



# MASTERING THE Unscripted Moment

remember what I was thinking as if it were yesterday.

“This oral argument is a big deal. For the past two years, we have been slogging through discovery. Expenses are high and client expectations are even higher. The scales may tip just in our favor if I pull off this argument and the judge grants summary judgment.”

I prepared for days. I crafted a detailed outline, old-school style: handwritten, on a yellow legal pad. I entered the courtroom, sat at counsel table, and laid out my materials. It was then I discovered my yellow legal pad was gone. If I could have run, I would have. But before I could even look for someone to help, the judge took the bench. My only option was to forge ahead without my trusty legal pad.

“May it please the court . . .”

While lawyers tend to seek out certainty and structure, sometimes a hearing, mediation, meeting, or negotiation does not go as planned. You have to respond to what is happening differently than how you anticipated. Being careful and confident when going off script might be the positive deciding factor in the courtroom or at the negotiating table. So, how do young lawyers master the unknown, off-script performance? How do we prepare for the unexpected?

Going off script does not mean doing something that you aren't prepared to do. Be prepared for any eventuality. In fact, it is the unscripted moment that teaches that preparation is crucial. To be able to go off script, you have to do three things:

1. master both facts and law;
2. learn the big picture; and
3. develop and internalize the themes and theory of your case.

Mastering the facts and law of a case means you have to carefully review all relevant materials: all evidence, all documents related to a deal, any statements of the client's expectations, and the background of key witnesses or negotiating partners. You should read all relevant cases, statutes, and regulations, and be prepared to summarize the law without notes. Mastering the facts, in detail, will give you the upper hand and the confidence to change course if necessary.

To understand the big picture, you must learn how the transaction or dispute fits into your client's business or personal plans. How is the client positioned in its industry? How will this transaction or dispute affect such a position or the industry as a whole? What are the client's personal goals, and how does the matter affect those aspirations? Grasping the big picture helps you understand where the path you

are on leads. Understanding the industry of your client and the background of a dispute makes it safe to go off script because you understand how all the facts you have memorized and all the law that you have researched fits into the big picture. If you're only focused on a narrow issue within the broader dispute or transaction, you can't responsibly go off script because you won't know if what you are saying is good or bad in the long term.

Finally, you must develop a strategy and build the narrative that you will use to accomplish that strategy. Before you go to the meeting, negotiation, hearing, or mediation, outline the big picture and themes that have come up through all your preparation. Use an example to illustrate why your argument is correct. In one or two sentences, summarize the dispute and why it should come out your way.

If appropriate, think about the implications that a decision in your favor would have on future disputes or on the relevant industry, then craft a one- or two-line argument about why a win for your side would benefit others similarly situated to your client. Craft another short argument that describes why a win for your side is a win for the party on the other side of the courtroom or the negotiating table. This is a great way to both script and also prepare for going off script if needed. Remember that your unscripted remarks and arguments must fit within your overall goals.

## WHAT TO DO ONCE YOU GET OFF SCRIPT

Be confident and remember the big picture: You have already memorized themes and your best arguments—now adapt them to the situation. Use your preparation to make the unanticipated moment swing in your favor. For example, you may want to bring up a piece of evidence that you internalized but had not intended to address. Trust what your gut tells you.

Be in as much control of the situation as possible. Being in control might feel difficult when you are a young lawyer, but remind yourself this is your presentation, and you determine how it will turn out. Control the interaction through words, your voice, and how you react to opposing counsel and negotiating partners. Mold those interactions to your strategy. Be aware of your nonverbal cues and how they are interpreted by others. For

example, even though you may be nervous, consider keeping a steady, low tone. People will often lean in and engage with you when your tone is calm and matter-of-fact instead of strident.

Take comfort knowing that going off script for a short time is often the responsible thing to do. It is crucial to listen to what is happening in the meeting or hearing—to the mood of a room in a negotiation or the way a decision maker is thinking about something. The best advocates are great listeners. By observing and listening to what is happening, you can uncover what subjects are most important to a successful outcome.

Have your antennae up to non-verbal cues of others. Unspoken hints can be as important as verbal cues to show you where key issues lie, and how an argument or tactic is affecting a client, a deponent, or a decision maker. If you religiously stick to your script—your crutch—you may not be providing the best possible service for your client because you might not be addressing the things that are really important in the moment.

After you address a point that seems key to the others in the room, you typically should work hard to get back on script. There is a lot of merit to your script—it is after all what you thought important after extensive preparation. Do not worry about whether the transition itself is a bit awkward. Find your favorite transition phrases and practice them out loud to yourself. For example:

“Your Honor, I will now turn back to the primary argument in our brief.”

If you have a few of these phrases crafted in your mind, you will be able to recall them quickly.

## AVOID PITFALLS WHILE OFF SCRIPT

What should you avoid when off script?

First, remember that you represent a client and your actions are those of your client. If a situation arises that you have not discussed with your client, and you don't know how your client would want you to respond, do not make a commitment without client approval. The client is almost always your highest authority. Feel comfortable and confident putting off a response until you have fully vetted it with your client.

Second, don't allow the pressure of the moment force you in a direction that you do not want to go. You had a goal when you sat down at the negotiation or deposition table; do not let the pressure of opposing counsel or fear of the unknown convince you to accede to the position of others. If you have to, excuse yourself and take a quick break to recompose yourself. A properly timed break can be invaluable.

Finding opportunities to go off script can be difficult because so many experiences are high risk. A key aspect of making yourself comfortable is practice. Ideally, such practice should be non-threatening.

Find a good mentor who will give you the freedom to learn. Volunteer to put on CLE presentations or to speak at bar association functions and other events where you will need to master a subject area so you can be tested on your feet. Even if the questions and answers come at social gatherings or at dinner following a more formal presentation, such interactions help test your ability to respond quickly and confidently to the unexpected. Consider volunteering on pro bono matters where you are the primary point of contact but still have the comfort of being supervised by a more experienced attorney. Such experiences are both innately rewarding and greatly help to develop the self-confidence needed to go off script.

Remember that time I forgot my legal pad? In that moment, standing at the podium, client to my right and opponent to my left, I needed to go off script—fast. I knew I was prepared, because I had worked for days on the argument. The detailed operative facts had been crafted into a story that made sense within the broader context of my client's business, and the law was well established. I did not have the crutch of my yellow legal pad, but I had the confidence to ask the court for a moment as I jotted down three major points. One by one, I ran through the argument as if the script were in front of me. Only after the celebratory lunch with the client would I find out that my trusty legal pad was sitting on the middle of my office desk, just where I left it.

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