

## IV. THE ORAL ARGUMENT

### A. Introduction

The primary function of the oral argument is persuasion. There are two essential elements in presenting an effective oral argument: (1) an accurate and complete understanding of the facts and law; and (2) a confident, passionate, and flexible delivery.

### B. The Presentation

#### 1. *Mechanics of the Presentation*

Facing the bench, Petitioner's counsel ("Petitioner") sits to the left of the podium, Respondent's counsel ("Respondent") to the right. The bailiff will call the court to order. As the judges enter, all present should rise. The bailiff will then state the name of the case and ask Petitioner if he or she wishes to reserve rebuttal time. The bailiff will instruct the courtroom to be seated and the argument will commence.

The argument proceeds in the following order: (1) Petitioner's Opening Argument; (2) Respondent's Argument; (3) Petitioner's Rebuttal. Petitioner argues first, presenting his or her Opening Argument. Petitioner has fifteen (15) minutes minus any time reserved for rebuttal as designated at the beginning of his or her argument when asked by the bailiff. Petitioner may reserve **no less than one (1) minute and no more than three (3) minutes** for rebuttal. Respondent then argues for fifteen (15) minutes. Respondent may not "reserve" any time for rebuttal. Finally, Petitioner uses his or her "reserved" rebuttal time to address any arguments made by Respondent.

The bailiff will keep time and show the time remaining through use of a series of cards — "5" minute, "2" minute and "0" minute cards. Each card designates the *time remaining* in the argument.

Participants should begin his or her presentation with the following customary introduction: **"Good [morning/afternoon] your honors and may it please the Court, my name is [your name], counsel for [Petitioner / Respondent], [name of client]."**

#### 2. *Recitation of the Facts*

Petitioner should offer the court a brief statement of the facts. The court will either ask you to recite the facts or instruct you to proceed with your argument. If the court asks for a recitation of the facts, the facts should be presented in a way most favorable to your client. However, as with the Statement of Facts in the brief, the facts should be stated concisely and accurately; do not stretch the facts and do not speculate as to the existence of, truth or falsity of the facts. If the court instructs you to proceed with your argument, you should still discuss the facts that are critical to the case in the body of your presentation.

Respondent should not repeat a statement of the facts. Instead, he or she should listen to Petitioner's characterization of the facts and point any out omissions or mischaracterizations. Like Petitioner, Respondent should discuss facts to bolster the arguments he or she will make.

### 3. *Body of the Presentation*

The argument should begin with a clear statement of the key points and contentions. Emphasize the strongest points first. Be aware of time constraints. Do not save the best point(s) for the end. In presenting the argument, do not discuss every case and argument used in your brief. Also, weave the facts of the case into the argument, and compare and contrast the facts of cited cases with facts from your case.

Leave approximately one minute of your allotted time to summarize your argument. The summary should be a strong reiteration of the major points and should remind the court of what action the court should take (i.e., affirm or reverse). If time runs out before you have summarized your argument, respectfully ask the court for a minute to summarize. Although some courts may allow a short summary beyond the time allotment, others may not. If the court allows you to summarize, do so very quickly, being mindful that your allotted time has expired and the court has graciously allowed extra time for a conclusion. If the court does not grant extra time, thank the court and sit down.

Participants should listen carefully to what his or her opponent says. More importantly, listen to the questions the judges ask. Those questions will give you clues about the court's concerns. Be flexible enough in your outline of arguments to incorporate anything learned through listening to your opponent's arguments and the judges' questions. This will assist you in attacking any weaknesses in your opponent's arguments and address the court's concerns before they ask you difficult questions.

A Petitioner in rebuttal *cannot raise new legal arguments*. Instead, he or she should systematically respond to all strong points made by Respondent.

### 4. *Concluding Your Presentation*

When the bailiff holds up a card with a zero on it, that means you have run out of time. If you are still speaking when you see the zero card, **finish your sentence**. Here are some common situations and suggested responses:

- A. If you are the Petitioner and you see the zero card during your **opening argument, finish your sentence** and then say, "Your honors I see that I am out of time, I would like to save the rest of my comments for rebuttal" and sit down.
- B. If you are the Petitioner and the bailiff raises the zero card during your **opening argument** while a judge is asking you a question, say, "Your

honor, I see that I am out of time would you like me to answer your question.” Generally, the judge will give you an opportunity to answer the question. After you finish answering the judge’s question, say “I would like to save the rest of my comments for rebuttal” and sit down.

- C. If you are the Respondent and you see the zero card during your argument, **finish your sentence** and then say, “Your honors I see that I am out of time, may I have a brief moment to conclude.” If the judges allow you to conclude, make sure it is brief.
- D. If you are the Respondent and the bailiff raises the zero card while a judge is asking you a question, say “Your honor, I see that I am out of time would you like me to answer your question.” Generally, the judge will give you an opportunity to answer the question. After you finish answering the judge’s question, say “Although I am out of time, may I have a brief moment to conclude.” If the judges allow you to conclude, **make sure it is brief**.
- E. If you are the Petitioner and the bailiff raises the zero card during your **rebuttal**, say, “Your honors I see that I am out of time, may I have a brief moment to conclude.” If the judges allow you to conclude, make sure it is brief. Similarly, if the bailiff raises the zero card while a judge is asking you a question, say, “Your honor I see that I am out of time, would you like me to answer your question.” After you answer their question, say “Although I am out of time, may I have a brief moment to conclude.” If the judges allow you to conclude, make it brief and then sit down.

If you finish your argument before you see the zero card, present your concluding remarks, say “thank you” and then sit down.

##### 5. *Handling Judges’ Questions*

An important requirement in oral argument is to listen to what the judge is asking and answer directly. If a question can be answered “yes” or “no,” do so first and *then* explain. Keep your answers short and to the point. If possible, use the answer to lead into your next point to be covered. If unsure about a judge’s question, respectfully request that it be repeated or rephrased. Do not try to bluff when you are unfamiliar with a case or you do not know the answer to a question a judge asks.

Do not assume that all questions are hostile. Sometimes a judge will ask a friendly question, colloquially referred to as a “softball.” Recognize it, and use it to your advantage. Be prepared for policy questions, hypothetical situations and questions about the cases cited in the briefs. When a hypothetical can only be answered truthfully in a way that appears to be adverse to your position, distinguish the hypothetical situation from your client’s case.

Above all, never interrupt a judge, never argue with a judge, and never respond to a question with “I’ll get back to that.” Always answer the question when asked and move on to your next point.

## 6. *Style*

There is no “correct” style in appellate advocacy. However, there are some general guidelines which may help.

Avoid saying “I” or “we.” Instead, say “Petitioner” or “Respondent” or “my client.” For example, say, “It is my client’s position that . . .” rather than “I feel that . . . .”

Judges may have trouble concentrating on the argument when other irritating distractions are present. Some common distractions to avoid include the following: visible or distracting jewelry; noisy items in pockets (coins, keys, etc.) that might be handled when nervous; a pen or pencil at the podium which can be used as a pointer; and constant removing and replacing eyeglasses during argument. A more common problem is nervous dancing around the podium. You should practice planting your feet and keeping your hands out of your pockets. Slight, natural movements, such as turning to face the judge who is questioning you, are expected and perfectly acceptable. Avoid leaning from side to side, leaning on the podium, and making excessive gestures.

The most important aspect of oral arguments is that you be heard and understood. Speak slowly, clearly, and loudly so that judges can easily hear you. It is very important to pause and collect your thoughts when answering questions. It is far better to ask the court for a moment to think than to leap into a disconnected, rambling answer. Eliminate all “uhs” and “ums.” If you anticipated a particular question in preparation, do not read a prepared response to the question. Instead, look directly at a judge when a question is being asked and answer from memory. Throughout the argument, maintain eye contact with the judges, looking down only when necessary.

## 7. *Deliberation by the Court*

At the conclusion of the arguments, the bailiff will announce a recess and the judges will retire (in the courtroom) to deliberate. All present must leave the courtroom. Once the court reaches a decision, the court will announce its decision. The court’s decision is based on the quality of the oral presentations, not on the merits of the case. The judges will then critique the oral presentations and briefs. After the judges have provided their feedback, they will generally be available for informal discussion regarding the brief, the oral argument, and any questions you may have about the practice of law.

### C. Preparations

There is only one “secret” to effective oral presentation of legal matters: know what you are talking about! Lack of preparation is painfully obvious. Lawyers make oral presentations on a daily basis — to a court, to a client, or to an opponent.

Prepare, relax, and see how rewarding an experience it can be. Practice makes perfect!