

‘Mr. Boutrous, You Have 4 Minutes’: On Rebuttal With Ted Boutrous of Gibson Dunn

In the first installment of our series getting masters of certain litigation skills to discuss their craft, the *Litigation Daily* digs into rebuttal arguments with Boutrous.

By Ross Todd
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Rebuttal arguments are where preparation opens the gate to improvisation.

They are the last chance for a litigator to make their best points, poke at an opponent’s weak spots, or address the concerns of a judge. Or maybe even do all three, if you have time. That’s the thing. The clock is ticking. And depending on how inquisitive the judge or judges are, the target could be a moving one.

I asked the question “Who’s the Best You’ve Ever Seen?” in a column earlier this week in hopes of shaking loose a few suggestions from readers about people who have mastered a particular slice of being a successful litigator. But I’m going to start this series with one of the best I’ve ever seen at rebuttals: **Ted Boutrous of Gibson, Dunn & Crutcher**.

“I have found that oftentimes, you can make your most powerful articulation of the argument in rebuttal because you’ve heard everything,” Boutrous told me when we caught up via videoconference yesterday. “It brings it home. You can just drill down and make the final pitch on the key issues because everything kind of gets crystallized during everything that precedes it.”

Boutrous has a way of making the high-wire act of fielding judges’ rapid-fire questions while making



Ted Boutrous of Gibson, Dunn & Crutcher speaks via video to Ross Todd, editor and columnist with ALM, on August 24, 2022.

his final points sound smooth in the moment. And he’s among the only advocates I know who is persuasive enough to tell Justice Elena Kagan “That’s incorrect, Your Honor” to her face during a spicy rebuttal exchange and still get her vote in a unanimous decision. He did that in 2013’s *The Standard Fire Insurance Co. v. Knowles*, a decision barring class action plaintiffs from stipulating low damages to keep a case in state court. You can hear the exchange yourself around the 57:52 mark in the oral argument found here.

But when we talked yesterday, the first rebuttal Boutrous brought up was in a separate SCOTUS case: 2011's *Wal-Mart Stores Inc. v. Dukes*. During his rebuttal there, Boutrous took a moment to agree with a concept Justice Sonia Sotomayor raised about plaintiffs potentially using company records to build gender discrimination claims. That allowed him to make a broader point about why the claims weren't appropriate for class treatment.

"Yes, Your Honor, what you've just outlined, we agree that a woman should be able to come in and say that, and she may say 'Well, the records don't show what really happened,'" Boutrous said around the 58:00 mark here in response to the justice. "I had more experience; I was a much better employee than the guy working next to me.' Under the plaintiff's theory in order to get a class here, they have thrown that out the window; that woman would not be able to come and testify."

Looking back at the *Dukes* argument, Boutrous called the moment "a doubly nice thing."

"I can embrace her position, use it to attack what the other side had just said, and then go back to our bigger picture points," Boutrous said.

How does Boutrous prepare for rebuttal moments like these? He told me that even though he's 61, his preparation looks much like it did when he was a law student preparing for a test. "I'm reading cases, reading briefs. I'm outlining and then I'm spring-loading myself with all this information so

that you're ready for whatever comes your way," he said. He said his moot arguments aren't geared directly toward rebuttal. But some of the questions he faces in Q&As—which he practices answering aloud—do come up.

Even with all that preparation, Boutrous said about 70% of what he says during rebuttal is improvisation. "You're dealing with it from another vantage point," Boutrous said. "You're reacting to the point that the lawyer on the other side has made and then linking it to the core arguments that you think are the winners for you or to what a judge or justice has said in the top side argument," Boutrous said.

Sometimes he'll have a loose-leaf stack of papers where he'll write out the key points he wants to make in rebuttal and he'll arrange them like note cards during the argument that he can shift around depending on the order he wants to proceed. Sometimes, he'll just write down about five key points in shorthand on a single page.

"But you also need to keep listening to what's happening," Boutrous said.

"You're having to be your own editor on the fly, and figure out 'How am I going to package this? What am I going to hit?'" Boutrous said. "It really is a combination of both responding to key points the other side made, addressing concerns that the judges or justices were making when they were questioning the other side, and then getting back to the basics of your affirmative themes."

Sounds so smooth.