

12

Oral Argument

12.1	The Importance of Oral Argument	438
12.2	How to Obtain Oral Argument	439
12.3	Who Should Argue	441
12.4	Typical Mechanics and Courtroom Logistics	444
	(a) Time Limits and Requesting More Time	444
	(b) Arrive Early and Get Comfortable	446
	(c) Use of Exhibits	446
	(d) Co-Counsel	447
12.5	Preparing for Argument	448
	(a) When to Prepare	448
	(b) What to Prepare	450
	(c) Organizing the Argument	452
	(d) Updating the Briefs	453
	(e) Prepared Scripts or Outlines	454
	(f) Moot Courts	457
12.6	Delivering the Argument	458
	(a) Tone	458
	(b) The Opening	458
	(c) Treatment of the Facts	459
	(d) Essence of the Case	460
	(e) Conclusion	460
12.7	Answering Questions	461
12.8	Appellee's Argument	467
12.9	Rebuttal	469
12.10	Common Mistakes	470

12.1 The Importance of Oral Argument

Uninspired oral advocacy—and criticism of it—remains endemic in our appellate courts. Even the United States Supreme Court is not immune despite the relatively small number and high visibility of arguments there. Discussions with federal appellate judges confirm that, although the quality of oral arguments may be improving slightly, most arguments still leave a lot to be desired. As the fate of a client's case rests in the hands of these most demanding consumers of legal arguments, a lawyer arguing an appeal would do well to take judges' concerns to heart.

Several Justices over the years have commented publicly on the lack of preparation by many of the lawyers who appear before them. They also have noted that many lawyers handling appeals fail to understand the essential goal of an oral argument before an appellate court. Justice William O. Douglas deemed a full 40 percent of Supreme Court advocates to be “incompetent.”¹ Justice Powell explained that he

should not be understood as saying that all or even the great majority of cases before us are poorly briefed or argued * * *. Many of our cases are superbly presented by highly competent counsel, and that competency is not necessarily related to age or experience. Some of the best advocacy I have witnessed has come from fairly young members of the bar, who tend to be especially thorough in their research and briefing. But the delight of the occasional high level of counsel performance is diluted by the more numerous performances that one must rate as “average or poor.” Of course, no one expects a John W. Davis in every case, but I had hoped for greater assistance from briefs and oral argument than we often receive. I certainly had expected that there would be relatively few mediocre performances before our Court. I regret to say that performance has not measured up to my expectations.²

Judges often comment that oral advocates who appear before them fail to prepare adequately or disregard the essential goal of an oral argument—to address the judges' concerns.³ And judges are particularly critical of arguments that resemble what former Chief Justice Rehnquist called a brief “with gestures.”⁴ His point was that the brief and the oral argument are fundamentally different forms of advocacy. They have different objectives and different formats. The oral advocate must understand these differences.

¹WILLIAM O. DOUGLAS, *THE COURT YEARS* 183 (1980).

²Remarks of Justice Powell at Fifth Circuit Judicial Conference, *The Level of Supreme Court Advocacy* 4 (May 27, 1974) (unpublished manuscript), quoted in ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 672 (8th ed. 2002).

³See, e.g., *20 Questions for Circuit Judge William Curtis Bryson of the U.S. Court of Appeals for the Federal Circuit* (Sept. 2, 2003), available at http://howappealing.law.com/20q/2003_09_01_20q-appellateblog_archive.html#106247524514644693 (commenting that the most surprising thing about oral argument “is how unprepared the lawyers are”); *20 Questions for Senior Circuit Judge Richard S. Arnold of the U.S. Court of Appeals for the Eighth Circuit* (Nov. 3, 2003), available at http://howappealing.law.com/20q/2003_11_01_20q-appellateblog_archive.html#106783560357360819 (urging oral advocates “to get the point” and not “be irritated with judges who ask questions” because “[y]ou might hear something that is the key to your case”).

⁴John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 78 (2005).

These criticisms of poor advocacy might lead some to the mistaken view that oral argument is a perilous exercise likely to do more harm than good. To the contrary, a properly handled oral argument is an invaluable opportunity to advance the advocate's cause. It is the only occasion on which the advocate can interact directly with the judges to learn of and answer their concerns. As Judge Frank Easterbrook of the Seventh Circuit puts it, the "brief is counsel's monologue, argument the dialog. * * * If the lawyer is lucky, he will hear the doubts that the judge noted in red ink in the margins while reading the brief; a skillful advocate elicits those from the bench. Far better to learn of the judge's qualms while time remains to give the answer than to be shocked when the opinion appears."⁵

Oral argument also offers the lawyer a last chance to clarify the issues, including questions that the parties may not have briefed, such as standing, ripeness, mootness, or, most often, issue preservation; direct the court to relevant parts of the record; clarify the scope of arguments and examine their logic; and address the practical import of the legal rules counsel espouses. In short, oral argument is an opportunity to provide reasons why the judges should *want* to decide the case in the advocate's favor.

Judge Jerry E. Smith of the Fifth Circuit has estimated that oral argument determines the outcome "in about ten percent of the cases" and "affects the court's reasoning and the details of the opinion in a significantly greater percentage than that."⁶ Judges Myron Bright and the late Richard Arnold of the Eighth Circuit did a study based on recording their impressions of oral arguments over a 10-month period. Judge Bright reported his opinion changed in 37 percent of all cases heard, and Judge Arnold reported a change in 17 percent.⁷

While these figures demonstrate what most experienced lawyers assume—that oral argument is not as important as the written briefs in influencing the outcome of an appeal—they also make a point that should not be ignored: In a not insignificant percentage of cases, the oral argument does determine the outcome of the appeal, and in an even larger number of cases it influences how the appeals court disposes of the case and rationalizes its result. Accordingly, oral argument should virtually never be waived. Even if the argument can be presented only by teleconference, that is still generally preferable to no oral argument at all.

12.2 How to Obtain Oral Argument

Different circuits have adopted different approaches to allowing oral argument. Some allow oral argument—even if brief—as a matter of course when

⁵20 Questions for Circuit Judge Frank H. Easterbrook of the U.S. Court of Appeals for the Seventh Circuit (Aug. 2, 2004), at http://howappealing.law.com/20q/2004_08_01_20q-appellateblog_archive.html#109137189053652494.

⁶20 Questions for Circuit Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit (Jan. 24, 2003), available at http://howappealing.law.com/20q/2003_02_01_20q-appellateblog_archive.html#90388248.

⁷Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35, 40 n.32 (1986).

the parties request it. Others use a screening mechanism administered by the court's administrative staff or the panel assigned to the case to select cases suitable for oral argument. Many courts require the parties to request oral argument explicitly in their opening briefs, if they desire the chance to appear. In this instance as in others, the local rules should be checked carefully to determine what needs to be done.

Even if the local rules are silent, Rule 34(a)(1) of the Federal Rules of Appellate Procedure allows the advocates to include in their briefs a section stating why oral argument is requested. This section should be short—generally no more than a paragraph. For those appellate courts that do not grant argument in every appeal, Rule 34(a)(2) establishes the criteria for when oral argument may be denied:

Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

Counsel should draft the request for oral argument with this rule in mind. Demonstrate in one paragraph that the appeal involves substantial legal issues that would benefit from oral exposition and are not foreclosed by precedent. Some courts also require the parties to indicate how much argument time they believe should be allotted to the appeal. As a general rule, the request should be for as much time as can reasonably be sought. In our experience, any appeal worth pursuing in a federal appellate court requires at least 10 to 15 minutes per side. That is the most common range of time allocated to the typical appeal, although some circuits allow as much as 20 minutes and occasionally more in more complex appeals.

In those courts where argument is not uniformly granted, staff attorneys or other court personnel generally screen cases after briefing is complete and recommend to the judges whether the case warrants argument and, if so, how much argument time to allow. In the D.C. Circuit, the staff recommends that most cases be resolved without oral argument.⁸ The official policy of the Second Circuit, by contrast, is to grant at least some argument time in every case in which it is requested (unless the case involves an incarcerated pro se party).⁹ Other circuits are more selective in granting requests for oral argument—

⁸This screening usually happens even before the briefing schedule is released. See HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT 46–49 (Dec. 2006). If a case is selected for argument, counsel will receive an order setting out the briefing schedule as well as scheduling the argument date and identifying the panel. *Id.* at 48. If the staff attorney recommends against hearing argument, counsel will be notified and may request argument in the opening brief. If the panel accepts the staff attorney's recommendation against hearing argument, the parties may seek reconsideration within 10 days, although such motions are "disfavored." D.C. CIR. R. 34(j)(2). Because a panel deciding to dispense with argument must have done so unanimously, such reconsideration is rarely granted.

⁹2ND CIRCUIT HANDBOOK: EVERYTHING YOU EVER WANTED TO KNOW ABOUT THE SECOND CIRCUIT (2006), available at <http://www.ca2.uscourts.gov/>.

especially in criminal and administrative appeals, which are generally more likely to be deemed to meet the criteria outlined in Rule 34(a)(2) for denying oral argument. For example, in a typical year, the Tenth Circuit hears argument in fewer than 30 percent of the cases it decides.¹⁰ Similarly, from June 2006 through June 2007 in the Fifth Circuit, fewer than 20 percent of briefed cases received argument time, although that figure rose to almost 55 percent in civil cases between private parties.¹¹

What the data show, therefore, is that the circuits differ in philosophy as well as in case mix. Certain types of cases are more likely to receive the benefit of oral argument than others. Those patterns shift somewhat over time, particularly as personnel change, but the shifts tend to be slow. A call to the clerk's office or a consultation with an experienced practitioner before the court can give the advocate a sense of the likelihood of obtaining argument. Whatever the odds of succeeding with a request for oral argument in a particular case, this is really a situation in which there is no harm in trying. Even making the request may provide a preliminary opportunity to alert the panel to the reasons why the case offers some intriguing issues that will merit close attention.

When oral argument is granted, the court clerk will advise the parties of the date, time, and place of argument, as well as the time allowed for each side.¹² Courts generally are fairly accommodating of counsel's schedules and try to avoid setting arguments for dates on which counsel have conflicting engagements. Once an argument date has been set, however, courts generally are most reluctant to change it. Accordingly, though Rule 34 provides that a motion to postpone the argument (or to allow a longer argument) will be entertained so long as it is filed "reasonably in advance" of the specified hearing date, it is unquestionably best to communicate with the clerk's office in advance of the scheduling of the argument to identify dates when counsel will be unavailable.

Some courts alert the parties in advance of the sitting for which the argument is proposed and invite counsel to notify the clerk's office if they have a conflict for that period.¹³ It is best to become acquainted with the practice followed in the particular appellate court in order to minimize the risk of a serious scheduling conflict. Usually, the clerk's office will inform counsel of its court's practices.

12.3 Who Should Argue

The selection of appellate counsel can present nonobvious decisions. Should the client stick with trial counsel or bring in specialized appellate

¹⁰PRACTITIONER'S GUIDE TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT 55 (6th rev. 2006) (reporting figures for 2002).

¹¹PRACTITIONER'S GUIDE TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT 64 & App. I (Dec. 2007).

¹²See FED. R. APP. P. 34(b).

¹³See, e.g., PRACTITIONER'S HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 93-94 (2003); 1ST CIR. R. 34.1(c); 4TH CIR. R. 34(c); 5TH CIR. I.O.P. 34; 6TH CIR. I.O.P. 34(c)(1); 8TH CIR. I.O.P. III(J).

counsel? If the latter, should it be someone local or a lawyer regarded as the “best,” even if not a regular before the court to which the appeal is headed?

As to the first question, it is often thought necessary to balance the advantages of experienced appellate advocacy and a fresh perspective against the knowledge of the record of the trial lawyer. Even in large-record cases, however, there is no compelling reason to believe that having the trial lawyer argue the appeal is necessarily the right way to go. Relatively few appeals turn on the oral advocate’s intimate familiarity with the record. Moreover, an experienced appellate lawyer should be able to master the trial record well enough in preparing for the appeal without devoting an extravagant amount of time to the exercise. Part of the skill of appellate advocacy is recognizing what aspects of the proceedings below are likely to be of interest to the appellate panel. In any event, even where intensive knowledge of a large record is required, a victory even at the cost of somewhat higher fees to bring new counsel up to speed usually will be more financially advantageous to a client than a loss with lower fees incurred by existing counsel.

More important than the cost of new counsel’s familiarizing himself or herself with the record, then, is choosing who will most effectively identify and present the issues in a manner that will persuade the appellate court. Delivering an effective oral argument requires a set of skills wholly distinct from those valuable in cross-examining witnesses at trial or making a closing argument to a jury. If the legal argument is novel or complex, the advocate must be able to answer hypothetical questions nimbly while simultaneously advancing the principal points. The advocate must be prepared to discuss the policy implications of the requested ruling in the context of the entire statutory or regulatory structure at issue. Experienced appellate advocates are more likely to have honed these skills than trial lawyers. The advocate also needs to be able to address legal issues without reference to facts when they are irrelevant, a degree of detachment that some trial counsel find difficult after having immersed themselves in the facts at trial. Even the tenor of appellate argument delivery is entirely different from presentations made at trial. Appellate arguments are generally more low-key and cerebral, and the frequent tendency of effective trial lawyers to want to dominate the courtroom or appeal to the emotions of the listeners (witnesses, jurors, and spectators) can backfire in the context of an appellate argument.

Apart from the question of expertise in the distinct skill set required in appellate arguments, there is great independent value to having an appeal prepared by an advocate who was not involved in the trial. The trial lawyer may get stuck in the ruts of the trial and not be able to see ways to escape those ruts. Although the appeal emerges from the trial, it is a new proceeding and often may be won only by emphasizing new themes. Indeed, the fact that a strategy or position proved unconvincing in the trial court often signals the need to have the case reevaluated by a fresh pair of eyes. Together, these considerations generally favor retaining an appellate specialist rather than proceeding with even the most able trial lawyer.

As to the second question, some clients believe that there is an inherent advantage to designating as the oral advocate a lawyer who has long experience arguing before a particular court. The premise for this preference is the

assumption that judges are likely to react favorably to a lawyer whom they know or at least have seen and heard on a number of earlier occasions. This assumption seems ill-founded: the mere fact of experience in a particular forum bespeaks neither quality of advocacy nor confidence on the part of the judges. Although some lawyers who frequently appear before particular courts do so because they genuinely reflect great talent and judgment in handling oral arguments, this is not always the case. Further, in some instances, a lawyer who appears frequently before a court has crossed swords so often with several of the judges that a degree of antagonism may have arisen.

Sometimes, however, a lawyer with extensive experience appearing before the court is the best choice. Oral advocacy is an art form and, as with many art forms, additional practice and experience in a particular forum may hone the lawyer's professional skill. Additional experience also may provide the advocate with a degree of stature and confidence before the court that enables the lawyer to spar effectively with the judges without either conceding what should not be conceded or insisting on the indefensible. If the lawyer has appeared often before the court and convinced the judges that, even in a losing cause, the lawyer will provide candid and reliable information and argument, the court may well be prepared to listen more attentively to what counsel has to say in the latest appeal. Finally, a lawyer with special experience before a court may have a well-developed sense of the predilections and concerns that inevitably distinguish one judge from another.

We do not want to overstate the importance of great experience, though. Many newer appellate advocates are quite capable and impress appellate judges with their earnestness and vigor. Indeed, sometimes a panel may be more indulgent toward a newer advocate, especially with helpful questions. Nevertheless, they will not smile on a bumbler who does not understand the process or lacks a relatively confident command of the material just because the lawyer is well intentioned.

Where the choice is between local counsel and out-of-state counsel, the majority of federal courts welcome the latter, provided they obtain admission *pro hac vice*, comply with local rules, and argue the case effectively. Unlike some state courts (although fewer than many suppose), which may manifest a degree of parochialism that may make it prudent to select an in-state lawyer to handle the appeal, the federal courts of appeals show no such bias. Since they all cover multiple states—indeed, the D.C. Circuit and the Federal Circuit are truly national courts—they are accustomed to seeing counsel from all around the region, and there is no tendency towards “home cooking.”

In any event, in all but the most unusual cases, there should be only a single advocate arguing for the party. Most courts do not look kindly on motions to have two counsel argue for one party,¹⁴ and for good reason: divided arguments are rarely as effective as those presented by a single advocate.¹⁵

¹⁴See FREDERICK WEINER, BRIEFING AND ARGUING FEDERAL APPEALS 317–18 (1961); see also Judge Bright, *The Ten Commandments of Oral Argument*, 67 A.B.A. J. 1136 (Sept. 1981).

¹⁵Justice Jackson once urged the appellate bar “[n]ever [to] divide between two or more counsel the argument on behalf of a single interest. * * * When two lawyers undertake to share a single presentation,

12.4 Typical Mechanics and Courtroom Logistics

(a) Time Limits and Requesting More Time

Most courts typically allot from 10 to 20 minutes per side for oral argument, although shorter allotments are not uncommon and more substantial allotments may be made for truly important and complex cases. In any event, the time usually will be short relative to all that the advocate may wish to say.

In the initial Rule 34(a) request for oral argument, counsel can seek more time than the usual allotment for oral argument but a strong showing is needed for the court to agree to a significant departure from what is customary. Requests for additional time may also be made by motion or letter to the clerk after the scheduling and time allotments have been made but such requests are rarely granted.

Courts generally will not permit more than one counsel to argue for a party, so that is not an acceptable ground for requesting increased argument time.¹⁶ On the other hand, if there is more than one party on the same side of a case, most but not all courts will permit each party to present argument.¹⁷ Nevertheless, so long as the parties' interests are fully aligned, it may in fact be preferable to have only a single counsel present argument for that side—particularly if the time permitted for argument is short. Sometimes, however, the issues may divide in such a fashion that it is feasible for the parties to share time and allocate the arguments among themselves. In any event, it is essential in such circumstances that counsel coordinate to avoid wasteful repetition and to make certain that those points that should be addressed at oral argument are covered by one counsel or the other and are presented as effectively as possible.

Counsel in a multiparty appeal should not presume that the court will hear from several counsel just because there are multiple parties. The worst outcome is for several lawyers to show up in court, with the clients in train, expecting to share the argument time, only to be told that the court will hear from just a single lawyer. The actual allocation of any division of labor should be worked out with the court or the clerk's office in advance, by motion if necessary.

Amici curiae are rarely permitted to argue; if they wish to do so, they must make a motion under Federal Rule of Appellate Procedure 29 showing extraordinary reasons for their participation. There is, of course, no harm in

their two arguments at best will be somewhat overlapping, repetitious and incomplete and, at worst, contradictory, inconsistent and confusing." Justice Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 802 (1951).

¹⁶Compare, e.g., 2D CIR. R. 34(a) ("Only one counsel will be heard for each party on the argument of a case, except by leave of court.") and 6TH CIR. R. 34(h)(2) ("Without leave of court and absent exceptional circumstances, this Court will not permit divided arguments.") with 11TH CIR. R. 34-4(d) ("Only two counsel will be heard for each party whose appeal is scheduled to be argued * * *").

¹⁷But see 10TH CIR. R. 34.1(B) ("The Court does not favor divided arguments on behalf of a single party or multiple parties with the same interests.").

asking, and prospects for success on such a motion are enhanced if the party the amicus wishes to support consents to a division of its time for the purpose.

Having settled who will argue and ascertained how much time will be allotted, it is very important to understand, prior to argument, the court's practices with respect to counting time and alerting counsel through lights or other means of the time remaining. For example, some courts have set times at which the warning will be given (usually an amber light) that time is drawing to a close, while others allow the advocate to arrange when such a warning will be given. Many, but not all, courts have a clock at the lectern that measures the time used. This is another topic on which advance planning is necessary. If this is your first time before the particular court, or if you have not argued there recently, confer with the clerk's office or visit the courtroom before the argument so that you are familiar with the layout and logistical matters such as the timing light system. It is awkward to try to learn all of this while the client is looking on, wondering whether you know what you are doing there. Plan how you will keep track of time used. Some experienced advocates bring (silent) digital watches and place them on the lectern at the beginning of argument to track minutes; others choose to rely on the court's light system or a clock that may be embedded in the lectern.

Appellants who intend to reserve time for rebuttal—and every appellant should—must be particularly sure to ascertain before the argument how the court tracks the end of time allocated for the opening (as distinct from the whole) argument. Usually, the red light that signals that time is up will appear when the time for the *opening*, rather than *all* time for the party's argument, has expired. In some courts, however, as in the United States Supreme Court, the red light marks the end of *all* argument time, so that the amber light is the caution that it is time to wind up, if time is to be saved for rebuttal. It is essential for an appellant to understand before commencing the argument which procedure the court uses.

Once at argument, the advocate for the appellant should notify the appropriate courtroom clerk or deputy at the time of checking in, or the court itself at the opening of the argument, how much time is to be reserved for rebuttal. Ask the clerk which is appropriate when you check in.

During the argument, depending on the propensities of the presiding judge and the heaviness of that day's schedule, advocates often will be permitted to run over their time allotment. This practice varies from circuit to circuit, with the D.C. Circuit, for instance, paying much less attention to time allotments than most other circuits. Knowing the judges' usual practice helps the advocate appreciate how succinct or expansive to be in answering questions toward the end of allotted time.

Even when a court tends to be liberal in allowing arguments to run over the allotted time, however, it is wise for counsel arguing the case to demonstrate awareness of the formal time limit. But there is no need to halt an answer in mid-sentence to ask to be allowed to complete the answer, even after the red warning light blinks on (so long as the response is not needlessly long-winded). Nor is it necessary to seek leave to respond to additional questions that a member of the panel puts to the advocate while the red light is glowing. Counsel may fairly assume that, by asking the additional questions,

the judges have implicitly waived the time limits. Once the active questioning ceases, though, it is presumptuous for counsel to begin a new point without expressly asking for additional time.

One way to do this is to ask deferentially, “May I have an additional minute or two to cover one more important point?” Most times the presiding judge will allow that limited amount of additional time. However, it is not wise to ask for a substantial enlargement of the allotted time simply because the judges’ questions have consumed a lot of the time that the advocate had planned to use for other purposes. As discussed in Section 12.7, *infra*, the main purpose of oral argument is to give the judges who will be deciding the case the chance to pursue matters that interest, confuse, or trouble them. It is not to allow counsel to deliver a soliloquy. Therefore, neither by word nor body language should the advocate appear to be seeking extra time at the end of the argument because the judges have “wasted” the lawyer’s time and they “owe” the lawyer the chance to give the speech that had been prepared.

The main point is to be sure you fully understand the system followed in the particular court and adapt your time management to that system.

(b) Arrive Early and Get Comfortable

Most federal appellate courts require counsel to be present and check in before the start of the day’s arguments (or the session, if the case is scheduled for an afternoon sitting), in case the schedule needs to be shuffled. The notice of scheduling of argument will specify when counsel must be present. If you are not familiar with the court and the judges, you may find it useful to attend a prior day’s arguments. You will also have the opportunity to observe the panel on the day of your argument if your argument comes later in the session.

Early arrival also enables counsel to become familiar with the courthouse and to map out bathroom trips and lunch breaks. If you feel it is necessary, consider how and where you will get coffee or a soda shortly before your argument. It is also a good time, if the courtroom is open, to understand the seating arrangements and to get acquainted with the audio/visual equipment in the courtroom, including microphones, the lectern, and the warning lights.

Finally—and importantly—if the argument is being held in a city other than your home town, be sure to allow ample time to reach the city where the argument is being held and to get a good night’s sleep the night before the argument. Anticipate possible weather delays when traveling to certain parts of the country during certain times of the year (the Midwest or mountain states in winter, or the South during the thunderstorm season), even if that means traveling to the argument site a day in advance.

(c) Use of Exhibits

Use of demonstratives, such as blowups of key trial exhibits or testimony or the text of a statute, is generally inadvisable, simply because it is so rare in an appellate court. This is one of the areas in which effective demonstration at

the trial level does not carry over to an appellate argument. Many experts on learning would contend that demonstrative exhibits should be just as useful when trying to convey points to appellate judges as they are when trying a case to a trial judge or jury. Nevertheless, the pace with which cases are called in the typical federal appellate court may make it cumbersome to try to set up easels while moving from the stand-by area to counsels' tables. And while exhibits and posters might be helpful in the rare case, many appellate judges find them gimmicky and may prefer handouts, although use of these, too, is rare.

Additionally, charts and other visuals can be distracting to both judge and counsel. Turning away from the lectern—and the microphone located at the lectern—to point to a demonstrative exhibit may interrupt the flow of argument and the judges' concentration. By moving away from the microphone, counsel also may compromise the quality of the recording of the argument and make it difficult for judges who rely on the microphones for hearing. Moving back and forth between the lectern and the exhibits also tends to waste precious time and should be avoided unless counsel anticipates that it will be necessary to answer the judges' questions. This movement also breaks the eye contact that you should try to maintain with the members of the panel.

Where counsel nevertheless concludes that use of demonstratives is warranted, the material should be cleared with the clerk's office in advance of the argument to verify that their use will actually be allowed.¹⁸ Some judges informally forbid the use of any sort of material beyond the briefs and appendices. Although no rule officially forbids the use of exhibits during oral argument, judges have been known to refuse to accept them. The better course usually would be to hand out to the judges and opposing counsel a copy of the relevant statute, regulation, or contract language, if necessary, although inclusion of, and citation at argument to, the relevant material in one's brief or appendix would avoid even the need to do that.

Far more traditional than demonstrative exhibits is the use of the joint appendix or the brief as the written prop to which the advocate may wish to direct the court's attention. Without overdoing it—creating a risk that the judges become engrossed in reading while the lawyer is trying to maintain a conversation—you can refer to a passage in the brief or appendix and invite the court to follow the quoted material as you read it. As discussed in Section 12.5(e), *infra*, though, do not confuse this limited use of the briefs or appendix in lieu of demonstrative exhibits as a device for reading long passages of *anything* to the court.

(d) Co-Counsel

While the layout varies significantly from court to court, most courts have a counsel table at which one or two lawyers, in addition to arguing counsel, can sit. Those lawyers are in a position to pass notes during the

¹⁸See FED. R. APP. P. 34(g).

adversary's argument and to respond quickly in the event that arguing counsel cannot recall where in the record something is to be found or other, similar information.

Selecting who sits at counsel's table is therefore of some importance. The best options ordinarily are the lawyer at your firm or office who worked most closely with you on the appeal and the lawyer who tried the case, if different from arguing counsel, but there is no magic formula. You should pick the person or persons who are most likely to feed you useful information or ideas during the argument without distracting you with unimportant details. If you are the appellee, such notes may be useful during the appellant's presentation, so that you have the benefit of any insights that may not already be obvious to you and can consider taking advantage of those points when your turn to speak arrives. If you are the appellant, short, discreet notes from co-counsel while the appellee is arguing may help in selecting the few points to make effectively in rebuttal.

Vigorous note-passing should be avoided, even under the circumstances just described. A flurry of activity at counsel table can be distracting not only to the lawyer who is about to argue but also to the judges on the panel. Lots of this eleventh-hour written consultation also make it seem as if you and your colleagues are figuring out what to say on the fly. Therefore, the lawyers joining the oral advocate should understand that their role should be essentially passive, unless they have something important to note that they fear the advocate may not personally recognize, know, or appreciate.

You should strenuously discourage the handing up of notes *while* you are arguing. That is rarely helpful and is almost invariably embarrassing. It also conveys a disquieting message both to the panel (and to the client, if present), suggesting that the advocate at the lectern is not in command of the material. Therefore, it is important to establish a sense of discipline with any other lawyers who will be joining you at counsel table: "Do not pass me any notes while I am arguing unless it is obvious that I need a citation that I do not have at hand or I have clearly misstated a fact or holding." Attempts by co-counsel to coach you during the argument are bad form and bad tactics.

12.5 Preparing for Argument

Before beginning substantive preparation, counsel should ascertain the sequencing of the arguments. The appellant normally goes first, but in some courts, where there are cross-appeals, the first to notice the appeal may also get to lead off the argument.

(a) When to Prepare

Now for the bulk of counsel's work: learning the record and developing a full understanding of the legal principles being espoused by both sides. Judge William Bryson of the Federal Circuit, a former Acting Solicitor General who

argued 31 cases in the Supreme Court and more than 150 in the courts of appeals, has remarked that the most surprising thing about oral argument

is how unprepared the lawyers are. * * * I tell my law clerks that even though the comic book version of oral advocates is that they have to be silver-tongued orators, that is not at all the case. Lord knows, I was not. Preparation is everything, or nearly everything. If you are fully prepared, it is hard to be really bad, even if you consider yourself a miserable courtroom performer. And if you are not prepared, it doesn't matter if you are the second coming of Cicero; even Cicero is in trouble if he doesn't know what's in the joint appendix.¹⁹

What then should preparation entail? Make sure that you:

- (1) know the facts and procedural history of your case;
- (2) know the relevant precedents;
- (3) understand and can articulate the essence of your argument and fully grasp the practical and theoretical implications of the legal rules you will be espousing; and
- (4) perhaps most important, anticipate as comprehensively as possible all the tough questions that might be asked about your positions and prepare effective responses to those questions, so that you are able forthrightly and persuasively to address the most troublesome aspects of your case.

Different advocates approach the task of preparation differently. There is, for example, the question of how far in advance to begin preparing. It is said that John W. Davis, when in private practice, did his entire preparation on the train from New York to Washington.²⁰ This approach is not recommended for ordinary mortals. Nevertheless, there is room for variation from lawyer to lawyer, based on personal characteristics such as the speed with which the individual picks up information, the advocate's confidence level, and the extent of the advocate's argument experience.

The time needed for preparation may also depend on the complexity of the case, the presence of budgetary constraints, the degree of the advocate's involvement in writing the brief, and the interval between writing the brief and the forthcoming oral argument, which will affect how long it will take to get, or get back, "up to speed" on the case. Just make sure that enough time is allotted to permit thorough preparation, with a comfortable margin in case unforeseen emergencies arise at the last minute that distract the advocate from the task of preparation.

An informal survey of experienced appellate advocates at Mayer Brown, including the authors of this treatise, revealed that most devoted at least a week to preparing for the argument of a "typical" case, with a scattering at either end of the spectrum. Others begin preparing several weeks or a month

¹⁹20 *Questions for Circuit Judge William Curtis Bryson of the U.S. Court of Appeals for the Federal Circuit* (Sept. 2, 2003), available at http://howappealing.law.com/20q/2003_09_01_20q-appellateblog_archive.html#106247524514644693.

²⁰William H. Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief*, 1 J. APP. PRAC. & PROCESS 1, 4 (1999).

in advance—particularly in multi-issue or major cases—although not all the intervening time is devoted to argument preparation. Even in simple cases, few devote less than three or four days to preparation.

(b) What to Prepare

There are certain recommendations that apply to all advocates. First, one must carefully review the relevant portions of the record below. Even the most brilliant and seasoned advocate will suffer if ignorant of the facts underlying the case. As Judge Gerald Bard Tjoflat has observed: “Nothing is more frustrating for an appellate judge than being confronted by counsel who do not know the record. Knowing the record is vital; yet, many lawyers are unable to tell us during the course of an argument whether, for example, they objected to the jury instruction they are challenging on appeal.”²¹

Although counsel need not commit to memory every procedural twist or each testifying witness’s middle name, counsel should know cold those portions of the record to which the appeal relates—and thus those that might come up at argument. The essential aspects of the record will vary from case to case, but typically include such things as the precise nature of and reasons given for the rulings below that are being challenged on appeal, the place in the record at which issues were raised and points preserved (or not), the evidence bearing on any sufficiency argument, and the reasons for believing an error prejudicial (or not).

Second, it is important early on in the preparation to go through the briefs with fresh eyes and write down all the questions, factual or legal, procedural or substantive, to which your briefs do not provide clear and complete answers. In this regard, you should keep in mind John W. Davis’s primary rule of appellate advocacy: change places mentally with the court and imagine what a generalist judge might find troubling about your case. If enough time has elapsed since you wrote the briefs, or if you did not work intensively on the briefing, you will likely be seeing your case in somewhat the same manner as the court will do, although with the advocate’s natural bias, which you must recognize and for which you must adjust. Indeed, it is the experience of most appellate advocates that, no matter how thoroughly they think they considered the issues in preparing the brief, they have new insights and see new problems during the argument preparation. As Boswell famously quoted Samuel Johnson: “[W]hen a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully.”²²

²¹20 *Questions for Circuit Judge Gerald Bard Tjoflat of the U.S. Court of Appeals for the Eleventh Circuit* (Aug. 4, 2003), available at http://howappealing.law.com/20q/2003_08_01_20q-appellateblog_archive.html#105996965614360491. Similarly, when asked to give advice to a hypothetical lawyer about to argue his first case before the court of appeals, Judge Jerry E. Smith simply stated, “[k]now the record cold.” 20 *Questions for Circuit Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit* (Jan. 24, 2003), available at http://howappealing.law.com/20q/2003_02_01_20q-appellateblog_archive.html#90388248.

²²JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 849 (Oxford Univ. Press 1998) (1791) (letter of September 19, 1777, to Boswell).

This fresh perspective will often bring with it fresh insights that may suggest a significant recasting or revision of an argument from the way it was presented in the briefs. If you conclude that there is a different and better way to frame an important argument, the oral argument will be your only opportunity to do so. But such a venture is fraught with hazards. If you appear to be interjecting a new issue not covered in the briefs, the court will likely bridle and may deem your new argument waived. But so long as the *issue* has been raised, you will be accorded some latitude in revising the manner of its presentation. To the extent that revising the argument will mean abandoning or disowning some point or points made in the brief, careful consideration must be given to whether that should be done explicitly or subtly.

In any event, if the decision is materially to modify the way an issue is treated, you should ordinarily plan to do it relatively early in the argument, lest the opportunity to do so disappears in a welter of questions and answers on other points. While most of the things you have to say at oral argument will also have been said in the briefs in one form or another, the court will have no way of learning about a significant revision from the approach taken in the briefs unless you tell them about it rather directly.

The answers to many of the questions collected in the process of reviewing the briefs will be found from study of the relevant portions of the record or review of the applicable precedents. Turn to each of the issues that you flagged during your fresh read through the briefs, rephrase them as questions, and craft your best answers. As you continue to prepare, continually hone the answers to the trickiest questions. Continue to add new questions as you re-read the record materials and joint appendix. Consult with trial counsel and your own colleagues in formulating responses.

If the budget permits, or if they are willing to do it *gratis*, you should also give your briefs to a couple of insightful and experienced colleagues who are unfamiliar with the case. They will have a perspective considerably closer to that of the judges and can help you identify the key weaknesses in your and your opponent's arguments and add to the list of questions you should be prepared to answer.

One aspect of argument preparation that often is overdone is the study of every case cited by each party. In almost any federal appeal, the briefs will contain citations to scores of cases. During oral argument, though, it is rare for the court to ask about the facts or holding in any cases, unless the appeal at hand turns squarely on some specific precedent and the parties are debating its application to the facts. Therefore, in preparing for argument, it is rarely necessary to study more than perhaps eight to a dozen cases in total. Those key cases should be relatively easy to spot as you read through your and your opponent's briefs. It is desirable to make up a notebook containing the cases and bring it with you to oral argument. The notebook should be organized and indexed in a way (such as by issue or alphabetically) that will make it easy for you to find a case quickly if you decide that there is something that you actually want to quote at argument. This reference may be useful if your opponent mischaracterizes the case during the argument or a judge seems confused about what the case held. You can score points if you are able to produce the opinion on the spot and read a short segment from it.

Another practical issue in preparation involves the record or joint appendix. As we have emphasized, oral arguments can go terribly wrong if the advocate lacks command of the trial record. As with the cases cited in the briefs, however, part of the art is in selecting what portions of the appendix deserve the most careful study and should be most easily accessible during the oral argument. The precise answer varies with the specific case, but the question to keep in mind during the review is this: “What is the likelihood that this particular document or testimony may come up at argument, either to support my position or to address a question that a judge may ask?”

Many experienced appellate advocates underscore and highlight key passages of the appendix during their preparation and then develop some system—such as annotated marginal “flags”—that will allow them to find relevant material in the appendix immediately, even in the midst of argument while standing at the lectern. Other advocates photocopy the few pages of the appendix likely to come up at argument and organize them, along with photocopies of any key statutory or regulatory provisions or key cases likely to be addressed at argument, into a short notebook organized by issues. The latter system is particularly effective in multiple-issue appeals with large joint appendices because it allows the advocate to carry a slim notebook, rather than a pile of tabbed joint appendix volumes, to the lectern, and to have readily at hand all materials pertinent to any given issue during the argument.

(c) Organizing the Argument

Once familiar with the record and the briefs, counsel can begin to build an argument. Following the briefs for a sense of breadth and structure, the issues should be winnowed into two categories: those most useful to mention in the limited available argument time (i.e., your strongest and your opponent’s weakest arguments) and those needed to respond to the judge or opposing counsel. Your affirmative presentation should focus on the former category, but your preparation should give equal or greater attention to the latter.

The argument should not be, or attempt to be, a recapitulation of the briefs. While obviously the subject matter of the two will overlap considerably, judicial ire can be raised when the judges sense that the advocate is just marching woodenly through the brief. In selecting which issues to discuss, consider that the ramifications of certain legal arguments lend themselves especially well to oral treatment. In addition, it is the very rare multi-issue case in which counsel has the opportunity to discuss in any useful way more than a couple of the issues. No matter how many issues or sub-issues are found in the brief, an effective oral argument depends on selecting no more than three or four points you plan to emphasize and develop orally—if given the opportunity to do so. Although it is essential to be prepared to respond to questions on any aspect of the appeal—the judges, after all, have the power and prerogative to control the agenda—counsel should plan, if permitted leeway, to focus on the issues most likely to be found persuasive.

While it often is best to begin your argument by going immediately to your strongest issue or most important point, lest you otherwise lose the opportunity to get to it, it sometimes is more appropriate to sequence your

argument differently. For example, if there are any jurisdictional issues, it generally makes sense to address them first. And if there is a logical sequence to the arguments, it may be best to follow that sequence rather than heading directly for the strongest argument. To illustrate, you may conclude that you have an especially powerful argument on damages, but if you bypass arguments on liability, the court may infer that you see them as weak arguments and discount them accordingly. Alternatively, the strongest arguments may be sufficiently clear, or may afford less valuable relief, so they would not benefit as much from oral elaboration as the closer questions.

For most legal propositions, counsel should rely primarily on reasons and principles rather than case discussions, although sometimes a case may contain such useful language that it could profitably be quoted—*briefly*. As a general matter, however, the argument is not likely to focus on a discussion of cases, except where the outcome may turn on whether the holding of a particular case is controlling. Keep in mind in this regard that decisions by trial courts or from other appellate courts are not controlling and, therefore, are only as impressive as their reasoning.

Different advocates disagree about whether to begin by discussing the facts, especially where the appeal turns on some proposition of law. It is rarely useful to spend valuable time rehearsing the facts in anything like the detail that was provided in the briefs. In virtually all federal appellate courts the judges will have read the briefs and will have a reasonably good idea what the case is about before they take the bench. Nevertheless, it is often useful to set the stage with a brief and favorable introduction describing what the case is about. One concept to keep in mind in this connection is that, just as with writing the statement of facts in the brief, the goal should be to convey quickly to the court the crucial facts that are most likely to make the court perceive that your side *should* win—as a matter of elementary justice. The ensuing discussion of the appeal points then will explain how and why the court should rule in favor of your side.

(d) Updating the Briefs

Counsel always must be sure to update the research to check if any new, relevant decisions have been rendered or a relevant statute or regulation enacted or amended since briefing was completed. Depending on the importance of the point, it may be appropriate to check recent case law in other jurisdictions for persuasive, if not binding, recent authority. If significant new authority has arisen since the briefs were filed, it will usually be desirable to file a letter with the court detailing, in brief compass, the new authority and the proposition it supports.²³ Some courts, such as the Seventh Circuit, prohibit counsel from referring to newly decided cases during oral argument unless a Rule 28(j) letter has been filed, which may be done on the morning of argument if necessary.²⁴

²³See FED. R. APP. P. 28(j) (limiting such letters, which may be filed pre- as well as post-argument, to 350 words).

²⁴See, e.g., 7TH CIR. R. 34(g).

A related issue arises when, too close to the argument to send a letter to the court and to opposing counsel, you find some new authority that bears significantly on an appeal issue and that you would like, or feel obligated, to call to the court's attention or discuss during the argument. Common courtesy requires that you advise your adversary of this authority as soon as you decide that you will be referring to it and that you give copies to your adversary and the court on the day of the argument. You should not plan an extended discussion of such last-minute authority, unless it is virtually controlling, as no one else will have had the opportunity to digest it; just provide the citation and indicate its relevance as succinctly as possible.

(e) Prepared Scripts or Outlines

Once counsel has a grasp of the essence of the case, the record, the relevant case law, and answers to the most difficult questions, it is time to begin mapping out the time behind the lectern. The first consideration is how detailed or abbreviated your "script" should be. This varies significantly depending on whether you are arguing first or second. If the latter, it is especially important not to be wedded to a preconceived script, but to adjust your argument to what has been said by counsel and court during your adversary's presentation.

Beyond that, the degree of detail of any argument outline is something that will vary from advocate to advocate. What is most important is that you be comfortable with whatever you are taking up with you to the lectern, whether sketchy notes or a detailed outline. That said, it is generally viewed as inadvisable to rely on a fully scripted argument if you are expecting to read it verbatim to the court. It is bad form to try to read a prepared presentation, and some court rules expressly forbid it.²⁵

Not only is it unwise or unacceptable, it also is impractical. Virtually every federal appeal will involve active questioning, and the questioning likely will not track the precise sequence of points in a prepared script. Nothing is more awkward and off-putting than to see a lawyer at the lectern frantically flipping through the pages of a yellow legal pad trying to find his or her place in a prepared script, after the judges' questions have dragged the advocate to another issue. Nor is it advisable to try to memorize a prepared script, even though repeated practice sessions may help you hone your phrasing and cadence in making points that you want to make. Advocates who have tried to memorize a prepared text are more likely to lose their bearings when the questioning takes the argument in unplanned directions.

At the other extreme, some advocates attempt to proceed wholly extemporaneously, entirely without notes. Lawyers who approach oral argument

²⁵See 6TH CIR. R. 34(h)(1) ("This Court looks with disfavor on any oral argument that is read from a prepared text."); D.C. CIR. R. 34(a) ("This court will not entertain any oral argument that is read from a prepared text.").

this way assume that they know what the case is about and know what they want to say, and they worry that rehearsing their argument in advance may make it seem “canned.” This approach requires an extraordinary level of self-confidence, as without notes of any kind it is easy to lose sight of the key points to be made.

For most lawyers, prudence dictates preparing some form of outline, which will help to remind the lawyer of the critical points he or she wishes to make with regard to each issue that may be discussed during the argument, and bringing that outline to the lectern as a point of reference. The degree of detail in the outline will vary depending on the advocate’s style and comfort level, but some effort should be made to avoid an outline that is so detailed as to slide into a prepared text. In addition, the more detailed the outline, the more difficult it may be to find your way back into a major theme after questioning has lured you to a point that is, from your original perspective, “out of order.”

At the very least, counsel preparing for oral argument should use such an outline in actually rehearsing the presentation. This will provide the opportunity to become comfortable with phrasing the points and making transitions. In addition, developing an outline to guide the presentation will help focus the advocate’s attention on two important bookend pieces of the argument: the opening line and the exit line. In this respect only, an appellate oral argument is akin to a closing argument at trial. Effective trial lawyers work to hone an appropriate, attention-grabbing opening line (or series of sentences). With time as short as it is during an appellate argument, it is equally important for the appellate advocate to have a very clear idea exactly how to open the presentation. Similarly, while the exit line need not be a rhetorical flourish, as it might be at trial, the advocate should plan carefully what final thought is to be left with the judges before the advocate sits down. Of course, you have to be flexible enough to adapt your exit line so that it does not appear canned, as it may if you do not link it to the last topic being discussed with the judges before it is time to sit down. The rest of the outline fills in between those two benchmarks.

Next, there is the question of how lengthy an argument to prepare. To begin with, the argument you prepare should not exceed the allotted time, and, for the appellant, consideration should be given to the amount of time needed for rebuttal. Your prepared argument should enable you, as succinctly as possible, to make all your most important points if you are facing a “cold” bench, i.e., one that is not actively engaged in asking questions. At the same time, it is necessary to be prepared for the high probability, at least in most federal appellate courts, that you will be unable to deliver much of your prepared argument. This means that it is essential to give careful thought to the priority of points, as there likely will not be time to cover many, perhaps most, of the points that you might like to address. Of course, even if you have winnowed out a particular topic as unworthy of mentioning at the argument, you should have well in mind how you will deal with it should the judges or your adversary raise it.

Identifying the panel that will hear the case might help in determining the length and content of the argument. The availability of that information

varies substantially from court to court.²⁶ As a general matter, counsel should at least ascertain whether the judges of the particular court are usually familiar with the briefs and arguments or tend, as some regrettably do, to learn on the fly during the course of the argument itself. Counsel also should seek to gain some sense of whether the judges tend to be active in questioning the advocates or instead to listen relatively passively. Additionally, if counsel can identify which judges will be on the panel, counsel will be able to ascertain what positions they have previously taken on the issues in dispute, which will aid in identifying and addressing their likely concerns. By researching what each judge has written and how they have voted on the issues similar to those in the current appeal, counsel may even be able to pin down who can—or must—be persuaded in order to prevail. Even if you do not know the names of the panel members in advance, you should have in mind what the various members of the court have said on issues related to those involved in the appeal.

Rhetorical flourishes that sound great in the office often fall flat in the courtroom and generally should be avoided, especially in the typical civil case. In particular, counsel should not be concerned to prepare a flowery closing, which will generally be a waste of precious time. When you have reached the point where the red light has come on or you need to save the balance of time for a rebuttal, you should be prepared to sum up very briefly using your exit line (if it fits in context), or just to thank the court and sit down.

Finally, most advocates find it useful to rehearse the argument, both as a guide to the length of time it will take and as a means of internalizing the key arguments so that, when the time comes, they may be expressed cogently and fluently. You should have well in mind the points you want to make and a full grasp of the best responses to all anticipated questions. Rather than prepare too many remarks, you should focus on the overall arc of the discussion, to be able to guide judges' questions towards the next point in the argument.

Counsel must also consider what materials to have handy at the lectern. As suggested in Section 12.5, *supra*, many advocates find it valuable to prepare a notebook that contains those relatively few cases or statutes that are sufficiently central that there may be reason to cite or quote them, carefully tabbed to the relevant sections for ready access, with pertinent language highlighted. The materials at the lectern should also include any crucial exhibits or portions of the transcript upon whose interpretation the case may depend; in some instances, this can most conveniently be accomplished by tabbing the appendix or excerpts of record. Such materials are useful during oral argument if one of the judges happens to ask counsel to refer to a specific passage. And, of course, to the extent counsel anticipate possible questioning regarding any aspect of the record, it is important to know where the perti-

²⁶Among federal courts, the Fourth, Seventh, and Federal Circuits do not disclose the identity of the panel members until the morning of argument. The First, Third, Fifth, Ninth, Tenth, and Eleventh Circuits disclose the identity of the panel about a week in advance of argument. The Second Circuit discloses the panel Thursday before the argument, the Sixth Circuit discloses two weeks before argument, and the Eighth Circuit discloses about three weeks before argument. The D.C. Circuit ordinarily discloses the make-up of the panel in the notice of oral argument.

ment portions are to be found in the appendix or trial record, so that counsel can swiftly direct the court's attention to the relevant materials.

(f) Moot Courts

Once prepared, many advocates find it helpful to hold one or more (again, depending on the budget and the complexity of the case) moot courts or other sessions to explore with other lawyers the most effective presentation. For relatively inexperienced lawyers, this will provide useful advice regarding technique: Does the lawyer speak clearly enough and at an appropriate pace? Are there annoying or distracting mannerisms that the lawyer should work to modify or eliminate? Is the lawyer prone to interrupt the judges' questions? Is the lawyer able to maintain appropriate eye contact with the judges? Does the lawyer promptly and directly answer the judges' questions? Is the tone suitably conversational or unduly stilted? Is the lawyer visibly reading the argument? Inexperienced advocates may find it helpful to videotape the moot court session and watch it to try to identify stylistic flaws that need correction.

This is an area in which experienced oral advocates follow radically different practices. Several years ago an experienced Supreme Court practitioner polled the relatively small number of lawyers who regularly appear before that Court—about 15 at the time. One of the questions posed was whether the lawyers used some kind of moot court as part of pre-argument preparation. The responses varied widely. At one extreme, several experienced oralists disclaimed formal moot courts, explaining that they tend to distract from personal preparation and to lead to canned speeches. At the other extreme, at least one able lawyer reported that he likes to have at least five or six moot courts before a major argument, if the client's budget allows. Most of the experienced lawyers were somewhere in the middle, acknowledging that they typically have at least one or two such sessions.

A moot court can be organized in various ways. For instance, the advocate might start by running through the argument without interruption, watching not only for effectiveness of presentation but for the length of time required. Then the process could be repeated, with questions from the "judges." The latter process should not be limited by the time allotted for the actual argument, because it will be impossible to replicate or predict how that will go. Rather, the objective of this part of the exercise is to test the advocate's ability to respond effectively to all the tough questions the moot court judges can concoct. The moot court panel could profitably include both lawyers knowledgeable in the area of the law and the particular case, and generalists who know little of the case but come at the matter fresh, with just a reading of the briefs and the lower court rulings, as may the actual judges.

Some experienced advocates, including the authors of this chapter, prefer to dispense with formal moot courts and instead convene their "judges" and co-counsel for practice question-and-answer sessions. In these sessions, counsel practices answering questions, but the floor remains open for brainstorming about the best answers. Some advocates hold such a brainstorming session early in their preparation, after which they formalize their opening, refine their answers to tough questions, and then hold a more formal moot

court. There is no one-size-fits-all formula. The essential thing is to employ a process that will test the advocate's positions and help in formulating succinct and effective answers.

12.6 Delivering the Argument

(a) Tone

The manner of interaction with the judges is an important aspect of effective oral advocacy. The best tone is one of respectful equality, in which the advocate discusses the issues in a calm and dignified manner, courteous but not fawning, more formally than in an ordinary conversation but not so formally as to be stilted. Pacing is also important. Even though time is very short, the advocate should not rush through the argument to ensure that everything that was planned is in fact uttered; almost inevitably, much of the planned argument will end up on the cutting room floor. The purpose of the exercise is not to get out as much as possible but rather to make sure that what is said is heard and understood by the judges, and, insofar as possible, addresses their concerns about the case.

(b) The Opening

Most advocates begin their argument with the phrase, "may it please the court," and then state their name and whom they represent. At least one chief judge of a circuit, however, chided counsel who introduced themselves after he as the presiding judge called upon the lawyers by name to introduce the case. In addition, he observed that it seems to be a waste of time for the lawyer who stands up first to announce that "I represent the appellant"—since (with only rare exceptions), the appellant automatically goes first. The same point applies to the lawyer for the appellee, who argues next and also may be summoned by name by the presiding judge. The point is that counsel may be able to dispense with needless formalities, when it is obvious who is arguing and whom the lawyer represents.

It is generally viewed as inappropriate to introduce co-counsel or clients who are present in the courtroom, although there may be some courts where that is accepted or expected. Normally, this folksy approach is considered inconsistent with the decorum of the appellate courtroom.

Although practice may vary from court to court, counsel should then usually indicate the length of time reserved for rebuttal. Counsel for the appellant should always reserve time for rebuttal, if only to serve as a check on the appellee. Typically, in a 15- or 20-minute argument, it is advisable to reserve 3 to 5 minutes for rebuttal.

Finally, at a calm pace, the argument should commence with a carefully crafted sentence that explains why the case is on appeal. This first sentence should succinctly capture what the appeal is about and, if feasible, why the outcome counsel seeks is required. This is the "opening line" that we suggested

in Section 12.5, *supra*, the preparation section, that counsel should carefully craft before stepping into the courtroom. In most instances, of course, federal appellate judges will be fully aware of the background of the case from reading the briefs, and the opening need not belabor the basics. If the bench is an active one, the first sentence may be the only complete one that you get out in the course of the argument.

At the same time, the first sentence should avoid a dubious or unnecessarily provocative assertion that might alienate the judges or invite immediate interruption. If no interruption comes, counsel ordinarily should identify the points he or she intends to address during the course of the argument, then proceed forthwith to the first of them. While there is not universal agreement as to the value of a brief opening “roadmap,” the approach of providing one may cause a judge to inquire at the end of the argument about issues the advocate intended to address but was unable to reach, thus affording an opportunity that might otherwise not exist to discuss the issue.

Some skilled advocates forgo outlining their intended argument, however, and simply launch into their first point; they prefer not to squander precious time before being interrupted by questions and to avoid promising to address issues they might not get a chance to reach. Moreover, it may appear presumptuous to outline what you intend to discuss when the judges may have very different discussion topics in mind. Again, there is no one-size-fits-all answer, and the best course may vary from case to case and advocate to advocate.

(c) Treatment of the Facts

This is one respect in which oral argument differs markedly from the briefs. Judges do not want to hear a general recounting of the fact of the case, and if an inexperienced advocate tries to provide one, they typically interrupt to say that they are familiar with the facts. Indeed some courts’ rules explicitly discourage a factual statement of the case at argument.²⁷ This is not to say that the facts established in the record are not important components of an oral argument, but rather that the key facts to which the advocate wishes to call the court’s attention should be marshaled during the course of the discussion of the legal point to which they are germane. This will give them far more effective impact.

²⁷See PRACTITIONER’S GUIDE TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT 67 (Nov. 2006). at 67 (“A common mistake lawyers make before this court is to spend half of their oral argument talking about background facts, not the key ones on which the decision turns.”); PRACTITIONER’S HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 96 (2003) (“Because the judges will have already read the briefs before oral argument, it is unnecessary for counsel to state the facts in detail.”); *see also* 1ST CIR. R. 34.0(c) (“Parties may expect the court to have some familiarity with the briefs.”); 7TH CIR. R. 34(d) (“In preparing for oral argument, counsel should be mindful that this court follows the practice of reading briefs prior to oral argument.”); 9TH CIR. R. 34-1 note (2) (“The Court thoroughly reviews the briefs before oral argument.”); 10TH CIR. R. 34.1(D) (“In preparing for oral argument, counsel should remember that the judges read the briefs before oral argument.”).

(d) Essence of the Case

In crafting the theory of the appeal and thus the principal thrust of your argument, highlight aspects of the case—either factual or legal—that give your position the legal or moral high ground, as well as showing the drawbacks associated with adoption of your adversary’s position. The guiding principle is that somewhere in your argument—often, if possible—you should provide the judges with a reason, or several reasons, why they should *want* your client to prevail or should find it distasteful to rule for your adversary. An example of such an argument would be to explain what unmanageable legal rules or undesirable policy consequences would follow from your opponent’s position. Another approach is to set up the (always accurate) depiction of the facts or the discussion of the legal points to leave the impression—*without expressly saying so*—that it would be *unfair* for your side to lose and the other wide to win.

What this entails will, of course, vary from case to case. Some cases manifestly implicate serious moral as well as legal issues—for example, a case about the right to die or the criteria for granting asylum to persons facing deportation. There, the challenge will be to convey in human terms the consequences of the ruling without at the same time becoming too preachy or appearing to ask the court to discard its role as applier of law in favor of some wholly subjective, emotional approach. While judges cannot help but be influenced by the emotional components of a case (although different judges may reach different moral judgments), they will surely bridle at any argument that appears to invite them to base their decision on their personal or subjective policy preferences.

Of course, many appeals will involve far more mundane topics, for example, the interpretation of a bill of lading or the requirement for recordation of documents affecting title to land. Even so, the court’s decision will have consequences for shippers or for land transactions. You must help the court to look ahead and see how the rule you espouse will facilitate, and your opponent’s position disrupt, the predictability and efficient conduct of transactions in the affected area.

Because rebuttal should be just that, you should ordinarily not hold back points that are part of the architecture of your position. There are times, however, when it may be advisable to lay a trap for your opponent by leaving them room to make an argument that you expect to be made and that you can effectively destroy on rebuttal.

(e) Conclusion

At some point—either when counsel has made the essential points, or, more likely, when the time is running out—counsel should wind up with a brief request for the relief being sought and, if you are the appellant completing your opening, with a statement such as: “Unless there are any questions, I would like to reserve the rest of my time for rebuttal.” When the red light on the lectern goes on, counsel should complete the current sentence and cease talking, unless counsel is answering questions from the court.

Sometimes, however (though not often), it may be acceptable to ask the court's indulgence to make a further point that seems important and has not yet been covered. Whether to do this depends in part on reading subtle signals from the court as to its openness to such a request and in part on the court's procedure regarding counting post-red-light time against rebuttal time. Some courts do not; others, like the Supreme Court, do. In the latter instance, you might get only an amber light when the time you have allotted to the opening has expired, but the court will not mind, if you go on with your argument; you will simply pay the price of abbreviated rebuttal time.

Conversely, if the former procedure applies and the time spent after the red light is not counted against rebuttal time, or if you are appellee, you need to balance the benefits of making "just one brief further point" against the risk of antagonizing the court by overstaying your welcome. On the other hand, if you have said what you want to say, sit down. The old adage "Quit while you are ahead" often applies. Especially if you are in a position to signal to the court that you are concluding early, wrap up with something like this: "If the court has no more questions, I shall simply conclude by asking the court to * * * " and deliver your exit line. The judges will appreciate your economy of expression.

12.7 Answering Questions

Because the greatest value of oral argument is the chance to learn what the judges find important about a case and to respond to their concerns, treating judges' questions as bullets to be dodged is self-defeating. Questions from the bench are an opportunity to assuage a judge's concerns at the very moment that they seem most pressing to the judge. Accordingly, questions should be welcomed and answered, not resented or evaded. Moreover, it is considerably more likely that you will retain the judge's attention when answering his or her question than when giving your prepared remarks. And when a question is asked during your adversary's argument, you will again have an especially attentive audience when you refer to and comment upon the implications of the judge's question and the adversary's response.

Although the temptation to postpone answering a question may be strong, especially if the question relates to a subject the advocate plans to reach later in the argument, the temptation should be resisted at all costs. *Never, never* say: "I shall be addressing that issue later in the argument." In the heat of argument, a belated response to a deferred question often escapes notice, or is addressed only after the judge who initially asked it has already tuned you out. In addition, further questioning may use up your time, so that you never have a chance to reach the answer to the question at the stage you would have preferred to confront it.

The time when a judge asks a question represents what educators call the "teaching moment." Since you are there to connect with the judges who will decide your client's fate, do not squander the teaching moment. It may be permissible to give a brief but responsive answer and then to add that you plan to address that issue at greater length later. Counsel is, however, generally

better served to reorder the oral argument, if necessary, and to accelerate the full discussion of the point once a judge's question manifests current interest in it. Moreover, counsel are likely to find themselves subject to judicial admonition for not responding promptly and directly to questions they are asked.²⁸ One possible exception to this advice, however, arises when counsel is in the midst of answering another judge's questions; in that case, counsel should seek to answer both sets of questions as expeditiously as feasible. In this vein, a question that appears to call for a yes-or-no answer should, if at all possible, be given such an answer, following which the advocate is free to elaborate, qualify, or explain.

At the same time, if the question involves a peripheral point, counsel need not spend more time on it than a candid and responsive answer requires. Counsel then should segue back to his or her main points. All too often, novice advocates who have taken perhaps too much to heart the importance of the judges' questions finish an answer and then stare inquiringly at the judge, as if waiting for a nod of approval. This silence often encourages further questions, sometimes of little relevance. Counsel would be best served by switching quickly and smoothly back into the argument after responding to a question. An effective technique to signal closure is to turn or direct one's gaze slightly away from the questioning judge and toward the rest of the panel.

If counsel does not know the answer to a question about the record or about a legal point that has not been briefed, it is appropriate to offer to submit a supplemental memorandum within a short period after argument—a few days or a week, for example. In the case of a new legal point that is potentially adverse to your position, it is legitimate to point out that your adversary has not raised the point. On the other hand, one cannot propose supplemental briefing in response to tough questions on issues that have been briefed. In such a case, you will just have to do your best—which you should be ready to do if you have prepared adequately. At all events, you should view hard questions as an opportunity to deal with what the court may see as the crux of the case.

If a question is unclear, counsel should ask for clarification. This must be done carefully. Judges do not like to be questioned—that is their role. Therefore, it may seem impertinent to respond: “Are you asking whether * * *?” One graceful way to deal with an unclear question is to preface your answer with a diffident: “If your Honor is asking whether * * *, then * * *.” This invites the judge to clarify the question, if the premise of your answer is mistaken, without directly querying the judge.

Often, when asked to clarify a question, a judge will link it to other issues in the case, potentially allowing counsel to return to a point on his or

²⁸One anecdote from a Supreme Court argument, perhaps apocryphal, concerns a prominent advocate who was asked by Justice O'Connor during the course of his argument how he distinguished a certain case. He first responded that it was covered in the brief, but Justice O'Connor persisted. He then demurred on the ground that the explanation would be complicated and time-consuming, to which Justice O'Connor retorted: “You're here, we're here, why don't we just go ahead and discuss it?” At this point, the advocate was compelled to admit that he was unfamiliar with the case.

her outline. At all times, credibility is crucial to the court's confidence in counsel's argument. If you do not know the answer to a question with a reasonable degree of confidence, never bluff. Admit that you do not know. But be appropriately apologetic: "I am sorry, your Honor, I do not know the answer to that question." The excuse, "But, your honor, I didn't try the case," will not be well received.

You can take some sting out of the concession, if you can smoothly shift ground into an area where you are more confident. For example, if asked about some testimony that does not seem familiar, admit that you are not aware whether there is anything in the record on that point, but then immediately turn to something relevant that you can invoke to support your position on the pertinent issue.

If a judge asks about a case that does not ring a bell, admit it. This may be an instance in which you have no choice but to ask the judge for some help in identifying the reference. Once again, the response should be candid but respectful. Something like this may work: "I am sorry, your Honor, but that reference does not bring anything to mind. Perhaps if I had a bit more information about the case, I could respond to your Honor's question." While it is awkward to forget or not know about something that is germane to the issues on appeal—or that the judge thinks may be germane—it is far worse to get caught bluffing. That will totally destroy your credibility with the court. As Judge Selya has noted: "Credibility is the advocate's stock [in] trade."²⁹ Indeed, often it is the advocate's most powerful asset. Better to suffer the slight embarrassment of admitting that you do not know an answer—and to offer to submit a supplemental memorandum addressing the point the next day—than to risk getting caught faking it.³⁰

Just as hard questions should be seen as an opportunity to reassure the court that your position is really sound, requests for concessions should be approached with caution. Courts have been known to use concessions against an advocate in deciding a case. Whether it is wise to concede a point will, of course, depend on the circumstances. Counsel may have no choice but to concede unfavorable facts, but with careful preparation you should be able to proffer a convincing explanation of why they are not lethal to the position being espoused. When legal concessions are solicited, however, counsel should think hard about the implications before agreeing. Does the proposed concession go to the heart of your case, or does it instead seek to test the logical limits of your position? If the former, you cannot concede the point. If the latter, it may be tactically advantageous to reassure the judge that you can prevail without your proposed rule producing the kind of untoward results

²⁹20 Questions for Circuit Judge Bruce M. Selya of the U.S. Court of Appeals for the First Circuit (Mar. 8, 2004), available at http://howappealing.law.com/20q/2004_03_01_20q-appellateblog_archive.html#107872201069299002.

³⁰On one occasion during a Supreme Court argument Justice Stevens asked an experienced but not always sure-footed advocate whether acceptance of his position would require overruling a certain old decision. The case had not been mentioned in the briefing, so the advocate could be excused for not having it in his sights. Nevertheless, instead of candidly admitting unfamiliarity with the case and asking Justice Stevens what the holding was, the advocate answered "yes"—which turned out to be the wrong answer.

implicit in the question. Anticipating questions of this sort is one constructive consequence of using formal or informal moot courts in preparing for argument. It is much better to have thought about such questions before you walk into the appellate courtroom and to be prepared with your answers than to try to figure out a response while standing at the lectern.

In any event, you should be prepared to stand your ground where you must, even if it involves disagreeing with the judge's assumptions or premises, and you should never concede a point just because a judge is pushing for a concession. Even if the inquiring judge is disdainful of your efforts to avoid a damaging concession, remember that there are other judges on the panel who may take a different view of the matter.

If the bench is a hot one, the questions may come without pause. Answer each question directly, then try to weave your affirmative arguments in as further explanation. Needless to say, you should endeavor to make your most important points during the course of the argument even if bombarded with questions. At the same time, the purpose of the argument is more about getting the judges' questions answered than about providing a forum for the advocate's speeches. You should not worry unduly if there is neither time nor opportunity to cover valuable points that you planned to make; the reality is that this is almost inevitable in any complex or substantial case. Moreover, if the undiscussed points are important, they will almost surely have been covered in the briefs.

There are endless types of questions judges might ask. The following are some of the major forms, as well as examples and the occasional strategy for answering them:

(1) *Pure factual questions*: "Does the record show how far the witness was from the place where the collision occurred?" To these questions, counsel should give concise, straightforward answers and move on, if the question involves only a minor or peripheral point. But if the question invites focus on a crucial fact, the significance of that fact should be stressed in the answer. Make a judgment whether the question provides the "teaching moment" for driving home a major theme of your case, even if it comes at a point in your argument earlier than you had anticipated. If so, expand upon the answer and explain why it is important to the ultimate resolution of the case. If, unfortunately, you do not know or cannot recall the correct information, consider whether the answer may be important enough to turn to co-counsel at counsel table to see whether one of them can supply the answer.

(2) *Threshold jurisdictional and waiver questions*: These are questions such as: "Do you have a final judgment as to all parties and issues?" "Is your appeal timely?" "Is there diversity of citizenship?"³¹ "Why isn't the case moot?" "Does the plaintiff have standing?" "What is our standard of

³¹That the relevant citizenship is in all probability that of all of the members of a limited liability company and not that of the citizenship of the limited liability company itself is an often-overlooked jurisdictional defect that discerning panels have raised *sua sponte* at oral argument. See, e.g., *Belleville Catering Co. v. Champaign Mkt. Place, L.L.C.*, 350 F.3d 691, 692 (7th Cir. 2003).

review?” “Where was the issue raised below?” “Did you make the necessary pretrial motions or offer a curative instruction?” These are all questions that counsel must be prepared to answer, even if one’s opponent has not raised them in the briefs. The oral argument is the last place that you wish to discover a potential defect in your case that you have not considered how to address. Questions like this must be taken seriously, because they may reflect a desire on the part of at least the questioning judge to try to duck the main substantive issues on the appeal. Your answer will depend, of course, on whether you are appellant or appellee and whether you would be happy to have the court sidestep an issue or whether you need to get it decided in order to prevail in the case.

(3) *Hypothetical questions*: These questions are tricky, and they are often the most important questions the advocate will receive. Counsel should not reflexively respond, as too many lawyers do: “That is not this case.” Most judges find such a response intensely irritating and an insult to their intelligence; they are perfectly aware that the question is not the precise one presented by the case. That is why they preface it with “if” or something like it. Instead, you should try to respond with a “yes” or “no” and then explain why the hypothetical demonstrates the soundness of your position or why, although the hypothetical might lead to a different result, the factual differences in the premises of the hypothetical are key to the difference in outcome. Generally, hypothetical questions are designed to test the principles underlying one’s argument. Counsel should avoid a radical argument that overextends the principle in a manner the judges are likely to find absurd or unacceptable. Where the hypothetical raises the possibility of a distasteful result, you should also explain why adopting the principle you are propounding would not compel the court also to reach an untoward result suggested by the hypothetical.

(4) *Tennis-match questions*: These are questions in which one judge is trying to counter or influence another judge, and counsel is simply the foil. An appellate oral argument is not merely a conversation between judges and the advocate, but also one among the judges themselves. Often, the judges will not have had occasion to discuss the case among themselves before the argument. Those judges with strong feelings about the proper outcome will often use their questions to attempt to persuade fellow judges. But from the standpoint of arguing counsel, these questions simply call for giving the best possible response. Where they are friendly, they should be seized upon as a means of advancing the advocate’s argument. Where they are implacably hostile, counsel should not become flustered but should keep in mind that the other judges hearing the case do not necessarily share the questioning judge’s viewpoint. And remember, you cannot participate in the conference at which your case will be discussed and voted on, so this is your best opportunity to be a party to the judges’ interchanges with one another.

(5) *Attack questions*: “Didn’t we hold in *Smith v. Jones* that * * *?” Although these questions may present an uphill battle, they offer an important opportunity for counsel to explain why seemingly adverse precedent, or another dangerous point lurking in the question, is not controlling.

These questions should not come as a complete surprise to the well-prepared advocate who has studied the briefs and applicable case law from the point of view of a skeptical judge. Chief Justice Roberts has recommended that counsel admit when his or her case is a complicated or hard one in order to attract sympathy from the bench, as insisting implausibly that the case is a “no-brainer” merely invites judges to find holes in your argument.³² Even though the question may be propounded in a forceful manner, counsel should respond in a calm and reasoned fashion and should not be bullied into making potentially fatal concessions. Counsel should also bear in mind that a hostile question does not necessarily signify a hostile questioner. Some of the toughest questions come from judges who are persuaded by your argument but need certain remaining questions answered in order to write what they wish to be an effective opinion.

(6) *Socratic questions*: These are questions that are actually intended to draw out from counsel the key points that the judge believes counsel wants to make. They may reflect the judge’s understanding of your position and a desire to see the arguments laid out in the sequence and at the time the judge believes is most intelligible. They may reflect a desire to have you move on quickly through your points, because the questioner knows where you are going. Try not to misinterpret these questions as an attack and respond defensively. Instead, grasp the questions appreciatively and provide prompt and reassuring answers.

(7) *Softballs*: These are questions in which the judge is characterizing your argument or your opponent’s argument or asking about something in the record or something held in another case. The purpose of this type of question is to help you underscore a favorable point. A surprising number of advocates, however, misinterpret softball questions as hostile, suspecting that the judge is cleverly laying a trap. Instead of appreciating the question and running with the answer it invites, too many lawyers respond defensively. This frustrates the questioning judge and forfeits a golden opportunity to drive home your point. Instead, you should embrace the question and seize upon it to delve into the argument. But if the question, though perhaps proffered with a seeming intent to be helpful, leads to conclusions you are not prepared to defend, you should not take the bait. Doing so is likely to produce a barrage of skeptical questions from the other judges. Best simply to correct the mistake politely and move on.

(8) *Humorous questions*: Sometimes judges like to get puckish with their questions, suggesting some silly comparison or jovial anecdote. Counsel should enjoy these quips, but should neither get distracted nor attempt to respond in kind, as such attempts usually fall flat. If the judges want to be light-hearted, let them, even if it appears that they are doing so at your expense. Stay on message and preserve a tone of respectful and serious professional gravitas.

³²Robert Barnes, *Chief Justice Counsels Humility; Roberts Says Lawyers Must Put Themselves in Judges’ Shoes*, WASH. POST, Feb. 5, 2007, at A15.

(9) *Irrelevant questions*: In many oral arguments, a judge will ask a question that may seem totally beside the point. These questions are perplexing and may prompt you to scratch your head, figuratively, in confusion and perhaps mild anxiety. You will wonder whether the judge sees something that you missed or instead simply misunderstands the case. You should provide a short, respectful response and return to the affirmative argument. If the point is in fact relevant in a manner that counsel has failed to grasp, the judges will probably be quick to provide enlightenment.

(10) *Repetitious (fly-paper) questions*: Sometimes a judge will doggedly pursue a point, even after you have attempted several times to provide your best response, and you have nothing further to offer. The judge simply will not let go. If, after several attempts to explain, the judge will not get off the issue, as a last resort, counsel can try “I am sorry, your Honor, but I have given the best answer I have, which I hope the court will find satisfactory.”

(11) *Stumpers*: If you have no idea what the judge is asking about, or if you do not know the answer to the question, use one of the techniques discussed above for handling such questions, trying to tease out the judge’s thrust without directly questioning the judge.

(12) *Questions as to the nature of further proceedings*: These are the “what if” questions that ask the advocate about how the court should dispose of the case. “If the court disagrees with the result below, should it reverse outright or remand?” “Should an evidentiary hearing be held?” “Should the remand be to the same or a different judge?” “Is the proper remedy judgment for the prevailing party or a new trial?” “Should any retrial be limited to damages?” “Should an issue be certified to the state court?” “Should decision be held until the Supreme Court decides another case?” “Should sanctions be imposed on counsel?” Counsel should have anticipated any of these questions, like the threshold questions discussed above, as part of a proper preparation for the argument. The key here is knowing what remedy you want the appeals court to provide.

12.8 Appellee’s Argument

In formulating the oral argument, counsel for the appellee should follow largely the same advice as that for appellants. The appellee should plan the argument to make the case affirmatively, crafting an independent narrative structure and interpretation of the facts. This advice to view the appellee as making an *affirmative* argument may sound counterintuitive. Is not the role of the appellee to respond to the points the appellant is making to challenge the decision below? Yes and no. The appellee must take account of those points, but it is often a significant tactical error to be drawn into arguing the case entirely on the appellant’s terms, on the turf the appellant has marked out.

By thinking about the appellee’s argument as an affirmative presentation, you can focus on explaining to the panel the reasons why your side

should win, a position that is more persuasive than just arguing that the other side should lose. After all, you are the appellee because you won below. Presumably, the trial court ruled in your favor on whatever the appellant is challenging. In many or even most cases, the reasons for that ruling may be quite supportable. Recognizing that most cases wind up getting affirmed, draw upon your strength—another federal judge already has agreed with your position. Do not overlook the opportunity to encourage the appellate judges to concur with their lower court colleague. You can do this by reminding the panel of all the reasons why the trial judge got it right.

This approach is particularly effective when the issue that the appellant is raising is one on which the appellate court is supposed to show considerable deference. As Chapter 8 discusses in examining the varying standards of review that apply in a federal appellate court, a district court's findings of fact must be accepted unless "clearly erroneous." If the appellant is actually trying to invite the appellate court to take an independent look at the facts, you should underscore the narrow standard of review and then explain why there is ample basis in the record for the finding the district court made. Similarly, rulings on the admission of evidence are normally subject to review only for "abuse of discretion." The appellant may be trying to ignore this test, addressing the admissibility issue as if the appeals court is to decide the matter for itself. You should counter by invoking the narrow standard of review and offering the reasons why the trial judge acted well within the ambit of discretion in allowing (or excluding) the evidence.

This approach may not work as well if the reasons given for the rulings being challenged are unsound, or if the district court did not offer any reasons for the ruling. Then, it may be necessary to concentrate on combating the appellant's points rather than trying to make an affirmative case that lacks support in the rulings below.

In any event, the appellee's argument should be flexibly structured in order to permit last-minute tailoring. After listening to the appellant's presentation—and its reception by the panel—the appellee should adjust the argument to fit the interests and concerns manifested by the judges, to take advantage of openings that the appellant's argument may have provided, and to focus on responding to points on which the appellant appeared to have gained ground with the court. Counsel for the appellee would be well served to prepare several different opening lines so that the one best suited to the court's interests may be used. If the judges have been asking counsel for the appellant mostly about one topic, it might seem jarring and distracting for counsel for the appellee to announce that he or she wants to talk first about another.

To catch the judges' attention, one device that is effective is to begin an argument that bears on an issue that the panel pursued with opposing counsel by invoking that discussion. For example, you could say, "Judge Jones asked counsel for the appellant [or Mr. A or Ms. B] whether * * *," and then launch into your position on the issue. This specific linkage may be especially useful, if the opposing counsel seemed to be scoring some points and you want to make sure that the judge involved in the colloquy focuses on your side of the story. It is equally effective, if your opponent was in trouble on the issue, and you want to underscore the reasons why your position on that issue of interest to one (or more) of the judges is more sound.

If you decide that your strongest points were ignored during the appellant's presentation or the colloquy with the panel, one way to refocus the court's attention is to describe explicitly what you are doing. Do not imply that the judges have missed the point, but frame your comment as if the appellant led the judges down the garden path of irrelevancy. Something like this may work: "Much of appellant's presentation was devoted to [some issue], but this case really turns on [your issue.]" This is a better way to signal a change in direction, even if it was the judges themselves who dragged the appellant into extended discussion of the subject you want to treat as beside the point.

12.9 Rebuttal

We have said that appellant's counsel always should reserve time for rebuttal. In most instances, you actually should use this time. It is the rare case in which nothing happened in the course of the appellee's argument that warrants a response, either to correct what you believe to be errors or to get your arguments back on track. Rebuttal is the chance to get in the last word. You want the judges thinking about your strong points (or about flaws in your opponent's case that you can expose crisply on rebuttal) as they complete their hearing of your case.

Counsel should keep rebuttal brief. The purpose of rebuttal is not to repeat what has already been said, but to *respond* to significant misstatements or distortions by the appellee or briefly revisit important points as to which your adversary has made arguments that must be countered.

You should be taking notes during the appellee's argument to identify the statements to which you have effective responses. Needless to say, you also should listen carefully to the court's questions and comments during your adversary's arguments, as they will give you important clues as to where that argument appears weakest or where the court needs to be disabused of any sympathies manifested for your adversary's position. Since you likely will find more of those than you will have time to address in any coherent fashion, you have to prioritize the points so that you cover the most important ones first, before you run out of time. You need to decide whether the judges already have made a point clearly enough that it needs no further attention from you, or whether there is more that should be said to drive home the weakness of your adversary's position. It is obviously essential to repair any apparent tears in the fabric of your argument.

But remember, rebuttal is not a time for a canned speech. Pick no more than two or three points that you can make quickly and succinctly. They should be points that have real force, not nits. Select one or two areas where your opposing counsel may have made a gaffe or gotten into trouble and drive the point home. Then end on an affirmative point, restoring the strength of your most important argument. If the judges appear visibly impatient, consider cutting rebuttal short, or even waiving it—although only after first offering to answer any questions. In the rare case in which you may think (perhaps incorrectly) that the appellee's position has imploded, so that there is nothing you need to say, do not appear to be smug or supercilious. If you

conclude that you do want to waive rebuttal, say something like this: “I believe that the issues have been thoroughly explored, and I have nothing to add, unless the court has further questions.”³³

12.10 Common Mistakes

The most common mistakes of technique made by appellate oral advocates are born of lack of preparation, lack of attentiveness to the court, and nervousness.

First of all, although the point is obvious, it is safest to address judges as “your Honor,” unless you are entirely confident that you have the judge’s name right. Trying to connect personally is a good idea, but only if you are absolutely sure that you will not mix up the judges. Even in courts that have nameplates in front of the judges’ bench, mistakes can happen. Although not every judge who is called by the wrong name will take umbrage, counsel is likely to realize the blunder, perhaps when one of the members of the panel corrects the misnomer—and that realization is bound to cause counsel to become distracted, flustered, or embarrassed. If the client is present, this kind of mistake also undermines the client’s confidence in the advocate.

Small physical manifestations of nervousness can appear unprofessional and distract the court from counsel’s argument. Unnecessary gestures, shuffling of papers, and fidgeting at the lectern should be kept to a minimum. Hands should be kept at counsel’s side or on the lectern. This will help create an appearance of earnestness and attentiveness. Crossing one’s arms or cocking one’s body to the side, by contrast, risks conveying a sense of combativeness. Rehearsals with video will help counsel to avoid these mistakes.

Counsel should tab reference material so as to avoid long delays while looking for page references. It is acceptable to pause for a sip of water, if you experience dry mouth, but do so carefully, lest the sip produce coughing, sputtering, or spraying. There is a technique that some experienced oral advocates use to prevent dry mouth and to avoid (or minimize) the need to quaff water—which can have its own complications.³⁴ Instead of depending on water, use hard candy (like Lifesavers®) that stimulate moistness in the mouth. It is possible to pop a hard candy into your mouth discreetly while waiting to be called to counsel table and even while sitting there. Be sure, however, to swallow the candy before being called to the lectern.

Poor oratorical form is another common blunder, one that takes many shapes. Some speakers, desperate to make a point, resort to hyperbole, invective, or overstatement of fact or law—all of which may result in a loss of

³³The First Circuit officially discourages rebuttal. See 1ST CIR. LOCAL RULE 34(c)(2).

³⁴Drinking a lot of water while waiting for your case to be called can create the need to resort to the facilities—perhaps at the most inopportune time. In addition, during the oral argument on a major constitutional case, one extremely able and experienced advocate is known to have knocked over the water carafe while gesticulating, causing the ink on his hand-written notes to run and literally blurring his major points.

credibility with the judges. Others read brilliant passages from their brief, but never engage the judges' recurring—and outcome-determinative—questions. The late Chief Justice Rehnquist famously noted four “species” of poor advocates: the “lector,” who reads the argument; the “debating champion,” who knows the case and its theory very well but does not listen carefully to questions and carefully answer them; “Casey Jones,” who knows the case but races ahead, not bothering to “pick up passengers along the way”; and the “spellbinder,” who substitutes rhetoric for careful analysis.³⁵

Finally, too many lawyers lose sight of their role as advocates before *appellate* judges. The forum is an appellate court, not a trial court. Arguments should not be pitched as if the judges were jurors: eschew emotional rhetoric in favor of intellectual debate. Judges are especially likely to take offense, or tune out, if they feel you are giving what is in essence a jury argument.

One important point of which many advocates lose sight is that the judges will have spent far less time than you studying your case. Accordingly, you should not assume that they are versed in every subtle nuance and factual wrinkle. You should listen to their comments carefully with an ear to whether they have lost track of what you are saying, which can occur when you assume familiarity with factual or legal details that the judges may not in fact possess.

Along similar lines, keep in mind that appellate judges are ordinarily generalists who may lack detailed knowledge of specialized areas of the law. This is a particular risk for counsel who practice regularly in a highly specialized area such as tax, securities, or ERISA, to name just a few. Take care to avoid jargon or the use of technical terms or acronyms that may be everyday fare for specialists in the area but a mystery to those not steeped in them. A related pitfall involves technically complex subjects such as computer technology and scientific or engineering details that may underlie the testimony of expert witnesses. Your presentation should be attuned to the panel's level of comprehension, and you should supply any necessary exposition if the judges do not appear to be following the point. If the subject matter of the case involves any of these risks, remain sensitive to the danger of losing your audience.

Finally, counsel should remember to display the proper respect for the court, the trial judge, and opposing counsel. Judges especially dislike *ad hominem* attacks directed against the trial judge or opposing counsel. You may think that the trial judge is a hopeless bumbler or was far from impartial, or at least behaved that way in ruling against your client. But the members of the panel may have lunch with that judicial colleague every day, or belong to the same golf club. Insulting a friend provokes a defensive reaction, which is the last thing you want to do.

A similar caveat applies to the temptation to attack opposing counsel by accusing your opponent of “misleading the court” or “misrepresenting the record.” Judges do not like incivility. They do not like to see lawsuits turn into a personal battle between the lawyers instead of a controversy between

³⁵See WILLIAM H. REHNQUIST, *THE SUPREME COURT AND ITS JUSTICES* 245–48 (1987).

their clients. And they do not want to be forced to choose sides by deciding which lawyer is being more candid and forthcoming in advocating the client's cause. Stay on the high road, no matter how tempting it may be to strike a hard blow.

While the debate with the bench may be vigorous, it should always be respectful, as an alienated judge will almost certainly not be open to persuasion regarding the correctness of your position.