

# Barger on Legal Writing



## Preparing for and Delivering an Effective Oral Argument

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*The attorney for the appellant sits at counsel table, reviewing her outline and mentally rehearsing her opening. Across the room, the appellee's counsel is similarly engaged in quiet meditation on the verbal match that will begin in just a few minutes.*

*The court's bailiff enters the room, announcing, "All rise! The Supreme Court of the State of Arkansas is now in session." Everyone in the large courtroom gets to his feet as the justices, in their black robes, file into the courtroom and take their seats at the bench. The chief justice indicates that the audience may be seated, and then he reads the style of the case: "This is case number 01-305, Johnson versus Olsen Construction Company. Is counsel for the appellant ready to proceed?"*

*Appellant's counsel stands and replies, "Yes, your honor." She walks to the lectern, looks at each member of the court, takes a breath, and begins, "May it please the Court . . . ."*

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If you are well prepared for it, oral argument is one of the most exhilarating experiences you can undergo as an attorney. If you are not well prepared, it can be one of the most humiliating. At its best, oral argument is a stimulating dialogue between counsel and the court. At its worst, oral argument is a droning verbal rehash of the points and authorities already laid out in the brief, delivered before a passive panel of judges. Delivering an excellent argument requires more skill and confidence from the lawyer who delivers it, but participation in an excellent argument is an immensely satisfying experience for all concerned. How, then, does one plan for and achieve the successful argument?

- ▶ **Re-read the briefs.** Although the court rules of your jurisdiction may have required that you request oral argument several months before you will deliver it, you won't begin preparing until a few weeks in advance of the actual date. Since it may have

been months since the briefs were written (and even if it hasn't been so long), begin your preparation by re-reading the briefs, both yours and your opponent's. If it's been a while since you read them, you may be pleasantly surprised at the quality of the argument you made. Even if you're not so pleased with the brief, upon your reacquaintance with it, don't be discouraged. Your oral argument will provide you with an opportunity to clarify points you didn't make so well, to state more persuasively and forcefully your best points, and to do a better job of responding to the strong points made by your opponent.

- ▶ **Refresh your memory of the facts of the case.** No one on the appellate panel will know the facts as well as the advocates do. While it's usually unwise to begin your oral argument by reciting the case facts, the court may well have factual questions for you, particularly where the abstract (or appendix, if you're in federal court) is unclear. If you can refer the judge to the exact place in the abstract (or appendix) where the critical matter appears, you will score high in credibility points. Be careful, however, not to go outside the record, and do not treat allegations as fact, unless the lower court made such factual findings. Remember that the only facts the appellate court can consider are those which are part of the record on appeal.
- ▶ **Re-read the authorities relied upon by each side.** You can be sure that the judges (and their law clerks) will read them too. Update these authorities to ensure that their status as "good law" has not changed since the briefs were filed.
- ▶ **Identify your case's strongest and weakest points.** Ask yourself what points you absolutely must win in order to achieve the result you're seeking on appeal. Don't let yourself be distracted by minor points that, even if they are decided against you, won't change the overall result. Many lawyers make the mistake of choosing too many "talking points" to cover in oral argument. The more points you try to cover, the less time you can devote to each. And if the court decides to question you extensively on a smaller point, your time may expire before you ever get to address the point that you've identified as crucial.

But why should you also focus on the points that may cause you to lose this appeal? Can't you just talk about the things you want the court to know? Well, you can try. But it's unlikely you'll get to avoid them. Remember that one of the purposes of oral argument is for the judges to ask questions about the aspects of the case that need clarification. Therefore, you must be prepared to answer their questions about the weak points of your case and to demonstrate why those points should not affect their holding.

- ▶ **Choose a theme that will unify the points of your argument.** What is this case really about? What was it that convinced you that your side deserves to win? Can you tie all the issues to an overriding legal theme? Consider these examples:

*"Your honors, a person's home is his sanctuary. Only the most compelling emergencies should be present before a law enforcement officer can be permitted to burst into a citizen's home without a warrant. Otherwise, no person's home is safe. In the case at bar, the officer admitted that the circumstances at appellant's home appeared to be*

*stable and non-threatening. The temporary unavailability of a magistrate to issue a warrant is not an emergency.”*

*“In any case involving child custody, the overriding concern must be the children’s best interests. In this case, there can be no question that permitting children to live with the parent who has the financial means to care for them, the emotional stability to raise them with patience and tenderness, and the support of other relatives for providing a stable and nurturing environment will be in their best interests.”*

▶ **Anticipate the questions you will be asked, particularly the hard ones.**

Now that you have re-read the briefs and refreshed yourself on the facts and authorities, you should have a good idea of the “make or break” points of your case. Do some brainstorming with your partner. Try to put yourselves in the position of the judges. What do you think they will want to learn more about? Does your argument ask the court to extend the law to a new factual setting? What will be the ramifications of that extension of the law in future cases? Put your Socratic training to good use and think up some hypothetical fact patterns, analogous to your facts, in which the holding you are requesting would be applied. Does it still work the way you intended? What questions do you particularly dread? Analyze them carefully. What is it about those questions that makes you uneasy? Spend additional time preparing careful, yet candid, answers to these kinds of questions. If you haven't prepared answers for the questions you figure you'll get, then you've dramatically increased the possibility that you'll be flustered when the question comes in the midst of your argument. Of course, there's no way you can anticipate every question the court could ask; but you should be able to anticipate a great many of them. It's a great feeling to have a ready answer.

▶ **Draft a concise outline of the argument.** Put the outline on a single sheet of paper—or if you need more room, on the interior of a manila folder that you can open up before you on the lecture stand. Use the outline only as a roadmap and quick reference, realizing that the court may not let you address your points in the order you have planned, and depending on the ferocity of the questioning, may not let you reach some of them at all. Having that outline in front of you, instead of a script, frees you to make eye contact with the members of the court. Eye contact is a powerfully persuasive tool of body language. A lawyer who can look at the judges comes across as more confident, more sincere, and more capable.

▶ **View oral argument as an opportunity to engage in a dialogue with the court.** Ideally, the oral argument should resemble a dialogue between the court and counsel—the judges asking questions and counsel providing well-reasoned and coherent answers. Questions can and do interrupt the flow of counsel's presentation, but effective advocates welcome such questions, as they offer an insight into the mind of the questioning judge. But remember, the courtroom is not a stage, and you are not a playwright. You have no control over the questions that the other participants in this argument—the judges—will ask. Thus, it is pointless to draft some sort of script. And there is no smooth way to make a transition back to a memorized speech. Instead, refer to your prepared outline of the major points you plan to make during your argument. If you need to, add brief notes to the outline about your principal

authorities, to help you remember their facts and holdings.

**Now it's time to go to court. Plan your responses and reactions to these common situations:**

- ▶ **Answering the question you are asked, not the question you wish you had been asked.** When a judge asks you a question, it's because she is interested in the answer. Now is not the time to be evasive. Remember that most judges have had extensive experience as trial lawyers; they will persist until you answer the question. And the sooner you answer the judge's question, the sooner you can get back to the points you have planned to make.
  
- ▶ **Answering "yes-no" questions with a "Yes" or a "No," and then explain the reason why.** As stated above, because many judges used to be trial lawyers, they have a tendency to ask "leading questions," i.e., questions full of substance, asking you to agree or disagree. For example, *"Counsel, wouldn't you agree that of the courts who have considered the question, only a handful have followed the logic you are urging us to adopt?"* If you avoid answering "yes" or "no," the judge will keep after you until you give him an answer. Therefore, the better strategy is to quickly answer the "yes" or "no" and then offer a reason why: *"Yes, your honor, that's true, but all of those cases have been decided since 1996, and those courts have led the way to development of a new trend, one which this court should join, for several important reasons. First, . . ."*
  
- ▶ **Using your theme to achieve smooth transitions from questioning back to your planned argument.** When a judge interrupts your presentation with a question, it's not always easy to get your mind back on track after you've provided the answer. This is where a strong theme will help you find a transition back to your intended argument. Can you relate the question you have just answered to the theme of your argument? Use that connection to lead to your next planned point: *"Your honor, a child's dependence on her parents' financial support can never be overlooked. That's why the 'best interests of the child' standard considers a parent's employment status. But equally important to this 'best interests' standard is the parent's emotional stability. In this case, the child's father has demonstrated . . ."*
  
- ▶ **Listening to your opponent, and giving the court your better answers to its questions.** In every oral argument, you have the opportunity both to speak and to respond to your opponent. Depending on which side you represent, however, your opportunities for response differ. As appellant, you have both the first and last word—first, your argument-in-chief; last, your rebuttal. When counsel for the appellee speaks, listen carefully to the judges' questions and that attorney's answers. You will often find that you could have provided a different answer to their questions, or that you could have made some crucial distinctions. Make a note of these matters, and consider using any truly important ones for your rebuttal.

As appellee's counsel, you have to do both jobs at once: make your own argument and during the same time period, respond to arguments already made by the appellant's counsel. Judges are appreciative when you can look them in the eyes and say, "*Justice X, you asked my opponent about the small number of jurisdictions who have followed the rule he is urging. You are correct that only a handful of courts have so held, but my opponent is wrong in describing those cases as representing some new developing trend. Here's the problem with his analysis. . . .*"

► **Using your time to your advantage.** Keep rebuttal time short. Every appellate court imposes strict time limits on oral arguments, and every court has some sort of time-keeping system. Keep an eye on the timer (for our class, you'll get a card showing the number of minutes remaining). Budget the amount of time you plan to spend on each important point.

If you represent the appellant, reserve a very small amount of time (two to three minutes) from your argument-in-chief to use for rebuttal of your opponent's argument. Keep it short; the more time you reserve for rebuttal, the greater the risk that the judges will ask you new questions leading you off into undesirable territory.

► **Stopping when you are done.** When you have made all the points you came to make, when you have explained all you planned to explain, it's time to end the argument, even if you have several minutes remaining of your allotted time. The court is busy; the judges appreciate the lawyer who knows when to "sit down and shut up." Don't worry about the court. If someone has another question for you, it will be asked. If no questions are forthcoming, however, don't invite them. It's better to end strong and to end on your own terms.