TIPS FOR ORAL ARGUMENT

prepared by Kim Rappaport[1]

I. PURPOSE OF ORAL ARGUMENT

A. WHEN DO YOU GET AN ORAL ARGUMENT?

Oral argument is part of the appeals process. An appeal occurs after there has been a full trial and a judgment issued. In some instances, the person who loses might find reason that the trial judge's decision was wrong and will seek to have the case heard by a higher court, like the Court of Appeals (intermediate appellate court) or the Supreme Court (the highest appellate court). The most common basis for an appeal is an error of law or an error of fact.

B. WHAT IS AN ORAL ARGUMENT?

At the appellate level, oral argument is the only opportunity for a lawyer to argue his/her case in person before the court. This argument is limited to issues raised and facts entered into evidence during trial in the lower level court. Unlike a trial, there are no witnesses or juries at an appellate oral argument. The argument is made solely by the lawyers before a panel of judges (3 judges for the U.S. Court of Appeals and 9 judges on the U.S. Supreme Court).

C. WHY IS ORAL ARGUMENT IMPORTANT?

An appellate argument is important for two main reasons.

1. To answer the questions of the judges.

2. To make sure the judges understand and focus on your claims. You want to point out the essential elements of the case, highlight the brief and explain why the judge should rule in your favor.

D. WHAT IS THE DIFFERENCE BETWEEN MOCK TRIAL AND ORAL ARGUMENT?

Oral argument is when attorneys actually argue in front of an appellate court. Moot court is the same thing, except that it is when students are simulating what actual attorneys do. Mock trial is a full-blown trial, complete with witnesses. When a case is first filed, it will first go to a trial

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court where all the facts will come out through the presentation of evidence and through the testimony of witnesses. The record from that trial is preserved for appeal. Oral argument (and moot court) is what happens at the next level, the appeals level. The appellate court relies on the facts that came out at the trial level and learns about those facts from the written record. On appeal, the attorney for each side gets to present their legal arguments again and the judges interrupt to ask questions. There are no witnesses, only one attorney for each side.

II. PREPARATION FOR ORAL ARGUMENT

A. BASICS.

1. Know the underlying record well.
   Know the facts of the case and what happened at the trial level. Carefully read the opposing party's brief.
2. Single out the most important issues and points of contention for oral argument. Prepare an outline or notes of argument.
3. Rehearse. Practice increases confidence level, and confidence is attractive to judges.

B. STRUCTURE OF THE ARGUMENT

1. **Formal Introduction**: tell the Court who you are and who you represent.

"Honorable Chief Justice, May it Please the Court, my name is X. I am counsel for [Petitioner /Respondent] in this matter. [If Petitioner says, "At this point, I would like to reserve time for rebuttal."]

For the Petitioner, wait until the judges are ready (i.e. silent and looking at you) or for a signal before you begin.

Note, afterwards you can refer to the judge as "your Honor."

2. **Real Introduction**: sum up for the Court what the case is about. This should be short and clear, stating the central issue/s.

"This case is about [the Fourth Amendment/equal protection rights of students....]. Petitioner/Respondent was ..... Petitioner/Respondent suggest that there is a [or is no] constitutional violation in this case.

Note, you don't want to refer to yourself in the first person (i.e., don't say "I think..." etc.). Address the Court as and answer questions from the viewpoint of your client, "petitioner" or "respondent."

3. **Prayer for Relief**: clearly state the remedy your client wishes to exact from the Court (ie what do you want the Court to do?).

C. ANSWERING QUESTIONS

1. **Actively Listen to the Question Being Asked.** It is extremely important to show the judge that you are listening to what she or he has to say. This enables you to address the key points of concern and meets a key interest of judges – to feel heard.

Common thoughts while "listening":

1. Judging: "What you just said is all wrong."
2. Defending: "Sure, but my client didn't do that."
3. Attacking: "You are so stupid!"
4. Advising: "How you should decide this case is so obvious...."
5. Daydreaming: "I wonder if they'll serve us pizza at lunch...."

Resist the urge to judge, defend, or give advice. Try to understand what the judge is trying to ask.

2. **Let the Judge Know That You Are Listening.** Acknowledge what is said without agreeing, unless intended. Rephrase and restate unclear questions to make sure that you answer the correct question.

At least *appear* to be listening. Body language (i.e., eye contact, facial expressions, head bobbing, body positioning/posture) is important. Do not try to interrupt the judge. Let the judge finish before you respond.

3. **Answer the Question Being Asked.**

First, state a basic answer like "yes," "no" or "it depends." It is OK to concede something but try to explain it.

Second, give a reason to explain. Is there is a source for your answer like a case or a rule of law or a statute?

- ***How to use authority***. When mentioning a case, always begin by naming the court that decided the case. (e.g., "The Ninth Circuit Court of Appeals discussed...." or for a Supreme Court case since the argument is supposed to be before the Supreme Court "This Court ruled in X that...."). When referring to a case, do not give the full formal citation. Use the first party name or the entire name if it is short. (This probably won't happen, but still be prepared to present the full citation because sometimes judges will ask for it.) If you have a lot of cases that say the same thing you can also simply say something like "the decisions in four recent supreme court cases all stated that...."

- ***When to use authority.*** You can use authority to support your arguments. It can be helpful to use decisions made by other courts with facts similar to your case. You can also use it to show that there are cases different from your opposition's authority based on factual

situations. A tip though is to keep it simple! You won't have enough time to delve into complex facts and issues raised by authority.

Ex: "Yes, but in this case is different because X." or "Yes, but there is a recent decision that says X."

Remember:

- Stop mid-sentence when a judge interrupts with a question (this also goes for if your time is up).
- If you don't know the answer to a question, say so. You can say something like: "I don't know the answer right now, but I can brief you on that later."
- You can ask a judge to repeat a question to you if you didn't hear or understand it.
- Do not stress if a judge asks you a question and you get off your road map: it is OK to go out of order. You should answer the judge and then can go back to where you were or if it works better with another argument you can move ahead on the roadmap. You can transition back from a question by saying something like:

  "I'd now like to go back and address the first point in my argument...." or
  "I'd now like to address another point in my argument...." or
  "I'd like to discuss this point further...."

III. COMMUNICATION: BASICS OF GOOD PUBLIC SPEAKING FOR ORAL ARGUMENT

A. **DO NOT READ YOUR ARGUMENT.** You can bring in a cheat sheet (preferably one page long) with an outline of your arguments just in case you get stuck.

B. **MAINTAIN EYE CONTACT.** Direct your eye contact to one person at a time. Try to look at all the judges (v. just looking at one) Avoid wandering eyes (ie looking up or down).

C. **BE HEARD.** Speak loudly and clearly enough that everyone in the room can hear you. Project but do not yell.

D. **USE EMPHASIS.** Sound like you are interested in your arguments. Do not speak in a monotone.

E. **GESTURE ONLY TO MAKE A POINT.** If it is natural for you to use your hands to add emphasis to your presentation do so, but be careful not to use your hands too much. It is best to keep hands resting on the podium.

F. **USE THE PAUSE.** Silence is not bad- a pause can provide emphasis or let you think about a question and collect your thoughts.

G. **SPEAK AT A GOOD PACE.** Don't speak too fast or too slow. Your argument should flow like a conversation. Try to cut out uhs and ums.

H. **WATCH YOUR POSTURE.** Do not lean on the podium. You can rest your hands on the podium, but not your elbows. Do not argue with your hands in your pockets or on your hips. Do not pace or rock back and forth. Do not fidget with pens or your hair. Stand in one place (feet at shoulder width apart and don't lock your knees, try to be as relaxed as you can) and maintain an upright, respectful posture.

I. **LOOK RESPECTABLE.** Wear a professional looking outfit. Guys, wear a suit or a nice button down shirt and tie with pants. Girls, wear a suit or a nice blouse with pants or a skirt. If you have long hair, make sure it is not it your face. Remember to spit out gum or candy before arguing.

J. **ACT RESPECTABLE.** Never lose your temper and yell at a judge. You don't want to give the judge any reason to be upset with you even if he or she is a stinker. Never interrupt a judge or another attorney. Show respect by using "your honor," remaining silent when a judge is speaking, and through eye contact and body language. Also, speak formally and respectfully and avoid using slang (ie I dunno....).

Final Remarks on Oral Argument:

1. **Be Yourself.**

2. **Practice**. Most people think for hours about *what* they are going to say, and a few minutes on *how*. The *how* is just as important as the what.

3. **Try to Have Fun and Enjoy the Experience.**

BEST OF LUCK!!!