A blurred photograph of a woman speaking into a microphone on a stage. In the foreground, the silhouette of an audience member's hand is raised. The background is a plain, light-colored wall.

In Support of Fair and Impartial Courts

Countering the Critics

Q&A Guide

In Support of Fair and Impartial Courts
Countering the Critics
A Q&A Guide

This pamphlet has been prepared by Margie Elsberg of Elsberg Associates for the Least Understood Branch group, a joint project of the American Bar Association Judicial Division and Standing Committee on Judicial Independence.

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Who Needs a Q&A Guide?

We recently heard the story of a judge who addressed a local civic group on the importance of judicial independence from political and special interest interference.

He expected enthusiastic applause at the end of his talk, perhaps even a standing ovation—but instead, he got a battery of complaints and comments about the courts and judges: their inefficiency, lack of accountability and mishandling of various hot-button issues.

The judge felt blind-sided, and acknowledged later that he was simply unprepared to respond.

To prepare for such hostile attacks, we were asked to develop a Q&A Guide for judges, attorneys, academics and plain folks who want to join the nation’s growing “speakers bureau” in support of America’s courts—courts that were designed by the framers of the Constitution to be as Fair and Impartial as is humanly possible.

When the detractors take their best shots, we hope you’ll feel ready.

Margie Elsborg

Elsberg Associates

Q&A: Top Six Tips

1. Prepare and Practice

There's no substitute for 3-step preparation: 1. List every question, comment or challenge that could come your way; 2. Decide how you'll respond to every item on the list, and how you'll "bridge" to your Core Message (virtually every answer should resolve into a version of your Core Message); 3. Practice with an audience that's willing and able to critique you fairly and honestly. Then practice again.

2. Always plan a "second close" for your presentation.

Most Q&A sessions end because the speaker's time runs out, not because the last question gives the speaker an opportunity to finish on a powerful note. So make sure you re-take control of the presentation after you've answered that last question, and re-end your speech with a message you want the audience to remember.

Note: In the unusual—but superb—event that the last question DOES end just right, discard your "second close," smile your brightest smile and end with a big "thank you!"

3. Think of the Q&A session as a one-on-one conversation with a reasonable person.

No matter how difficult the questions, comments or out-and-out attacks, you'd likely have a fairly easy time of it if you were in a one-on-one conversation with, say, a long-time neighbor. I think it's all of those other people listening in that makes Q&A unnerving. So tune them out, and talk only to the person you're looking at at a given moment. Find a different face every few seconds but maintain your one-on-one attitude.

4. Stay cool. Let your body language signal confidence.

Everyone in your audience knows (at least subconsciously) that body language, facial expressions and voice tone can tell them more about your message than the words themselves (that's a proven fact). So follow these guides; they'll help you appear fearless and truthful:

SMILE. Not a smile that says your words are funny or that you're belittling the questioner, but a soft smile that says you're relaxed and happy to be engaged in this interesting conversation.

*Encourage your hands to **GESTURE NATURALLY**, the way they would if you were talking to your best friend. Don't hang on to the lectern or let your hands seek the safety of your pockets or your back; don't assume the common "fig leaf" position or let your arms cross over your chest. If you start with your hands easily at your sides, they'll naturally connect with your words.*

***MAINTAIN EYE CONTACT, TAKE A STEP FORWARD** and relax your face when you're thrown a hardball to signal that you're happy and willing to engage. Beware! Your eyes will want to look down or away and your body will want to back up. If you let that happen, the audience will know that you've taken a hit.*

***START SHIFTING AWAY FROM THE QUESTIONER** so that person doesn't dominate the session and grab too much attention. Find other faces in the audience so others will feel that you're including them in the conversation. Let your eyebrows rise to add interest to your face and inflection to your voice. You'll look open and honest, and you'll sound more natural and engaging.*

***NO ALCOHOL OR CAFFEINE** in the hours before you speak!
And get plenty of sleep.*

5. Keep your audience's needs, interests and values central to your messages.

*The more you know about your audience, the more finely tuned your comments will be. If the audience is evenly divided on reproductive rights, for instance, you'd best cite examples on another topic. If you know the audience is generally liberal or conservative; management or labor; rich or poor; well- or poorly-educated, you'll be able to get on their wavelength—and avoid missteps—if you're sensitive to their needs, interests, concerns and values. Everyone in every audience is different, but most audiences have many things in common. Use **PLAIN LANGUAGE** so everyone will know what you're talking about.*

6. Think before you speak! A pause can be your best friend.

Take a few seconds to think about what you're going to say. The audience won't mind the silence—in fact it will alert them that something important and interesting is coming up. Use the time to plan how you'll get from the specific attack to your core message. Only when you've decided what you're going to do should you start to talk.

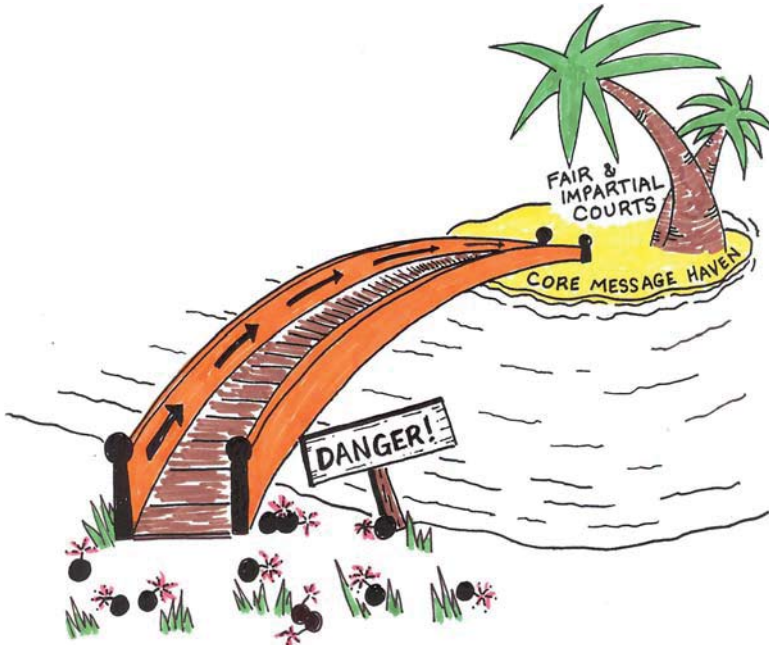
Bridge to Your Core Message

No matter how friendly or confrontational the questioner; no matter how loaded or straightforward the comment, you should treat every question with openness. At the same time, remember the reasons you're talking to this audience:

- To Counter the Critics
- To Support Fair and Impartial Courts.

Here's the easiest way to get from the question to your goal. We call it "Bridging."

Use the question only as a starting point to get to your Core Message. Remember, the thing you want your audience to take away is that America needs "Fair and Impartial Courts," so pause to decide how the question or comment relates to that point. When you start to talk, spend a little time talking about the questioner's specific issue, then broaden your point so you can bridge to your Core Message and finish with confidence.



Bridging Guidelines

Never debate

Research by the nonpartisan Justice at Stake Campaign shows that most Americans have little or no interest in slogans like “judicial activism” and “activist judges” and they rarely want to debate specific cases. What they DO agree with strongly is that “We need strong courts that are free from political influence.”

So don't waste time debating controversial decisions, arguing points of law or countering anti-court slogans. If an audience member insists on taking you there, you might offer to continue the conversation after the event. Meanwhile, use the issue to bridge to your Core Message.

Vary the length of answers, but be brief

Be polite and informative. You can tell a story from time to time to illustrate a point, but generally be brief—though not abrupt. You want to avoid being so short that you seem dismissive or confrontational.

Find different ways to express the Core Message

Repetition is a powerful tool so use it—your audience will remember the words “fair and impartial courts” if you say them over and over. At the same time, you'll want to avoid sounding like a broken record. So from time to time, you might turn to sports analogies for help.

- *“If we all want ballgames to be impartially refereed—when all that's at stake is a banner in the gym or a plaque on the wall—think how important it is to this democracy that our court proceedings be fair and impartial.”*
- *“Just as referees must follow the rules of the game, judges are held accountable to the Constitution and the Bill of Rights—not to politicians and special interests. Don't forget that court decisions must be published for all to see. And if someone feels the decision wasn't fair, they can appeal it to a higher court.”*
- *“Americans expect referees to stand up to the boos from the home team bleachers when they make an unpopular call. Just the same, they want strong courts to protect individual rights and to offer equal justice for all.”*

Fielding the Questions

There are three kinds of questions:

Softball

Hardball

Out of Left Field

All three types of questions can be managed, and with practice, they can almost always be managed well. Here are some guidelines:

Softball questions are the ones that give you relief, since you know the answer and are eager to get across the message it conveys. But remember, it's easy to sow seeds of discontent along the way. To that end...

- ***Pause and strategize.*** Recognize that your answer will give you a chance to deliver your Core Message—that Americans must do what they can to keep the courts as fair and impartial as possible. Use the “bridging” technique to fashion your answer.
- ***Spend a little extra time telling a story*** that will help support your Core Message. Your anecdote will help audience members understand and remember the point you're making.
- ***Use a pause*** to consider where you're going next, or whether you want to continue. Every time you add something new, you risk reminding the audience of some unpleasant courtroom memory, or of an issue about the judicial system that is divisive.

Hardball questions are usually asked in a confrontational manner. Everyone in the audience knows you've been challenged; they'll be eager to see what will happen next. Here's what to do...

- ***Break the tension*** by staying relaxed. Usually, a slight smile (not a smirk) while the questioner is still talking will signal to the audience that you're fine—the perfect way to retain control.

- **Don't debate the question.** *Instead, address the questioner's topic in a way that allows you to bridge to your Core Message.*
- **WARNING! Don't disregard the question or comment** and "leap" across the water to a message about Fair and Impartial Courts. *Audience members want you to show respect for the questioner by addressing the issue—but they'll nearly always be satisfied (and even relieved) if you use bridging to put the question in context and relate it to something they value, like Fair and Impartial Courts.*
- **Feel free to pause** as you decide what you're going to say. *The audience will wait. If your pause seems too long you can simply say, "Forgive me, please. I want to take a second to think about what I want to say." Then take the time you need to figure out where you want to go.*

Out of Left Field questions are the ones you haven't anticipated or know nothing about, and if you're certain that the audience agrees that it's too far removed from the event topic—and if you're equally sure you won't hurt the questioner's feelings—you can simply smile or laugh pleasantly and wave it off.

Nearly always, however, you'll need to give these questions and comments a fair hearing, so use a pause and figure out how you'll respond. Here are a few tips:

- **If there's an ally/expert in the room** who can help (the expression on you're ally's face should let you know), ask her to stand up and join you for the moment.
- **Use a pause** to decide if you know enough to answer briefly and to consider whether you can bridge to your Core Message.
- **If you don't know** about the decision, research or issue, feel free to say so. *Telling an audience, "I don't know enough to talk about that question" may be hard to admit, but audiences will find your honesty refreshing and they'll let you move on.*
- **Write down the "left field" question** as soon as you're done, then spend time figuring out how you'll answer it the next time it comes up. *Questions out of left field become softballs as soon as you've decided what you'll say.*

Real Questions You'll Probably Get

With the help of a few other people, including (and this is important) some who have no particular knowledge about the courts, you should brainstorm every question you might get and decide then and there what your response will be. You'll save yourself heartache and reduce the risk of misspeaking. After all, hot button topics morph into softballs questions when you're ready for them. Here are some questions to start with:

SOCIAL ISSUES

Abortion

When we had a liberal Supreme Court, abortion was legalized, but with the new conservative justices, most people expect that abortionists will become felons again. Aren't the courts more about politics than justice?

How can you defend liberal activist judges who rule that killing an unborn baby is not murder?

Adoption/Custody

Family courts do more damage than good in the name of "preserving the family." Judges give custody to parents who later hurt or even kill their children. They tear apart parent and grandparent relationships. And racial or sexual preference prejudice clearly colors many adoption rulings. Don't you agree that family court judges should be taken into custody when they do harm?

Medical Malpractice and Tort Reform

When incompetent doctors make terrible mistakes, don't you think that judges and juries should be free to award the victims or survivors as much as seems right?

Medical malpractice and product liability awards are so out of control that they force doctors to close practices and businesses to shut down. Don't we need control over the courts?

Same Sex Marriage

How can you defend any court that would threaten the sanctity of marriage—the real kind of marriage—by pronouncing it legal to allow marriages between gay men or lesbians?

Why is there any question about gay marriage? Why can't courts agree that the time to accept gay marriage has come?

* * *

CONSTITUTIONAL ISSUES

Activist Judges & Accountability

Why should we allow activist judges to legislate from the bench? Shouldn't we have the right to impeach them?

Don't you agree that our courts should reflect the values and traditions of the community and not the personal opinions of elitist judges?

Biased, incompetent and activist judges all over the country make decisions that ruin people's lives every day. Why aren't they ever held accountable for the damage they do?

Death Sentence; Death Sentence Appeals

Our system says that if a jury finds you guilty of a capital crime, you can be put to death. Why do we have to allow bleeding heart judges to overturn verdicts that are perfectly legal?

Isn't the death penalty appeals process far too costly in terms of time and money? Shouldn't appeals be limited?

The only thing we know for certain about the death sentence is that innocent people will be put to death. How can you defend a court system that gives the government the right to murder innocent men and women and call it justice?

If a judge hands down a death sentence and the person is put to death, and if that person is later proven innocent, shouldn't the judge be charged with murder?

Free Speech: Flag Burning & Pornography

Is nothing sacred? How can you defend liberal judges who allow demonstrators to burn the American flag?

The Bill of Rights guarantees the right of free speech and yet the courts are forever telling consenting adults that they can't purchase

or display certain books, photos and movies. Who gave the courts the right to declare that speech that hurts no one isn't free?

A judge ruled that a smut store can operate in our town. Something about the Bill of Rights and free speech. How can you, in all good conscience, defend a ruling like that?

School Prayer

With violence and drugs all around them, our children need God in their everyday school lives. We prayed every morning in public school when I was coming up and that's what should happen today. Don't you think the Supreme Court was wrong on this one?

* * *

THE COURTS THEMSELVES

Corruption, Election Campaigns and Cronyism

I recently heard a report about prosecutors who make deals with well-to-do people charged with crimes. If they'll donate money to the prosecutors' favorite charity or to a civic program, the charges are reduced or dropped. And this goes on in several states. How can they get away with that?

Judges often give lucrative appointments to friends and former law partners, naming them referees in bankruptcy cases, guardians or trustees of estates, or as implementers of complicated court orders. How can this cronyism be legal?

When a special interest group—real estate developers, for instance—donates millions to a judge's election campaign and the judge then rules in favor of that group, isn't that grounds for impeachment?

Decisions that Defy Logic or are Undecipherable

If we're to trust the courts, we need to understand their decisions and we need to agree that rulings make sense. (Questioner cites an example.) Why do many judges refuse to explain their decisions in plain English...and why do you allow rulings that don't make sense?

Evidence Rules that Hide the Truth from Juries

Judges often rule that evidence is not admissible for some arcane technical reason, and after the trials are done jurors feel they would have decided differently had they'd had *all* the evidence. Why should we trust a court system that lets judges load the dice?

Jury Duty

When I was on jury duty, the place they kept us was dirty and dingy, and no one told us what was going on. Why does the government allow the courts to turn our lives upside down and then treat us like cattle without brains?

Racial & Gender Bias; Reverse Discrimination

Study after study shows that blacks get more jail time and whites get less—or none—for the same crime. Juries are more likely to convict blacks, especially if the victim is white, and drug laws are written to ensure that young black men serve long sentences while white kids get off with a slap on the wrist. Since the courts refuse to fix this travesty, aren't we left to assume that the judges themselves are bigots?

Gender bias pervades America's courtrooms. Stereotypes, myths and biases color the way judges decide whether to admit evidence or determine sentences in rape cases. Biased judges devalue female witnesses, lawyers and experts; they trivialize domestic violence and sexual harassment; they devalue women and so-called "women's work" in civil cases; and their bias against both men and women colors decisions in child custody disputes. You talk about fairness and equality, but all we see is bias. When will this end?

Under what authority can courts rule that it's right to discriminate against whites when it comes to offering jobs and deciding who gets into college? If it's not right to discriminate against blacks or Jews or immigrants, why is it okay to discriminate against whites?

Speed, Fairness & Impartiality

Courts move so slowly and it's so expensive to mount a defense that righteous people lose reputations, livelihoods, family relationships, friendships and even their health while your so-called justice system moves at a snail's pace. How can you defend that?

Everyone knows that rich and famous people get justice and poor people—especially minorities—get jail. Even though you're part of the system and even though you believe in the system as a whole, don't you have to admit that's true?

It seems as if judges always believe the police and prosecutors. I've read that they believe men more than women, and they believe white people more than minorities or immigrants. Don't you get tired of pretending that our courts are fair and impartial?

More Questions

Real Answers: Putting Bridging to Work

For a Question on Social or Cultural Issues

This answer starts by putting the issue in perspective and steers clear of entering into a debate (which is the “mine field”).

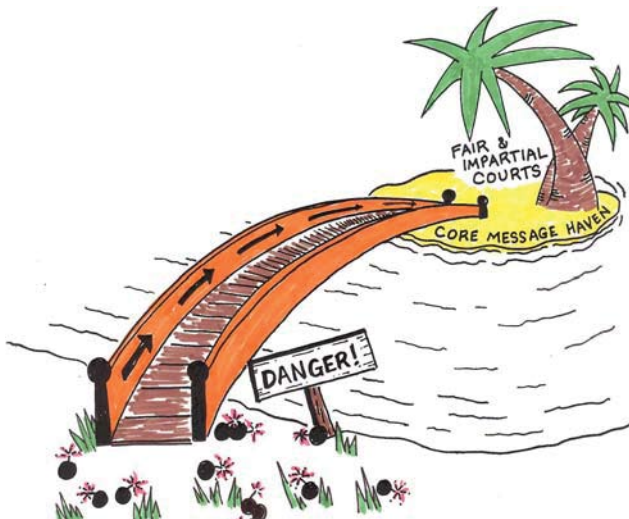
“Abortion, same sex marriage, stem cell research, school prayer (include the questioner’s issue)—these are social and cultural issues of our time about which we have widely differing opinions.

Continue by bridging away from the issues toward the safe haven of your core message...

“These issues are brought into our courts; the courts do not invite them. But one thing is certain—they must be decided according to the law; they must NOT be decided according to which side is the noisier, or which side has more demonstrators outside the courthouse.

Finish firmly, but graciously, in the Core Message haven:

“It is the law that looks at each issue, however difficult, with an impartial hand. Each side of the argument is treated fairly and equally. And that, after all, is where we can all agree.”



For a Question on Constitutional Issues

This answer uses the same approach as the first. Don't debate the issue or point of view—that's the mine field. Instead, begin by framing the questioner's issue and putting it into context.

Let's say the questioner wants you to agree that "activist judges" should be replaced "with judges who honor the Constitution as the Founding Fathers intended." Here goes:

"I'm going to assume you're asking about federal judges and the terms that they serve—terms that are set in the Constitution. The Founding Fathers were very clear that there must be three co-equal branches of government. And they were also very clear that the judicial branch (the courts) must be independent of the executive (the president and his various departments) and of the legislature, the Congress. They knew that the president and members of Congress would be beholden to the individuals and special interest group members who elect them, and they wanted judges to be distanced from those pressures. So the Constitution says two other things about federal judges: First: They serve for life, as long as they exhibit "good behavior"—whatever that means! And secondly: No one can reduce their salary.

Continue by bridging toward your core message.

"Why did the Founding Fathers make it so hard to remove judges? And why can't the president or Congress cut judges' pay if they don't like their decisions? Because the Founding Fathers wanted judges to be accountable only to the Constitution and the laws of the land. Judges are, after all, the nation's referees, and just as we wouldn't tolerate it if a team owner could fire a ref if he didn't like a call, or cut his salary, we don't want anyone bullying our judges when they don't like a decision.

As you arrive at the safe haven, finish your answer with your Core Message.

"In other words, the Founding Fathers did everything they could to keep you and me and the president and Congress from trying to influence judges and justices. They knew that fair and impartial courts are essential to our democracy. After all, that's where we go when we need someone with great power who will uphold our Constitutional rights."

For a Question About the Courts

These may be the most difficult questions to answer because they're often built around truisms: that a court or judge, law or set of rules is neither fair nor impartial, neither guarantor of civil rights nor well-mannered or even civil.

Just as you shouldn't debate a social or Constitutional issue, you shouldn't challenge the questioner's criticism as long as it seems reasonable. Instead, accept that the courts must uphold the law while being fair and impartial, respectful and polite...and move on from there.

The question this time is about federal mandatory sentencing rules that, according to studies, have put a disproportionate number of blacks in prison for disproportionately long amounts of time.

As always, start by framing the issue while avoiding confrontation.

"Many...perhaps most people familiar with the courts would agree that mandatory sentences ordered by Congress—however well intentioned—can cause serious problems. They're one-size-fits-all laws with one important exception that's become quite controversial: When it comes to the various forms of cocaine, Congress says sentences for dealing crack cocaine—where most defendants are black—must be much stiffer than sentences for dealing powder cocaine—where most defendants are white. If you're a non-violent first-offender and you're convicted of trafficking 50 grams of powder cocaine (that's less than 2 ounces), you'll serve two years in jail. If you deal the same amount of crack, you'll serve ten.

Now bridge to your core message:

"Lots of judges and observers think the federal courts that hear these cases should also determine the punishment, but the mandatory sentencing laws were written to ensure consistency from court to court, so judges have little leeway. A young person who shows great promise gets the jail time that Congress has ordered. Period. And if that young person sold crack, the sentence is going to last a long time. Your question is really about fairness, impartiality and colorblindness. It's a valid question.

Finish firmly in your Core Message haven...

"But until federal mandatory sentencing laws are rewritten by Congress, judges are bound to apply them as they now exist. Remember, judges do not write the laws. They must abide by the laws as they are written—even if they disagree with them. A judge's absolute duty is to follow the law and to uphold it."

Helpful Hints

Maintaining Control

- Look at the person as they ask their question and maintain good eye contact as you begin to answer. Then start to look at others in different parts of the audience as you speak. That way, you'll visually include others in the conversation.
- Keep your hands free to gesture. If you're unsure or uncomfortable, your hands will dive into your pockets or reach for each other and clasp; your arms will cross in front of your chest. Don't let them do that! Stay "open" and use your hands to gesture.
- Stand your ground or move forward—even when the question feels like an attack. Stepping back signals that you're on the defensive.
- Allow a follow-up question, but only one. Explain that you want to give everyone a turn.
- If a questioner won't let go, suggest that you'll be happy to continue the conversation afterward, but that it's time to let others have a turn.
- Break tension with a smile: A relaxed smile while someone's asking a question in a rude way tells the rest of the audience that you're okay. And a smile as you greet a new questioner says you're happy to make their acquaintance.
- Choose the time when you will end the Q&A portion of your presentation, retake control and finish with your prepared "second close." If you've forgotten that tip, return to Page 4—Q&A: Six Top Tips. The one about a "second close" is tip number 2.

Never Repeat Negative Accusations!

It's frighteningly natural to repeat accusations made against you or—in this case—against the courts, but the impact of hearing you do that is dreadful: you instantly give the accusation credibility. Listen to how this sounds:

Q. "Aren't all judges just power hungry narcissists?"

A. "No, all judges aren't power hungry narcissists."

Instead of repeating the accusation, answer the question positively, on *your* terms. As...

Q. "Aren't all judges just power hungry narcissists?"

A. "Judges know that their authority comes from the Constitution and from the law. Actually, it's most often a wonderfully humbling experience to be a judge."

We invite you to think of negative accusation as the bait in a mousetrap—the cheese, if you will. Our advice? Don't bite!



Assume that Reporters Are in the Audience

We hope you'll think of the reporter as someone who'll give you the opportunity to talk to an even larger audience. If you were happy to talk with this audience of 50 or 500, we hope you'll be glad that the reporter might spread your messages even more widely.

So if a reporter comes up to you after your talk, we encourage you to think of the interview as another phase of the presentation. Focus on the *media* audience's interests this time, and give them more of the same important views.

Notes

