)
In a products liability case brought against an automobile manufacturer, the plaintiff claimed the vehicle was defective and unreasonably dangerous as a result of a seat belt feature commonly referred to as a “comfort feature.” A comfort feature permits a seat belt wearer to relieve the tension on the shoulder strap of a seat belt by pulling out the shoulder strap and introducing a small amount of slack into the shoulder belt. Most vehicles built in the 1980s had such a feature. The plaintiff, seven months pregnant and a front passenger in the vehicle during a head-on collision, claimed the design of the comfort feature allowed her to inadvertently introduce a considerable amount of slack into her shoulder strap when she bent over to pick her purse up off the floor. She alleged that when she sat up, the slack remained. The plaintiff asserted the alleged slack eliminated the protective effects of wearing the seat belt during the collision, which caused her to suffer serious injuries to her face. Conversely, the automobile manufacturer sought to prove that she was not wearing her seat belt at all during the accident.

a) Geoff, What makes a visual aid “effective” vs. ineffective? (Back Up Chief Judge Lynn)
   i) Clear, easy to understand
   ii) Simple is better. Because a jury only has a short time period to learn and digest information, the more complicated the exhibit, the more likely the jury will miss the significance.
   iii) Size: make sure the trier of fact can easily see what is being illustrated.
   iv) Repetition: repeat key words, phrases and sounds to attract the jury’s attention.

b) Teresa, in this example, what evidence would be critical to present the plaintiff or defendant’s case, as well as undercutting the opposing party’s case?
   i) In deciding whether a demonstrative would assist the court in understanding critical evidence, consider the following:
      (1) Will it add credibility?
      (2) Have you tested the exhibit on a non-lawyer who is unfamiliar with the subject matter of the case? Does that person believe that your exhibit clearly sets out key but potentially confusing information, such as dates, in an orderly and easy-to-understand fashion?
      (3) Will the demonstrative exhibits be distracting or difficult to understand?
      (4) Is it worth the cost?

c) Geoff, how would your choice in use of demonstratives differ based on whether the case is pending in state versus federal court? Would your use of demonstratives differ based on whether the case was set for a bench or jury trial? How can you conform the demonstrative to your particular audience?
   i) A slick and fancy exhibit may do as much harm as good before the wrong audience. For example, a simple case in a rural jurisdiction probably does not need a pricey
exhibit. Conversely, complex cases involving substantial damages may warrant demonstratives requiring more technology and expense.

d) **Chief Judge Lynn**, what guidelines do you offer litigants in your courtroom regarding the use of demonstratives? When you talk to jurors after a case, what demonstratives do you find jurors find most and least persuasive? What types of demonstratives do you see most frequently in your court?

e) **Chief Judge Lynn**, how can an attorney overcome any reluctance to allow demonstrative exhibits?
   i) Ensure the demonstrative accurately reflects the evidence.
   ii) Conform the presentation to match the court’s desires and expectations. Know the likes and dislikes of the judge, the courtroom deputy, and any other staff in which the case is to be tried. If possible, ask the judicial assistant or law clerk about the general attitude of the judge towards demonstrative exhibits.
   iii) Know the physical limitations of the courtroom. If using a demonstrative exhibit requiring extensive set-up, find out well in advance exactly what will be needed to make it work smoothly and properly.
   iv) Set-up the demonstrative before the court is in session. The judge is more likely to permit the use of a demonstrative exhibit if it appears to be effortless and unobtrusive.
   v) Practice using the demonstrative several times. Anticipate possible failures or technical difficulties. Always bring physical copies or blow-ups in case of a technical issue.
   vi) Plan at least one alternative to present the evidence if the judge decides a demonstrative cannot be used or can be used only in a limited way.

Source: [https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2191&context=tlr](https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2191&context=tlr)
5) Dealing with Judicial Bias in a Jury Trial (10 minutes)

During a jury trial, while a witness for the prosecution was testifying, the judge made several statements: “tell the truth” when she was evasive; that she had “a problem” if she couldn’t prove a point without hearsay; and to “answer the question first” before explaining.

a) **Grace**, what should the lawyer who is the beneficiary of the judge’s apparent bias do?

i) Be prepared to amend your pleadings in the event the judge suggests additional claims or raises additional defenses. In *Eirline Co. S.A. v. Johnson*, 440 F.3d 648 (4th Cir. 2006), the Fourth Circuit held that the district court improperly raised a statute of limitations defense *sua sponte*. If this were to happen in your favor, immediately amend your pleadings to raise the defense.

ii) Be mindful of the effect favorable erroneous rulings may have on the record on appeal. Even with favorable rulings, counsel should work to avoid reversal and further unnecessary litigation. If you are the beneficiary of an incorrect evidentiary ruling, consider withdrawing your objection or request or otherwise blunting its impact.

b) **Teresa**, what should lawyers do when a judge (or opposing party) makes negative or inappropriate comments?

i) Always note your objection. If the judge will not let you make a record say, “At a break, I would like to make an objection.” If the judge will not allow a sidebar, state that you need to make a record at some other time.

ii) Request a curative instruction in the presence of the jury. A curative instruction may be poorly given, in which case you have successfully preserved the record and your objection has not been cured. The Fifth Circuit in *US v. Musgrave*, 444 F. 2d 755 (5th Cir. 1971) found that certain jury instructions given by the trial judge placed one party in a bad light and creating the appearance that the judge was advocating for the other side. In reversing and remanding, the court noted that “the prejudicial effect of the District Judge’s comments reached the jury without the benefit of an instruction that the jury is not bound by the judge’s questions or comments.”

iii) If you don’t ask for the curative instruction, you may not preserve the objection for appeal. Failure to provide a curative instruction can provide an additional ground for an appeal. In *Whitenight v. International Patrol and Detective Agency, Inc.*, 483 So.2d 473 (Fla. 3d Dist. Ct. App. 1986), the appellate court reversed a jury’s decision and remanded for new trial where the trial judge’s comments, including calling the plaintiff’s evidence ridiculous, compounded with an ineffective and confusion curative instruction prejudiced the plaintiff’s case, warranting reversal.

Sources:

https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015_corporate_counselcleseminar/Materials/11w_2_dealing_with_difficult_judges.pdf

6) **What to do when the judge cuts off your oral argument (10 minutes)**

In *4 Pillar Dynasty LLC v. New York & Co., Inc.*, 257 F. Supp. 3d 611 (S.D.N.Y. 2017) trademark owners sued a clothing seller alleging trademark infringement in connection with women’s activewear apparel. The plaintiffs alleged violations of the Lanham Act and New York law and sought to recover the clothing seller’s profits. At trial, the plaintiffs presented only one witness. After the plaintiffs rested their case, and before the defendants called their first witness, the defendants made an oral motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50.

Briefly after defense counsel began his argument on the Rule 50 motion, the court denied the motion in the following exchange:

Counsel: Your Honor, before we do that, we’d just like to move for a judgment –

Court: Ah yes, okay. That motion is properly made and is equally properly denied.

Counsel: As expected. Thank you your Honor.

Subsequently, the jury rendered a verdict for the plaintiffs, who were awarded $5.59 million by the court. The defendants then sought to renew their motion for judgment as a matter of law under Rule 50(b) or, alternatively, Rule 59(e) to alter and vacate the monetary award.

The court found that the defendants had waived their post-judgment challenge on willfulness because the defendants were presenting this ground for the first time after trial. The court explained that the motions under Rule 50(b) require that the moving party had previously presented the grounds for the motion to the court and any renewed motion is limited to grounds specifically raised in the prior motion for judgment as a matter of law. The court also rejected Rule 59(e) as a basis for the defendants’ motion because Rule 59(e) requires the moving party to point to controlling decisions or data that the court overlooked. Thus, the court denied the post-judgment motion, noting that while the defendants had moved for judgment as a matter of law before the case went to the jury, “they did so merely in a perfunctory manner, without specifying any particular ground for their motion.”

The defendants tried to argue that they should be excused for not articulating specific reasons for their original motion because the court had denied the motion before they had a chance to do so. The court rejected that argument too, saying even though it had promptly denied the earlier motion, the defendants’ counsel made no effort to preserve the issue.

a) **Geoff, how can lawyers avoid this harsh result? What should a lawyer do if the judge cuts him off during oral argument? Chief Judge Lynn Back-up**

   i) You must make an adequate record of all of the grounds on which relief is sought in order to preserve the right to seek review from an adverse ruling. This is crucially
important when arguing oral motions, or evidentiary objections, where there may be no formal briefing for the court to consider.

ii) Find a polite way to indicate that you understand the court has made its ruling, but ask if the court will allow you to put any grounds you have not yet addressed on the record. Be courteous and brief. Be professional. But, make sure you make your record!

Source:  https://www.americanbar.org/groups/litigation/publications/litigation-news/practice-points/judge-cuts-your-argument-make-your-record/

7) Handling Oral Argument with Multiple Parties (5 minutes)

Sonya represents an insurance company in a large potential MDL. Although the case is huge, the judge handling the MDL typically affords a total of 20 minutes for argument; 10 minutes per side – at most. Sonya must share the 10 minutes with multiple parties, who each have various positions as to whether there should be an MDL, who should be included, and where it should be located. If the parties split the time, the parties will be left with just one or two minutes to argue.

a) Chief Judge Lynn, should multiple parties on one side of the case divide their oral argument between them, or simply designate one or two to argue on behalf of all?
   i) Sometimes, the more that you split the argument, the more it dilutes the parties’ ability to answer the court’s questions meaningfully and the judge won’t particularly like it.

b) Geoff, what tips do you have? Some courts impose time limits for witness examinations. How does that impact your strategy? Back-up Teresa
   i) Keep it brief, don’t restate things in your brief or that another party has said.
   ii) Consider what the goals of your argument will be. Update, if need be, emphasize one or two crucial points, and then most importantly, answer all of the judges’ questions.
   iii) The more concise the witness examinations are, the more they will make an impact on the jury.

8) Final Tips/Questions from the Audience (5 minutes)