

## **Performing Your First Appellate Oral Argument**

Oral arguments can be one of the most anxiety-producing, challenging, and at the same time, fun, experience for law students and litigators. Many students who initially fear this experience walk away with exhilaration because of the intensity of the intellectual challenge. Although an oral argument consists of the advocate standing up in front of a panel of judges and talking, it is quite different from your typical “public speech.” A student who may think that he or she hates to speak in public will realize that the ultimate success of an appellate advocate depends much more on understanding the law and facts of one’s case, anticipating and addressing questions from the court, and developing a coherent theme for one’s case. Therefore, do not fret if you do not think of yourself as a “good public speaker” because effective oral advocacy can be achieved by preparation focused on areas other than pure speaking ability.<sup>1</sup>

This article will provide many pointers in how to achieve success in your oral argument, by walking you through preparing for the argument, explaining what happens at oral argument, and warning of potential pitfalls.

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<sup>1</sup> Judge E. Barrett Prettyman gives the following advice for success in appellate advocacy: “The answer is quite simple. It is: By work.... There is not other road to success at the law. Work. More work. Then more work.” E. Barrett Prettyman, *Some Observations Concerning Appellate Advocacy*, 39 Va. L. Rev. 285, 301 (1953).

## A) Importance of Oral Argument

Oral arguments at the appellate level have undergone many changes since the original arguments at the U.S. Supreme Court. For example, before 1849, the Supreme Court did not limit the length of oral argument. Daniel Webster, Luther Martin, and their colleagues are said to have argued for six days in *McCullough v. Maryland*.<sup>2</sup> The importance of oral arguments during that time period was further emphasized because up until 1821, the Supreme Court did not even require written briefs.<sup>3</sup>

Although the written appellate brief has much more prominence in presenting facts and legal issues to a court in current appeals than it did in the days of Daniel Webster,<sup>4</sup> the oral argument serves to clarify issues that are troublesome to the court. Chief Justice William Rehnquist reminds lawyers that in the appellate system, the oral argument “is the only opportunity that you will have to confront face to face the ... Court who will ponder and decide your case. The opportunity to convince [the Court] of the merits of your position is at its highpoint....”<sup>5</sup> Justice Ginsburg explains that

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<sup>2</sup> Nancy Winkelman, *Just a Brief Writer*, 29 NO. 4 Litigation 50, 51 (Summer 2003).

<sup>3</sup> *Id.*

<sup>4</sup> According to records kept by the Administrative Office of the United States Courts, for the 12-month period ending September 30, 2002, 67.1 percent of appeals that were terminated on the merits in the 12 circuit courts of appeals were decided on the briefs alone, without oral argument. *See id.* at 51; *see also* Henry Gabriel and Sidney Powell, *Federal Appellate Practice Guide: Fifth Circuit 7-1* (5<sup>th</sup> ed. 1998) citing Judicial Workload Statistics, United States Court of Appeals for the Fifth Circuit, Clerk’s Annual Report (1996) (In 1996, the United States Court of Appeals for the Fifth Circuit granted oral argument in only 28 percent of the cases.)

<sup>5</sup> Chief Justice William Rehnquist, *Oral Advocacy*, 27 S. Tex. L. Rev. 289, 303 (1986).

“several potential winners become losers in whole or in part because of clarification elicited at argument.”<sup>6</sup> According to Judges Myron Bright and Richard Arnold of the United States Court of Appeals for the Eighth Circuit, oral argument was “helpful” in decided cases about eighty percent of the time, in terms of assisting with the framing of the issues and clarification of reasoning.<sup>7</sup> Judge Bright said that the oral argument actually changed his mind in thirty-one percent of the cases, and Judge Arnold said it did in seventeen percent.<sup>8</sup> So “while various estimates suggest that oral argument influences the decision in far fewer than half of all cases, judges agree that oral arguments influence them in a significant number of cases.”<sup>9</sup>

## **B) Preparation for the Oral Argument**

In the days and weeks leading up to the first oral argument of your law school career, you may think about or hear some of the following:

“So how are we supposed to prepare for this oral argument”?

“How do I deal with being so nervous”?

“I hate speaking in public. I will never be a good lawyer.”

First of all, to debunk a few myths:

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<sup>6</sup> Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. Law R. 567 at 570.

<sup>7</sup> Myron H. Bright & Richard S. Arnold, *Oral Argument? It May Be Crucial!*, 70 A.B.A. J. 68, Sept. 1984.

<sup>8</sup> *Id.* at 70

<sup>9</sup> Michael Fontham, Micahel Vitiello, and David W. Miller, *Persuasive Written and Oral Advocacy in Trial and Appellate Courts*, p. 154 (2002)

- You CAN prepare for this experience and you WILL get better with preparation and practice.
- EVERYONE is nervous. Nobody can tell that you are more or less nervous than the person who went before or after you. And there are ways to deal with this.
- The skills, knowledge, and understanding needed to deliver an oral argument are much different than simply being a good public speaker.
- Do not be so hard on yourself even if doing oral arguments doesn't come easy at first. First of all, not all lawyers even do oral arguments at the appellate level; and secondly, even if you are not comfortable at first, you will get better.

How, then, should you plan for and achieve the successful argument?

- 1) *Re-read the briefs.* This will allow you to re-familiarize yourself with the major legal and factual points of the case. Your oral argument will then allow you to state your best points more persuasively and forcefully, to clarify points you did not make so well, and will allow you to address points made in your opponent's brief that you did not anticipate when writing your original brief.
- 2) *Review the record and KNOW the facts of the case.* It is amazing how much one can forget about the crucial facts of the case between initial review of the record, writing the brief, revising the brief, and then having to deliver an oral argument on the same set of facts. Several weeks will pass in the semester (and even longer in real-life) between your initial introduction to the facts and your final oral argument.

Also, remember that during oral argument, you should be the expert on the facts and will have to answer questions from the panel on these facts.

- 3) *Reread the important authorities relied upon by each side.* Judges will most likely be familiar with these authorities, so be prepared for many questions on the holdings of these cases as well as the reasoning behind the relevant holdings. Also, be sure to update the authorities. Make sure that the authorities relied upon in your brief are still “good law” and check for any recent developments which may affect your ultimate argument. You can be sure that your opponent will do the same.
- 4) *Create a theme that will unify the points of your argument.* Choose a central theme to focus and strengthen your argument. If you can tie the issues into an overriding reason that your side deserves to win, you will be able to deliver a clear and concise message throughout the little time that you have during oral argument. This theme not only sets the tone for the oral argument at the beginning, but as an advocate, you will be able to come back to it as you answer questions, permitting you to always get back to a central message. Furthermore,

using a theme allows you to conclude with a final message to leave the court with the strength of your case.

5) *Anticipate and prepare responses to likely questions.* More discussion will be given to the type of questions you are likely to face and how to deal with them later, but in your preparation stage, you should go through your brief and play “devil’s advocate.” What are your weak points? What, in your opponent’s brief has given you most difficulty in answering? What questions do you dread? Although this may sound a bit masochistic, it is certainly better to spend additional time BEFORE the argument preparing candid answers to these types of questions than it would be to look flustered during the actual question. Also, nothing looks better than giving a great answer to a question that the judge thinks is going to stump you. Also, nothing feels better than having a ready answer and watching the judge nod in approval to dealing with a potentially hostile situation.

6) *Prepare a BRIEF outline of your argument.* This outline should be on a single sheet of paper, or some professors and lawyers suggest using the interior of a manila folder that you can open up before you on the podium. You simply want to put your major points on the outline and use it as a quick reference. Your oral presentation to the court will be

conversational and persuasive. Although you should outline your arguments, you should not read from your brief;<sup>10</sup> nor should you write out your oral argument in its entirety and think that you should read from it or even consider that you will be able to memorize it.<sup>11</sup>

The oral argument is constant interchange of ideas between the bench and the advocate. Therefore, you want to maintain as much eye contact as possible and remain flexible enough to engage in dialogue with the court. If you like, you can write out your introduction. Sometimes it is helpful to memorize this first minute or so because it helps get you settled at the very beginning. The contents of the beginning portions of your oral argument are discussed in part C below.

7) *Practice.* Once you prepare and study your outline, you are ready to practice giving the oral argument. At first, you may want to deliver the argument by yourself without any interruptions or observers. This will help give you an idea of what really works, what sounds good, and it will increase your comfort level and confidence. As you practice, you may find the need to revise your outline. As a matter of

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<sup>10</sup> “The oral argument you make must necessarily be structured by what is covered by your brief, but under no circumstances should you simply recite, summarize, or selectively read from your brief and consider it a satisfactory oral argument.” Rehnquist, *Oral Advocacy*, 27 S. Tex. L. Rev. 289, 298 (1986).

<sup>11</sup> “Oral argument from a prepared text is not favored.” Sup.Ct.R. 28.1

fact, you will very likely revamp your outline completely by the time your actual oral argument is scheduled. After practicing the argument a couple of times alone, you need to rehearse in front of a friend or colleague, even if the individual is not associated with law school. Encourage feedback and suggestions. Finally, you should videotape your rehearsal and watch yourself on videotape. As a part of the classroom or even practice for a moot court competition, you will be likely videotaped at least once. Watching yourself on videotape may not sound like fun, but it sometimes is the only way for you to correct problems.

Now, you have some of the ways to begin the preparation process in becoming an effective oral advocate. What exactly does the oral argument entail? What should you expect when you stand up for the first time and deliver the argument? The next few sections will describe the actual presentation and will try to prepare you for what this experience will be like.

### **C) Delivering the Oral Argument**

#### *1) The Opening*

So where do you begin? At the beginning of the argument, you simply introduce yourself, who you are representing, and in what capacity. The traditional opening self-introduction is:



“May it please the Court, my name is \_\_\_\_\_, and I represent the appellant \_\_\_\_\_.”

## 2) *Brief Description of Why You are Here/ Statement of the Issues*

Then, you briefly describe the case in way that explains the issues to the judges and then simply state the reasons why you should win. This introduction of the issues and reasons for winning should only last one minute at most. This first minute should stimulate the interest of the court and should create *the theme* for your entire case. This theme will then be weaved throughout the remainder of your argument. If at all possible, avoid “legalese” at this point. Try to go beyond the technical, legal points of the case and appeal to the judges’ common sense, fair play, and logic. One technique that may work at this point is to ask yourself the question, “How would I tell a friend about this case?”<sup>12</sup>

This portion of your argument may sound something like:

“This cases raises the issue of whether (frame issue) and because the appellant in this case (describe significant facts necessary to set up issue and main reason why you should win), the decision of the lower court should be reversed.”

## 3) *Roadmap or Overview of Argument*

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<sup>12</sup> Michael Fontham, Micahel Vitiello, and David W. Miller, *Persuasive Written and Oral Advocacy in Trial and Appellate Courts*, p. 182 (2002)

After describing the case in this manner and setting forth the essential theme of your arguments, create a “roadmap” for your argument. This overview will again lay the foundation for the theme of your case. Also, it helps the court know where you are going with your argument. So, if you or the judges ever get distracted, having the organization laid out at the beginning will make it easier to get refocused.<sup>13</sup>

Be careful not to go into too much depth on each of your points. You do not want to get into the “meat” of your argument at this point; you are simply mapping out where you are going to go. The overview should only be a couple of sentences and may sound something like this:

“I would like to discuss three main points with the court today. First, \_\_\_\_\_. Second, \_\_\_\_\_. And third, \_\_\_\_\_.”

#### *4) Facts*

Lawyers and judges disagree on how much time should be spent reviewing the “Facts.” For example, students often wonder if they should re-tell all of the facts that are included in the brief before moving into any real discussion of the “law.” A couple of words of advice on this matter:

- Generally, you will be short on time to get through all of the substantive arguments you want to make, so your presentation should

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<sup>13</sup> *Id.* at 183.

focus on the reasons you should win. Keep in mind that the “reasons you should win” may be very fact intensive.

- The facts have already been set out in the brief; so if the court wants to hear a fuller discussion, or if the judges have not had the opportunity to read the briefs – they may tell you. Some courts’ rules, for example the Fifth Circuit, state explicitly that the attorneys should assume the court has read the briefs and are familiar with the facts.

Obviously, you want to observe these rules when applicable. By analogy, in the classroom or moot court setting, you should defer to the instructions of your professor or to the custom of that particular moot court competition as to how much time should be devoted to the facts.

- However, no matter what the rules of your particular court, be sure to include the facts that are relevant and crucial to setting up the issue, otherwise, your discussion of the legal issues will have no context or framework. In particular, the appellant should provide enough facts so that the court can understand the issues.

#### *5) Jump Right Into Your First Issue*

After introducing yourself, the relevant facts, the legal issues, and why you should win, be prepared to jump right into the first issue.

But keep in mind that the bench may re-direct your argument with questions.

6) *Customs of the Courtroom, including Questions from the Bench*

Appellate oral arguments are much different than most other speeches or oral presentation because the listener actually engages in the presentation with several questions. The presentation becomes much more like a conversation at this point with the attorney addressing each one of the concerns that a judge expresses.

Not all of these questions are adversarial. Many students get on the defensive as soon as a judge raises an issue. Although many judges will play this role of devil's advocate and try to get the attorney to focus on the weak part of the case, some judges merely are curious about certain facts or procedural details. Furthermore, some judges are asking questions to "help you along" either by providing some structure if you seem disorganized or by "throwing a softball" so that you can get back on track. Do not mistake this to think that lack of preparation will be rescued by your panel, but at the same time, do not get on the defensive with the onset of a question.

So, how do you respond to these questions?<sup>14</sup>

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<sup>14</sup> *Id.* at 196. According to Fontham, *et al.*, "[t]he ability to handle questions is often the key to effective argument." They offer the 6 tips that are highlighted here.

1. **Listen to the question.** This may seem obvious, but many attorneys want to respond to a question they wish they had been asked rather than the one actually posed. Nervous students who have memorized or who are reading an argument will often have trouble answering questions because it is not the next matter on the “script.”
2. **Answer the question immediately.** If you wait to answer the question or if you communicate that “I’ll get to that later,” you will irritate the judge or you will simply create a situation where the judge tunes you out until you answer.
3. **Answer the question directly.** Do not try to explain an answer before giving a direct response. If the question requires a “yes” or “no,” the next word out of your mouth should generally be “yes” or “no.” Of course, you can then explain or qualify your answer.
4. **Be candid.** Your argument will have weaknesses and your client’s position will have areas where your opponent has stronger legal footing. At times, you may have to concede a “bad point,” but you still have the opportunity to explain why that point is not controlling.

**5. Follow through.** This is probably the most difficult task of an oral argument. After answering a question and explaining your answer, you must lead back into your planned presentation.

The oral advocate who can do this communicates command of the argument. Although this skill takes time to develop, the best oral arguments will transition smoothly and effortlessly from question and answer back to the affirmative presentation.

As you write your outline, try to anticipate the questions and prepare your answers in a way that will make this transition most natural.

**6. Avoid being caught in a hostile dialogue.** Some judges will try to get you to concede certain points through persistent questioning. This process can oftentimes be extremely annoying and hostile. But you always want to remain polite, firm, and simply “keep to your guns” in a way that is respectful to the judge. Do not abandon key points in your argument simply because a judge asks a question that attempts to extract concessions. Simply try to move on. After answering a question, try to “Follow through” to the next point of your argument. Hesitating and silence only invites more questioning.

### ***A few notes about Rebuttal***

The appellant will have an opportunity to respond to statements from the appellee for purposes of your oral arguments. This rebuttal portion of the presentation should be brief and should respond to specific points raised by your opponent. This is not a time to summarize or re-state your earlier argument. Although this will require quick thinking as you need to respond to specific arguments, proper preparation will allow you to anticipate the points your opponent raised and your expected response.

### ***Live Oral Arguments***

Besides listening to recordings of oral arguments, students may also be interested in watching a live oral argument. All students should try to take a “field trip” to an actual appellate court to watch attorneys present an oral argument. Furthermore, students may want to attend any of the “moot court” activities sponsored by their law school.

## Oral Argument Checklist

- Always introduce yourself and who you represent
- Memorize the first 2 or 3 minutes: identify issue and articulate the fundamental reasons your client should win; memorize a conclusion
- Although it is important to consider and discuss policy arguments; you always want to give the court the legal basis for making their decision; i.e. what statute? what case? etc. And if your opponent overuses policy, be sure to counter with strong use of actual law
- Think through the implications of your major arguments so as to anticipate questions and counterarguments (same goes for written brief)
- Using analogies to make your point; can be very strong, but be careful not to go off on a tangent or invite questions that are irrelevant to your main argument
- DO NOT ask rhetorical questions such as “Does the Court really want to ...?”
- Stay behind the podium during appellate argument; more formal than an opening statement at trial where counsel has much more freedom to move around the court, etc.
- Don’t point at client or opponent
- Pick your two or three major points and try to emphasize those points; choose order that you want to present these arguments.
- Use outline; do not memorize entire speech; do not use note cards; try to come back to outline after a question is asked. Anticipate the order that is most important to judges. A roadmap at beginning of argument can be helpful (part of your first 2 or 3 memorized minutes)
- Watch your pace: most people need to slow down!!! But at the same time, you have a lot of information to get through in a short period of time.
- Maintain eye contact. DO NOT read from a script.
- No hands in pocket; No shifting feet
- DO NOT twirl pen
- Be professional. Humor can be ok, but generally not encouraged (oftentimes depends on relationship one has with panel of judges)
- DO NOT simply go through each case one by one; again just like writing brief; pull principles from case law and organize argument around those principles
- BE PREPARED. KNOW every case and every fact