

Tips for Giving an Effective Oral Argument

(Modifications made by Judge Karen Ashby to a handout originally prepared by Judge Dave Furman)

8/3/16 C.A.R. 3.4 training

I. Preparation

A. Understand the purpose of an argument: Dialogue as opposed to lecture.

1. Remember, you are not starting from scratch. You have already made extensive arguments in the briefs

2. The argument gives you a chance to dialogue with us about our anticipated concerns or questions about the law, the record or the scope of the opinion. If you have something to add to the arguments you have made in your brief that is the best use of your time.

B. Think about the essence of what your case is about and frame it in a way that emphasizes the strengths of your case and why you should prevail.

C. Those issues that are subject to de novo review, as opposed to an abuse of discretion, may be more likely to provide relief.

D. Plan to be flexible. What you want to discuss may not be what the judges want to discuss. That is okay. But as noted below, anticipate what the judges may want to discuss or questions they may have.

E. Anticipate all questions. Hard questions and easy questions. Brainstorm with people to develop these questions. Write down the questions and develop a short non-conciliatory answer- if you can.

F. Know the record. Know the law. Know how the law applies to the facts in your case. You can anticipate that the panel may ask you to identify where in the record you find support for a point that you are making.

G. If there is law that is relevant to your case that has recently been published file a notice of that supplemental authority as much ahead of time as possible.

H. Think about the limits of your position. It may be that the case has precedential value and will be published. You may get hypothetical questions. Your credibility may be harmed if you are unwilling to concede those points that cannot reasonably be contested. Know what you want and need to fight about and what you can agree to.

I. Visit the courtroom and watch another argument or two and/or go to the court's website and watch an archived argument. We are live-streaming all arguments now.

J. Learn about the judges on your panel. We all have bios on the court's website. Understanding the panel judges' backgrounds will help you anticipate questions they may have or know what you may need to focus on or explain further.

II. Beginning Your Argument

A. Tell us – in one minute – who you are, who you represent, what the case is about, and why you should prevail under existing precedent.

B. That means, lead off with your strongest argument. You may not have time to get through all of the issues raised in your brief.

C. Advocate for justice and fairness in the result as appropriate. But, issues of fairness and justice must be tied to a legal theory on which your client can be granted relief.

D. It is not beneficial to rehash the record unless you want to tie a portion of the record to a specific point you are making, especially where

that may not have been clear in your brief. The judges will have read the briefs and those portions of the record that they believe are relevant to the issues raised. To the extent they have questions about the record they will come prepared to ask for clarification.

E. Keep in mind that the COA is an error-correcting court. That is, if there was an error, politely and clearly point it out and discuss the remedy you are seeking. Be as specific as you can when framing the error for which you are seeking relief. Spending time discussing factual issues which the jury and court have found against you is not time well spent unless you can credibly argue that the record does not support their findings.

F. Remember that error alone does not entitle you to relief. Even if you can establish that an error was made you must say why the error requires reversal or any other relief you are requesting.

III. Responding to Questions

A. Welcome questions. It provides you with the opportunity to explain why the panel should adopt your answer.

B. Answer questions directly, without conceding, if you can.

C. Concede if you must. But, you may not need to use a “yes, but” answer if you have thought ahead about a difficult question. That is, you may be able to answer “no, because.”

D. If you are evasive or non-responsive to a question, it looks like your opponent’s question is the right one. If you don’t understand the question or don’t know how to answer a question (hopefully not due to lack of preparation), say so.

E. If there are questions about a particular case you, or another party, have cited, explain the rationale behind the case and how it supports your position or is distinguishable.

F. If the panel discusses or asks questions about or opposing counsel is allowed to cite to a case which was not previously addressed in the briefs, ask for time to submit a response if you are unable to do so during your argument.

G. Explain why you should prevail even with the weaknesses in your case.

IV. Credibility

A. Be respectful of opposing counsel and statements made by opposing counsel. Your facial expressions will not sway the panel. Your legal arguments may. Focus on the panel. That is who you need to persuade.

B. Don't be disrespectful of the trial judge. Use language which acknowledges the error without personally attacking the trial judge or using language which is dismissive.

C. Again, if you don't know an answer to a question, say so.

V. Clock Management

A. The length of an argument does not correspond to its effectiveness. If you don't need to use all of the time allotted ask the panel if they have any further questions and-sit down.

B. Appellant: reserve time for rebuttal. It will usually be up to you and any co-counsel with whom you are sharing time to keep track of your time. The panel will not generally do this for you.

C. Don't keep talking once the light turns red. Red means STOP.