

Presenting Oral Argument

Laura A. Kaster*

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I. [§ 14.1] Introduction

Unlike a number of other circuits, the Seventh Circuit ordinarily allows oral argument as a matter of course. The time allowed for oral argument in most cases has been severely curtailed in recent years, however, and usually ranges from 10 to 30 minutes for each side.

The time limitations dictate the argument's format and content. A detailed statement of the facts is impossible, and also is unnecessary because the court will have read the briefs. Only the most important points can be treated, and even these points must be distilled. The advocate must focus on essentials. Because of the time limitations, the purpose stated in

* This chapter was originally authored by Philip W. Tone.

U.S. Supreme Court Rule 28.1, “to emphasize and clarify the written arguments in the briefs,” may not always be fully achieved.

From the court’s standpoint, oral argument is valuable because it distills what counsel thinks is most important in the case; it also affords an opportunity to ask questions that the briefs either have not answered at all or have not answered to the judge’s satisfaction. From counsel’s standpoint, oral argument is an opportunity to present the principal points in the case, face-to-face and in summary fashion. It also may give counsel an opportunity to learn from the court’s questions any doubts that may be troubling the judges and to dispel those doubts.

An argument for one side should be delivered by one attorney. Seventh Circuit Court Rule 34(c) specifically warns that “[d]ivided arguments . . . are not favored by the court,” whether “on behalf of a single party or multiple parties with the same interests.” When parties on a side have differing interests, they may agree to apportion the time allotted to that side; if they are unable to agree, the court will allocate the time. *Id.*

Among the excellent resources on oral argument are Frank M. Coffin, *On Appeal* (1994), and Ruggero J. Aldisert, *Winning on Appeal* (1992).

II. [§ 14.2] Preparation

A. [§ 14.3] Content of the Argument

Thorough familiarity with the record, the briefs, and the cases cited by the parties is essential to a successful argument. Even counsel who has tried the case should thoroughly review the record in preparation for the oral argument.

In preparation for the argument, counsel should outline the points to be made and their sequence. Often the outline cannot be followed because of the court’s questioning, but counsel should prepare on the assumption that the argument will be presented in an orderly manner.

Because of the format, not more than two or three points should be presented in the oral argument, except in the most unusual case. The detailed and documented statement of the argument and supporting reasons, as well as the facts, should be made in the brief. Points not covered in the oral argument are not abandoned; judges understand that some points cannot be treated orally. A brief statement that the points not reached in

oral argument are fully treated in the briefs is unnecessary, but may make counsel more comfortable.

The oral argument does not lend itself to a detailed recital or dissection of the facts or reasoning of the cases relied upon for authority. References to relevant authorities should be brief and cogent, except in the unusual situation in which a case closely resembling the one at bar must be either distinguished or relied upon for critical support. Seventh Circuit Rule 34(g) prohibits oral citation to authority not previously cited in one of the briefs or drawn to the court's attention by letter pursuant to Federal Rule of Appellate Procedure 28(j). The letter must follow the filing requirements specified under Seventh Circuit Rule 28(e). Rule 34(g) provides that "[t]he filing may be made on the day of oral argument, if absolutely necessary, but should be made sooner."

B. [§ 14.4] Attending Other Arguments

Counsel who has not argued in the court previously will find it helpful to observe the court in action before his or her case is reached. When cases involving similar issues are scheduled for the same or successive days, even counsel who is experienced in arguing before the court will want to attend the earlier argument. If counsel's case is preceded by others on the same day, this opportunity to attend other arguments is afforded automatically, but it is often advisable for counsel to attend court the day before, if possible, even though in the Seventh Circuit the panel of judges differs on successive days.

Counsel will not know which judges will be on the panel until the day of the argument. The judges' positions on the bench will be printed on a card on the attorney's lectern at oral argument.

C. [§ 14.5] Rehearsal

Some kind of rehearsal is important in preparing for the argument. Counsel can rehearse alone. It is useful, however, to have another attorney or other attorneys in counsel's office read the briefs and ask questions that they believe the court is likely to ask. Some attorneys, if resources permit, schedule and conduct a mock argument with colleagues acting as opposing counsel and judges. This is perhaps the best way to simulate the kinds of questions the judges are likely to ask, to prepare counsel to deal with these questions, and to practice presenting the argument. Some lawyers,

however, prefer not to use this method of preparation, for fear of leaving their best arguments in the mock-argument room.

III. [§ 14.6] Presentation

A. [§ 14.7] In General

Counsel should have all papers in order before walking to the lectern, so preliminary shuffling will be unnecessary. Counsel should begin by addressing the court: “May it please the court.” Counsel may give his or her name, but the clerk’s office supplies the judges on the panel with cards naming the attorneys (or parties pro se) who will argue the case for each side. Seventh Circuit Rule 34(a) provides that counsel must notify the clerk, no later than two days before argument, of the name of counsel intending to argue orally.

Counsel should, however, be prepared to make a brief summary, not longer than a few sentences, of the nature of the case and the general issues. This assists the judges, who have read six sets of briefs for that day and perhaps have already heard arguments in the day’s other cases, in focusing on the particular case.

The necessity of limiting the oral argument to two or three points has already been mentioned. These points should be presented, whenever possible, with a statement of the policy and reasons underlying the rule relied upon. Although some issues are controlled by authority directly on point, many are not. A reviewing court is interested in “the consideration from which the rules of law actually stem.” Walter V. Schaefer, *Appellate Advocacy*, 23 Tenn. L. Rev. 471, 476 (1954). As Justice Wiley Rutledge once wrote, the judges want to know

why this case, or line of cases, should apply to these facts rather than that other line on which the opponent relies with equal certitude, if not certainty. Too often the why is left out . . . [T]he discussion of the underlying principles as related to the present application counts heavily to swing the scales.

Wiley Rutledge, *The Appellate Brief*, 28 A.B.A. J. 251, 253 (1942).

In discussing a pertinent precedent, a detailed recital of the facts and reasoning of the court in the earlier case is almost never appropriate. This is not only because of the time constraints in an oral argument but also because judges, like others, usually have great difficulty in following such a dissection.

B. [§ 14.8] The Court's Questions

Counsel should welcome questions from the bench and answer them immediately, not later in the argument. Answers should be responsive and forthright. A judge's question may tell counsel what issue may be troubling the judge. Whenever possible, counsel should move directly from the answer into the part of the planned argument that relates to the question and answer, even though a different sequence was originally planned. A point is most telling when introduced by a judge's question.

Counsel's answer to a question during oral argument ordinarily is taken as an admission, despite Justice Rehnquist's observation that "[W]e are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 170 (1972). *But see infra* § 14.11 (suggesting follow-up measures to retract admission or counteract misstatement). Counsel who does not know the answer to the question should certainly say so. If the question is a legal one, and counsel has not anticipated it and therefore has not thought about it, counsel should say so and, if the point is important, ask for an opportunity to reply in a short supplemental memorandum. Sometimes counsel arguing the case can be reasonably sure that a colleague at counsel table knows the answer, and it may be appropriate to turn to him or her for the answer. It is not advisable, however, for counsel's colleague to be passing unsolicited notes to arguing counsel during the argument. These are rarely useful and usually only distract counsel and the court.

When, as often occurs, the court's questions have taken up so much of the lawyer's time that he or she is unable to make anything approaching the orderly presentation hoped for, counsel will at least want to drive home certain critical points. Sometimes this is impossible, but it is more likely to be feasible if the lawyer has prepared for such an eventuality.

C. [§ 14.9] Style

An oral argument addressed to a panel of appellate judges should be conversational rather than oratorical in style. Counsel should speak loudly and clearly, because the microphone in the courtroom is for recording purposes only, and does not amplify counsel's voice.

Counsel should never read all, or even part, of the argument. Nor should counsel read at length from briefs, records, or authorities. Some-

times it is necessary to read briefly from a document that is critical to the issue to be decided, or even from a relied-upon authority. Such a reading should be as brief as possible, for “regardless of what is read, the very act of reading draws an iron curtain between counsel and the sympathetic attention of the court.” Raymond S. Wilkins, *The Argument of an Appeal*, 33 Cornell L.Q. 40, 47 (1947).

The credibility counsel must have with the court in order to be effective can be secured and retained only by displaying the utmost integrity and candor. Counsel should not attempt to hide unfavorable facts, but instead should state the record fairly and openly. Also, attempts to make arguments that are not intellectually sustainable destroy credibility.

Counsel should, of course, never engage in personal attacks, direct or indirect, on opposing counsel or the trial judge. Their reasoning properly can be criticized, and any misstatements can, and should, be corrected. But all this should be done without involving personalities. Proceeding otherwise is not only bad form but also counterproductive.

D. [§ 14.10] Concluding

If available time permits, appellant’s counsel ordinarily should save a few minutes for rebuttal. If he or she uses the entire allotted time in the opening argument, counsel is not entitled to rebuttal, unless the court makes an exception to the rule because it feels that questioning has unduly interfered with counsel’s presentation.

Although most speeches have conclusions, none is necessary in an appellate argument. The court will not be persuaded by counsel’s summary. It is wiser in an appellant’s opening argument to save the time for rebuttal, or in an appellee’s argument, simply to close gracefully and sit down.

E. [§ 14.11] Following Up

The members of the court are aware that, during oral argument, counsel may take an unanticipated position on a “hypothetical question” or in following a judge’s line of reasoning. Counsel who believe they have made an unwise concession or an incorrect statement should, after argument, promptly write a letter, which the court will accept as a retraction of an admission or a correction of a misstatement.