

Oral Argument Tips?

OK, I've got oral argument set next week in the Court of Appeals for the Federal Circuit. I've reviewed our brief; made extensive factual notes so I know the facts clearly. Reviewed their brief (I think it's an awful argument!). While I feel confident, I am still nervous. I have no idea what questions they may ask me. This is only my second appeals court oral argument in my career!!! The first wasn't too bad - just grilling by one judge, but not too harsh. But that was like 10 years ago. Other times I've only briefed cases at the appeals level. I didn't even think they'd grant oral argument in this case as I thought it was pretty straightforward.

Any tips on what you pros out there do for such?

You win big points if you can refer to something one of the judges that you are appearing before wrote in a case you cite to....(i.e., this case is similar to ___v ___ where you correctly pointed out that _____).

Nick Bowers, New York

But only if you avoid making it sound like pandering.

Wendy C. Lascher, California

Try to treat oral argument as a discussion with the judge asking the question. Listen to the questions carefully and take the time needed to respond thoughtfully. Don't get too bent out of shape just because the questions are hard or don't seem to be going your way. A lot of judges just like to ask hard questions even if they have already made the decision to rule in your favor.

Also, remember that advocacy is supposed to be fun.

Bert Krages, Oregon

Agreed; you are there to discuss the strengths and weaknesses of your case. And during the time you are speaking, it is YOUR courtroom.

Also, smile before you start. It will relax the muscles in your face.

Good luck.

Wendy C. Lascher

Do you want your client present sitting behind you in the front row?

If you are going to use exhibits in the argument, make sure they are blown up, large, etc., and you may want to pass around copies of select exhibits.

I understand many appellate cases are decided after hearing when the junior justice is passing around cookies and coffee in the conference room and counsel has not even made it yet to the parking lot/garage.

Rob V. Robertson, Texas

If the case can afford it, get some colleagues together to be the judges and run through oral argument several times. You'd be amazed how much you learn.

Shell Bleiweiss, Illinois

Concur with Mr. Bleiweiss.

Roger M. Rosen, California

Watch an oral argument, ideally by the same panel, the day or week before.

I can't remember if it was the Federal Circuit or the 4th (I think it was the Fed) that had a unique way of dealing with reserving rebuttal time. I was used to the Third Circuit, where you begin your argument by informing the court that you would like to reserve 3 minutes for rebuttal. As I recall, the Fed Circuit is like SCOTUS, where you simply have to try to stop the argument before your time is up and reserve the balance of your time for rebuttal. (If you can't get to the court to watch, listen to some of the audios of past oral arguments.)

Read this for tips on arguing to the Fed Circuit:

https://bannerwitcoff.com/_docs/library/articles/mistakes.pdf

I echo the advice of others (and the above article) about treating the judges as colleagues, not adversaries, with whom you are having a discussion aimed at getting the right result. Don't be intimidated by the robes. Believe it or not, many judges are in awe of advocates who can stand at the podium and field questions. Unless you are really young, you are in their peer group or, with the decreasing average age of judges these days, you may actually be more wizened than they.

Good advice here:

<http://ca3blog.com/oral-argument/my-advice-to-lawyers-preparing-for-their-first-ever-oral-argument/>

If you are appellant and have 15 minutes for argument, don't reserve more than 3 for rebuttal. It truly should be rebuttal -- hitting 2-3 points that appellee made that you really feel need to be rebutted. If you reserve 1/3 of your time for rebuttal, I think it actually undermines your credibility with the court because they are thinking that you either don't know what you are doing or that you are going to try to use rebuttal to advance arguments that are not true rebuttal.

I go to the podium with two sheets of paper. (I have the briefs and appendix handy, but rarely end up opening them.) On one sheet is my entire argument, outlined, double-spaced, on one side of one page. The outline consists of bullet points that will remind me of what is important about that issue or subissue. Case citations to truly important cases (including obscure, non-binding cases that may be particularly supportive) are interspersed in the outline with the appropriate issue so that if I develop brain freeze, I have those at my fingertips. The second page is citations to particular points in the appendix where I think the court might focus.

(If it's a breach of contract case, perhaps the page where the key clause appears; if it's a trial and the issue is whether an objection was preserved, the specific page where the objection was made or attempted to be made, etc.)

Many times, I am able to condense both of those pages into one.

At the top of the outline is a reminder to reserve time for rebuttal. And perhaps a few bullet points for the key themes of my argument. My argument might start, "There are three key issues I would like to focus on today:

1____, 2____ and 3_____." My outline will just list those three."

At the bottom of the outline is my conclusion. Not just "we ask the you affirm the district court." Try to tie the conclusion to the issues and/or important policy and the action you want: "Because the filing of a notice of appeal is jurisdictional, It is essential that litigators have a bright line that tells them when the deadline clock begins to tick. We ask that you reverse the district court and rule that the clock begins to tick when the final judgment is entered."

The purpose of the outline is to make sure that I am able to hit the important points I want to make in any order and overcome the brain freeze that can occur when you are getting hit with questions. The Fed Circuit, like the Third Circuit, is a hot court. You can expect questions right away and they may jump directly to issue 3. So you glance at your outline for issue 3 and answer the question, continue making the other points you want to make about issue 3 and when it seems appropriate or an opening arises from a question, you jump back to issue 1 or 2. Once I hit an issue, I put a check mark next to it so that I can quickly see what I haven't covered. If I have time as my argument is concluding, it lets me jump to those other points I want to make and helps me avoid forgetting them.

Circuit courts are looking at a bigger picture than the litigants.

Consider the policy considerations that support your argument and try to weave them into your argument (and briefs).

Enjoy it!

Andy Simpson, U.S. Virgin Islands

I agree with Andy and others have offered good advice, so I'll just add a couple of points. First, look at your brief as though you were opposing counsel, what would you attack? Be prepared to defend the weak spots you identify. Video yourself making your argument within the time limit and review the video; make corrections and do it again. Repeat until you can't find anything to improve. It won't happen that way usually, because you'll be interrupted with questions; but you will be prepared.

Duke Drouillard, Nebraska

I just did oral argument for a state appeal (my first, won it). You're pretty much set knowing the facts and the law cold. Try to distill everything down to a one or two sentence summary you can get out to lay the groundwork for fuller argument (if you get to them).

Like Shell (?) said - perform your argument in front of a couple of colleagues who do not know the case. Don't dismiss their questions when they say they don't understand something or that something wasn't clear.

Sometimes we are so deep in a case we make assumptions about certain facts or issues that are not apparent to an outsider.

Bruce Wingate, New York

Know the record cold. In many of my appeals I get the question "Where is that in the record?" You will score points by responding with the exact location.

John D. Kitch, Tennessee

To add to the excellent advice:

I structure my argument, not knowing how long I will have before interrupted by questions:

First 30 seconds: Theme and best argument.

Next 2 minutes: Expand on best argument and theme.

Remainder: Theme, best argument, lesser argument(s), rebuttal and conclusion.

Good Luck!

Janet Silver Rosen

Thanks! These are all great.

Sterling L. DeRamus, Alabama

Congratulations, Sterling.

I just had an oral argument, there are many things I wish I'd said. :) My advise is:

1. Make an outline.
2. Write S L O W down on the top your outline and be flexible to abandon it if you find the Court begins to fire away with questions.
3. Don't read.
4. Make direct eye contact with the judge.
5. Don't just know the case, be read to cite to the record to show the court where the evidence you are referencing is supported.
6. Know the standard of review and if a shifting burden--when and where the burden shifts.
7. Answer each question immediately when asked (don't say I'm getting to that or delay the court).
Near the end of my argument, the court asked a question and I attempted to answer but then froze. The judge said "Anything else?" and some how I was able to get out "Yes, your honor. I do not believe I answered Your Honor's question." The court said "No, you did not." Then I proceeded to answer. Be present and give yourself time to think...it also gives the transcriptionist time to record the record.
8. If it is your motion, reserve rebuttal time.
9. Be helpful by being able to clearly articulate a legal path the outcome you desire.
10. If there is new case law that would be helpful to the court, create a supplemental Table of Authorities and bring copies for the panel and opposing counsel.

Talonya Adams

Great suggestions! This is one of the best threads we have had in a long time. I wish I had incorporated them in my practice.

Randy Birch, Utah

Hi Randy! I agree. I really enjoyed reading this thread. I only wish I had an appellate argument in my future!

Andrea Goldman, Massachusetts

Well that was fun!!

It wasn't too bad. I was surprised how much I wasn't nervous. I felt like I knew the case and law pretty well - but I found out I really didn't. I didn't handle the case below at the MSPB level, and only handled on the appeal and they asked me all sorts of things that were basically outside the record that I didn't know about, but I handled the questions as best I could. They weren't too mean to me, but they did push their concerns and really didn't let me get out my arguments - especially when I wanted to rebut what the DoJ lawyer argued. But it's in the briefs so I should be OK on those points.

I only got about a sentence into my argument, when the Chief judge stopped it and went on a tangent about whether the case was ripe for review - she thought we could still ask for our money in front of the judge, and I said, no. I don't read it that way at all. It's final, my client gets nothing unless this court reverses. But they kept at it. When the DoJ lawyer got up there, though he agreed that it was final. I got the impression that they knew him, and indeed he appears in front of them a lot, so they seemed a bit softer on him than on me. But at least they expressed extreme skepticism on the issue of money owed my client. They didn't like that my client got nothing when he clearly should have.

The judge also didn't give me my full rebuttal time - I had asked for five minutes, but she only gave me two. I didn't want to say anything though. It wasn't that big of a deal. But I could have talked far more about the facts and how my poor client got screwed over by the Agency. We'll see.

All in all, I actually enjoyed the repartee. While the questions did seem to come from left field, they weren't entirely off the wall. I look forward to doing it again some time!

I can only say that the advice on this message board was indeed indispensable. Thanks again to everyone!! I did follow the advice for the most part.

Sterling L. DeRamus

Hate when they start venturing outside of the record. I generally try to tell them that the record only reflects >>>>>. The direct answer to their question is not in the record, but I will oblige and answer as best I can.

Robert "Robby" W. Hughes, Jr., Georgia

"I did follow the advice for the most part."

Whoa, Sterling!

What, exactly, do you mean "for the most part"?

You've got a lot of damn gall coming on here, asking us for advice, and then not following it to the letter.

We just may not give you any advice in the future, if we can't count on you following it *exactly*—even if one of us contradicts what someone else says.

We've got our pride, too, you know!

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But seriously, I'm glad the argument went well, and I hope you get a satisfactory result.

Brian H. Cole, California

If you had fun, you won. Whether your client wins is, of course, a different question

Wendy C. Lascher

I did keep my two page "argument" with me primarily, but I also brought my iPad with the record in it. We had to look something up so it was helpful. I didn't have to flip through a big print out of pages. The DoJ lawyer did have a hard copy of the record, and I think that actually made it harder for him when he got a question.

WRT going outside the record, part of what we were appealing was cured after we filed our initial brief (they finally did what they had been ordered to do 3 years before), so we had to go outside the actual record to discuss whether the remedy was sufficient for that issue.

Sterling L. DeRamus

