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Law

iPhones and oral argument

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One of my more uncomfortable moments in the appellate courtroom occurred about a year ago when, as I waited for my case to be argued, somebody called my client's cell phone during the oral argument of the case immediately preceding ours. I didn't think to ask my client to turn off the phone prior to entering the courtroom. But, in my defense, she really did not seem the type with the kind of ringtone which could penetrate any background noise barrier and be heard, just in case her BFF absolutely had to talk to her, even in the final two minutes of a game at M&T Bank Stadium. Too bad we weren't watching Joe Flacco and the Ravens when that call came through.

There are not too many places a lawyer can hide in that situation, but I nevertheless did my best to create as much distance between me and the noise as allowed by the rules of professional conduct that prohibit lawyers from abandoning their clients, by leaning ever so slightly away from mine, who had a little bit of trouble finding the phone's silence button.

To say that the event traumatized me would be an understatement. By the time peace was restored, I was pretty sure, at least as sure as a person could be after listening to one of the judges make a pointed comment about the somewhat prolonged interruption which had just occurred, that the only association I would ever make between iPhones and oral argument would be a negative one.

But that was before witnessing a recent appellate argument in which an iPhone gave rise to one of the most clever oral advocacy moments I have ever seen.

Outside the record

The appeal involved a criminal defendant who challenged his convictions on the ground, among others, that the trial court erroneously permitted the State to base its closing argument on facts which were not in evidence. An issue arose at trial concerning the veracity of the defendant's testimony that he used a charger for his phone, which he testified was not an iPhone.

Although there were two photographs in evidence of a white phone charger, there was no testimony as to the type of phone charger it was. Nevertheless, citing the defendant's acknowledgement that he did not own an iPhone, the prosecutor told the jury during closing argument that the defendant could not have used the phone charger because it was for an iPhone.

On appeal, the defendant argued that the trial court erred by allowing the prosecutor to impugn the defendant's credibility in this manner because there was no evidence that the phone charger in the photos was an iPhone charger. At oral argument, the State's lawyer conceded there was no such evidence in the record. He contended, however, that the trial court did not err in overruling the defendant's objection to the prosecutor's closing argument, arguing that Apple sells millions of iPhones, that it is common knowledge iPhones use white chargers such as the one depicted in the photos, and that the jury could reasonably infer on the basis of this common knowledge that these were photos of an iPhone charger.

The negative association I previously made between iPhones and oral argument completely vanished upon watching the way in which the defendant's counsel responded to this argument at the conclusion of his rebuttal.

After spending time addressing other issues which had come up during the State's argument, the lawyer for the defendant held up a phone charger. It was still in its original packaging and, as the judges could plainly see, it was white.

As one of the judges exclaimed "no, no, no" and waved his hands in response to what was taking place at the lectern, the defendant's lawyer said something to the effect that the charger was not for an iPhone and that he hoped he could return it to Radio Shack because he wasn't sure what he did with the receipt. Then he sat down.

The judge's somewhat animated reaction made clear his view that the defendant's counsel had transgressed the well-settled rule that courts are confined to the record when deciding cases. But that transgression is what made the rebuttal so effective, at least from my perspective as a neutral observer of this argument.

The defendant's counsel went outside the record to illustrate in a very concrete and creative way that the State violated the same rule he did when the prosecutor argued to the jury that the charger depicted in the photos was for an iPhone. The jury had no more basis than the appellate court did for drawing inferences about the type of charger it was based on the record in this case.

Just so I'm clear and do not draw the ire of any appellate judges, I am not suggesting that lawyers should feel unshackled at oral argument by the record in their cases. Illustrating your point by using a hypothetical which varies the facts of your case is one thing, but it's quite another to take liberties with the record or wander beyond it.

On the other hand, just because something is not in the record does not necessarily mean it's off limits. Just be careful.

And don't forget to turn your phone off. Unless, of course, you have a point to make. Or want to traumatize someone.

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