

Oral Argument Preparation Checklist

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A good appellate argument is a delight to behold. Like any virtuoso performance, a compelling oral argument delivered with a commanding courtroom presence requires thorough preparation. Daniel Webster, when asked how long he had spent preparing an argument, responded “My entire life, Sir.” [Sound like the inquisitor might have been a client?] It can feel that way as you go through the enormous amount of preparation needed for a fifteen or twenty minute show.

Early

- Upon completion of your Brief, decide who will argue the case and assign the duty to monitor developments between filing and oral argument. Set up an Argument Book (Three Ring or Electronic) which will eventually contain your argument notes, all briefs, the appendix, copies of all authorities cited in the briefs, and any other useful material. Set legal research program to monitor and report on principal cases cited in briefs. Monitor developments in field. Jot down thoughts about the argument as they occur.
- Monitor the docket for screening decisions to determine whether the case is scheduled for argument or will be submitted to a panel on briefs. Consider submission of a letter covering recent developments (if any) and file before case is to be submitted to panel without argument.

After Notice

- If oral argument is available, take it.
- Upon receipt of Notice of Argument, call the Clerk *immediately* if there is a scheduling problem.
- If you have not already done so, cite check all cases cited in briefs for history after the date a brief was filed. Overruled? Questioned? Mentioned? Law review commentary? Amendments to relevant statutes, regulations, or rules? Anything else that might impact the case?
- Consider whether a letter addressing recent developments should be filed before argument. If so, do so promptly.

- Familiarize yourself with the professional background of the judges who will hear the argument. Find out about their idiosyncracies. *Know your tribunal.*
- Check whether judges assigned to the hearing panel authored the opinion or participated in the decision of any cases cited in the briefs.
- Review all the briefs. Pay careful attention to the other side's arguments. Try to look at them objectively. What do they have that might resonate with the Court? How will you respond if asked by the Court, "What do you say to Ms Smith's argument that ...?"
- Review the entire record. This is your hidden advantage. Never give it away. You should know the record better than the judges. *You must have complete mastery of the record.*
- Decide the critical points you want to make at oral argument. Don't attempt to argue everything in the brief. Some issues are better left to the written arguments. *Nothing in the brief is waived by failing to argue it orally.*
- Prepare an outline of your argument. Don't get too detailed. Use keywords that will remind you of the points you wish to make, not lengthy text. If you put too much in your notes, you will spend too much time looking down instead of looking at the Court. *Never read from your brief or a prepared text.*
- Jot down record references to key information. Jot down *short* quotations from key cases (or even better synthesize the key legal standards) you say control the case.
- Remind yourself about the key principles of advocacy. Not much has changed since Cicero's time: "The aim of forensic oratory is to teach, to delight, to move." How are you going to engage the Court intellectually and emotionally in your case and move them to decide in your client's favor? Review helpful articles on oral argument.
- Prepare an advocate's statement of the issue.
- What's your theory of the case? Can you say it in plain English, simply, clearly, and concisely? Recall Webster's admonition: "*The power of clear statement is the great power at the bar.*"
- What's the theme of your argument?

- Prepare a succinct statement of the key legal standards you say apply to the case and plan to tell the Court early in your argument what they are. Suggest to the Court an appropriate rationale for deciding in your favor.
- Always be prepared to show why, on those legal standards, you win on the record in this case.
- Be prepared to demonstrate how hard it would be to write an opinion for the other side.
- Ask yourself what things would trouble you about your case if you were the judge and be prepared to address them – candidly. The true test of advocacy is not how well you argue your strong points (anyone should be able to do that), but how well you handle the weaknesses in your case, or even better, turn those weaknesses into strengths.
- Be prepared to show that a victory for your client will also be a victory for the sound development of the law. You must satisfy the Court that the outcome you seek is just and workable in the general run of cases. You may have been thinking only of your client's interests, but the Court must take broader interests into account. Think deeply about policy and prepare to respond to such questions from the Court.

As the Day Approaches

- Check whether similar or related cases are on the same oral argument list. Check the briefs in those cases so you will be prepared to distinguish them from your case. If they are called before your case, watch the argument in those cases for clues about the Court's concerns.
- Practice your argument. Not to recite something from rote memory, but to be sure that key concepts are expressed clearly and in appropriate language. Time your remarks. Like an accordion player, you must be able to expand and contract your argument as demanded by the tune the court wants to play. You can usually expect plenty of questions.
- Try a mock argument or two. Use some people who are unfamiliar with the case. Hire someone good to moot your argument. Do all in your power to anticipate questions from the bench and think through the most effective response. Figure out your best responses to questions you anticipate and try them out.

If it is your first argument in the Court, go there ahead of time and watch a few arguments. (Or in the SJC watch the webcast of arguments from the comfort of your office. Go to www.suffolk.edu/sjc and click on “view webcast.”) Familiarize yourself with the surroundings. Find the bathrooms. Check where to sit. You’ll be a lot more comfortable and confident on the day of argument if the surroundings are familiar to you.

The Day

- Get a good night’s sleep before the argument.
- Dress appropriately.
- Practice on your way to Court. Arrive early.
- Check in with the Court Officer. Let him know if you will be in Counsel’s room preparing for the argument. Sometimes it is better to watch the cases in front of you on the list to assess the mood of the panel. In all events, you are supposed to be in the courtroom while the case immediately before yours is argued. Your ticket to practice law gives you admission to the seats within the bar.
- When your turn comes (the clerk will call the case), walk confidently to counsel table (know where to sit). Don’t fuss around. Get right up to the podium. Stay there throughout your argument. Don’t worry about the butterflies; they’ll go away once you get rolling.
- Introduce yourself, start with “May It Please the Court,” jump right in, and enjoy the legal profession’s version of white-water rafting without a life jacket. Exhilarating.
- Listen to the Judges’ questions.*
- Answer the questions asked.
- Work the responses into your planned argument.
- Don’t make a jury argument, but show some life.
- Don’t interrupt the questions or try to talk over the judge, but don’t be obsequious either.
- Stop when the red light goes on (unless the Court still has questions in which case you can continue to answer them).

- There is ordinarily no rebuttal in state court and only very limited rebuttal in the First Circuit.
- Submit a letter immediately after argument if you need to correct anything you said or add something significant that was overlooked or provide the Court with something you promised in oral argument. Copy counsel, of course.
- Tell anyone who asks that you had the Court mesmerized by the eloquence and force of your remarks. Rufus Choate never spoke as well. Daniel Webster couldn't have done any better. Exude confidence. Nobody needs to know that your knees were trembling, your stomach was churning, your mouth was drier than the Sahara desert, and your voice was cracking. Everybody who has done this work already knows.
- Order a copy of the oral argument CD so you can listen to what you actually said.
- Don't worry if it sounds terrible. Keep in mind Mr. Justice Jackson's sage advice.

“I used to say that, as Solicitor General, I made three arguments of every case. First, came the one that I planned -- as I thought, logical, coherent, complete. Second was the one actually presented -- interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.”