



MAY IT PLEASE THE COURT? PREPARING FOR COMPETITION AND ADVANCED ORAL ARGUMENT¹

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The oral arguments required by your Legal Practice course are not the same as those in Georgetown's Beaudry and Leahy Competitions, which are in turn quite different from arguments made by Georgetown's Barristers' Council members who participate in moot court competitions around the country. Below you will find advice for moot court competitions and more advanced strategies that will aid in the transition from serviceable arguments to those that marshal all available resources to present your client's best possible case.

Preparing for Competition

Arguing Both Sides.

Unlike Legal Practice oral arguments, and unlike real oral arguments, competitors in moot court competitions are generally required to argue both sides of their case before panels of judges. While this does not change the preparation you should be doing, it should change the mindset you bring to the procedure. In most competitions, you will have written a brief for only one side of the argument, and thus you will need to do additional research to argue effectively the opposite side. It is also extremely difficult to switch sides in oral arguments, and there is always the danger that you will accidentally begin arguing the wrong side during your argument.

Note that preparing both sides of an argument, whether or not you actually are required to do so, is a very effective way to prepare for any oral argument. There is no better way to anticipate your opponent's arguments than to prepare it yourself. To avoid the problem of becoming confused between the two sides, it is especially important that you moot *both* sides of the argument, preferably one right after the other. This will force you to develop the two sides and to become comfortable switching between them.

Tougher Judges.

In your Legal Practice oral arguments, your bench will generally be students, and they will question you in ways to improve your brief writing. In moot court competitions, however, judges are likely to be much more aggressive in challenging your understanding of the law and

¹ By Jaclyn DiLauro, Carolyn Bannon, and Todd Bissett. Jasmine R. Sola made minimal edits and merged DiLauro's handout with a part of Bannon and Bissett's original handout

eager to trap you into contradictory positions or into undermining your argument. In the final rounds of Georgetown's in-school competitions or law school competitions around the country, judges will be attorneys or even judges from actual courts of appeals. They will know far more about this law than the student judges you deal with at Georgetown and have years of experience in challenging attorneys in oral argument.

Given this expanded challenge, it is imperative that you prepare through mooted your arguments. Ideally, if the rules of your competition allow, you should seek professionals in the area of law you are arguing to moot you – they can bring the kind of knowledge you will face when you argue in competition.

Opponents.

In your Legal Practice oral arguments, you will technically be arguing against other students in the same round. The judges, however, likely will not expect direct responses to your "opponent's" arguments. On the other hand, in moot court competitions, effective responses to your opponent's positions is often an important part of your evaluation. Responses to opposing counsel's argument should not be limited to rebuttal time. As a respondent, you should generally challenge petitioner's argument in your presentation, either by direct comparison or simply by ensuring that the same issues are discussed as were covered in petitioner's argument. This technique is something you should practice extensively in your mooted sessions.

Strategies for Advanced Oral Argument

Learn your record: Inside, outside, and backward.

When you first receive an argument on appeal, you may or may not have written the briefs in the case, and you may or may not have handled the case below. If you were on brief, you have the advantage of knowing a lot about the case, and your challenge is to use your knowledge to advance your argument and not to allow yourself to be handicapped by the form of the brief. If you were not on brief, you will need to immerse yourself in your record, but you will have the advantage of your own skepticism. In either case, know that this will be a recursive process. New questions will arise each time you review the record and briefs below. You will forget answers you have already found. Trust that this is part of the process, but do not allow yourself to be satisfied with not knowing. If the answers are in the papers below, find them. If you do not, an enterprising law clerk will, and you will find yourself on the wrong side of surprise, either before the panel or in the written opinion.

Oral Argument for Those On Brief.

Oral argument shares some qualities with brief writing. Effective organization and road-mapping will serve you well in both contexts. But we know that oral advocates never say "cf.," and you do not have the advantage of attaching an oral appendix. Moreover, your argument will be a dialogue (usually with a panel of three educated, well-prepared interlocutors), so you will not have complete control over the trajectory of your argument. As you make the transition from written to spoken argument, evaluate the thematic core of your case. Make a list of the core ideas that animate your client's case, including emotional and policy arguments. Why *should* your client win? As you craft your oral argument, return to these foundational themes, even if they were not highlighted in your brief.

Oral Argument for Those Not On Brief.

Begin by reading the record. NOT THE BRIEFS. Form your own ideas about what is important at all levels of the case. Take precise notes. Often, these will take the form of questions. Keep a separate list of these questions, from the philosophical to the mundane, and be diligent in returning to answer them later. Resist “buying in to the briefs” too early. Your point of view will likely enrich the argument and will help you to own it once you stand it up. You will then, of course, read the briefs below, but you will do so with a broader understanding of the issues at play and you will know what was omitted from the briefing and why.

Begin with a sense of play.

You should begin your preparation with all cards on the table. Ask for the moon. See what happens. There will come a time when you will need to rein in your arguments, but not yet. By allowing yourself to ask for relief you would not have thought possible, you give your mind permission to think creatively about your case, and that is all for the good. This is a good time for roundtable moots. Choose colleagues that challenge you. Especially those who tend to approach cases differently than you do. Ask one another as many “what if” questions as you can think of. Take notes and record² the session, so you can come back to this imaginative place when you begin to get stuck or discouraged. By exploring many different responses, you will be able to identify your territory, which will become very important as you get closer to argument.

Know your territory.

In all likelihood, to succeed on the merits, your argument does not require a vast overhaul of prior precedent. Even if that would be your ideal result, you usually do not *need* it to win. So it becomes your job to define the most conservative holding that will get your client what he needs. This is your territory, and you should guard it with your life. Anything beyond that is a “bonus,” and while you should not concede anything too soon, concessions of bonuses can give you credibility when you need it most. Concessions of territory lose the war. The most skilled oral advocates know when and what to concede well in advance of argument. They never give up something they cannot afford to lose. As you prepare, make a list of “must wins” and “wish lists.” As you moot, when you find yourself backed into a corner, practice strategic concessions. See what it feels like to give in a little (even if you are not giving up much!).

Be rigorous with yourself.

This is probably a best practice for life generally, but it is particularly important in this context. When you come to argument, you will be faced with opposing counsel, an intelligent and well-prepared panel, and an army of hard-working law clerks, all of whom are tasked with finding gaps in your reasoning. This context does not have to be terrifying, but it should keep you honest. If you overstate the holding of a case, misrepresent the record, or do not address contrary authority, you will most likely get caught. However, if you are rigorous in your

² Taking notes is helpful for those who learn by writing. However, I strongly recommend recording these sessions for two reasons. First, recording allows you to fully pay attention to your colleagues at the table and you do not have to worry about “catching” what they say. Second, it allows you to return to this session later, without the filter of your own perception at the time of the roundtable moot. You may discount an argument initially, but in a week’s time, the idea may not seem silly at all and you may want to approach it anew.

preparation and identify these pitfalls in advance, you gain the opportunity to package them in their best light and diffuse their destructive power. Be rigorous in your reading of the record, in your choice of moot judges, and in your continuing research. This intellectual honesty will give you the gift of credibility in argument, and the panel will likely be more receptive to your points as a result.

Mooting: Stand and Deliver.

You have filled legal pads with questions and answers. You have developed a thoughtful, winning argument in your mind. You are convinced you cannot lose. Now it is time to moot. Moots can be done with varying levels of formality, but often the more formal moots can be the most helpful because they are the closest you will come to courtroom conditions. Staying in-role for the entire moot is crucial because it forces you to be creative when you might otherwise claim ignorance and give into laziness. Thinking off the cuff at this stage cannot be harmful, and it may lead to creative responses to questions that you had not anticipated. Choose mooters who terrify you. Choose mooters who tend to view issues in a different light than you do. Choose mooters who have been involved in your previous preparation *and those who have not*. Often, an argument will hit impasse and will benefit from a novel set of questions. Use this time to hone your craft and strike a balance between creativity and the conservative, structured responses you might actually give at argument. If you plan on doing several moots (a very good idea!), try new openings and new ways of responding to anticipated questions. This flexibility will keep your argument fresh and allow you to find better answers as you prepare. Recording these moots is invaluable because it allows you to evaluate all facets of your presentation: your demeanor, your posture, your responses.

Attend to everything within your control.

In the run-up to argument, plan all that can be planned. Assemble the materials that you will take to the podium with you and those that you will leave with your colleagues at counsel table. Make any necessary travel arrangements and allow plenty of time for error, traffic, and weather. Decide what you will wear and be sure it is dry cleaned and pressed. Eat a balanced meal the night before argument and the next morning. Decide who will be with you at counsel table and discuss with them if and how you would like information given to you during opposing counsel's argument. If at all possible, visit the courtroom in advance and ask the clerk's office if you can go to the podium. Pay attention to its dimensions. Inquire about the use of lights for timekeeping and learn whether your panel or your court has idiosyncratic rules that you should follow in argument. Learn enough about the other cases scheduled for your argument date to know what topics the judges will have on their minds. If your case follows an ERISA appeal and may raise implications for tax law, be aware that the panel might make such a connection. There is enough of the unknown in oral argument. Do not subject yourself to unnecessary surprises.

Your security blanket: what to bring to the podium.

This is a very personal decision and will depend largely on the nature of your case. You will likely want to have immediate access to a list of critical record citations, a large-scale outline for your argument to keep you on track, and short text that you will like to read directly to the panel. Of course, some advocates bring the kitchen sink, and some prefer to bring nothing at all. As a rule of thumb, bring enough to keep you comfortable and not so much that you are

distracted. Any material you take with you should be professionally packaged and easily referenced. If at all possible, moot with your materials well in advance of the argument, so that you gain facility with retrieving information. The panel will give you time to find the answer, but you want the finding to be as quick and efficient as possible.

Listen.

Your best weapon in argument is your ear. Before responding, be sure that you understand the question. If you are unsure, seek clarification. Many believe that it is always inappropriate to ask a judge a question. This potential faux pas can be easily addressed by clarifying a question through a statement. For example, you might say, “If I understand Your Honor correctly, your hypothetical, where the defendant was *not* in custody, would come out in X way under our analysis.” If you have misunderstood the judge, he will take the opportunity to correct you. Too often, counsel will begin answering the question he *thought* the judge would ask instead of the question before him. If you are listening carefully to the panel, you will pick up on subtle hints of what is concerning, and what points may need additional or different emphasis to be received properly. Addressing these, perhaps unstated, concerns will get you closer to the opinion you want. Listening during opposing counsel’s argument is equally important. If you represent the appellant, you can use the unstated concerns of the panel vis à vis the opposing party to frame your rebuttal. If you have the opportunity to attend oral arguments and read the resulting opinions, you will see that the opinions closely track questioning threads that emerged at argument. Sometimes judges are set in their view of the case, but sometimes taking advantage of this knowledge allows you to reframe the argument to comfort a doubting judge and prevail.

Answer the question, counsel.

Without a doubt, failure to answer a question responsively and directly is the quickest way to lose a judge. Although moot court judges will often ask questions to test your knowledge or to see how you think on your feet, real judges ask questions *because they want to know the answer*. It is amazing how many advocates do not seem to take this to heart and dodge questions. Evading a judge’s question is always to your detriment because the judge will always notice your failure to answer, and it will leave him or her feeling unsatisfied and disrespected. Questions are gifts because they tell you what is keeping each judge from writing the opinion you want. Take these opportunities to clarify ambiguities and to instruct the judge when you believe he or she is misunderstanding or mischaracterizing the question. Finally, yes or no questions have two possible answers: yes and no. You should immediately follow up these quick responses with reasoning, but a yes or no response shows respect for the question. Responding directly tells the inquiring judge that you are a plain dealer and that you, and by extension your argument, have nothing to hide. As a corollary, admit when you do not know something. If you don’t, it will soon become apparent anyway, and you will look like a trickster. Through your preparation, limit this occurrence to times when it will be excusable.

Be respectful, but don’t be a pushover: Learn when and how to say no.

If yes and no questions have *two* possible answers, that means that sometimes you can (and should!) answer no. This is not a license to be disrespectful, but it is important to push back when judges get it wrong. Sometimes they will characterize your argument as extreme to persuade their colleagues of the weakness of your position. Sometimes they will simply

misremember or misunderstand facts in the record. When this happens, embrace your role as the subject-matter expert on your position and say no. Then take a moment to explain to the judge why you disagree. In the case of an honest mistake, the judge will appreciate the correction. In the case of persuasion aimed at other judges, you will have corrected the record for their benefit. In either case, your saying no is appropriate, necessary, and expected. Practice saying no in your moots because this can become a more intimidating prospect in the heat of argument. This discipline will also encourage you to question the premise of questions as you receive them. If the premise is faulty, this is another good reason to say no.

Judges may be umpires, but you need to know how to spot a softball.

Although judges usually ask questions for the obvious reason that they want to know the answer, they will sometimes ask questions in order to communicate with their colleagues on the bench. Sometimes a judge who is friendly to your position will throw out an additional argument and craft a dummy question to see if you agree. Accept the gift, but *tread carefully*. Sometimes a judge will wander out of your territory and into the zone of issues that you would want to win in an ideal situation but that may alienate other judges who may be inclined to find for your client on a narrower ground. If this happens, acknowledge the possibility that he is correct and then immediately follow up with a way for the court to resolve the issue without going to such extremes. This response allows you to persuade both the inquiring judge and his more skeptical colleagues at once.

For example, imagine that you are appearing in the Supreme Court, representing the government on an interlocutory appeal from the district court's grant of a criminal defendant's motion to exclude evidence. One Justice may use your case as a vehicle to challenge the wisdom of the exclusionary rule, generally. Another Justice may be willing to agree with you that the excluded evidence should have been admitted in this case, but he or she may believe that the exclusionary rule is generally the appropriate remedy for Fourth Amendment violations. Accepting the premise of the first Justice might alienate the second. An effective colloquy might look something like this:

Justice A: And, counsel, doesn't this case demonstrate the disproportionate consequences for the government when only a technical violation of the Fourth Amendment arguably occurred?

Government Counsel: Yes, Your Honor, but even within the context of this Court's existing framework for exclusionary rule analysis, this was not a proper case for exclusion because...

In this example, counsel has preserved Justice A's ability to write an opinion invalidating the exclusionary rule. In the event that Justice A cannot reach five votes on such a theory, however, he has also provided reasoning for a narrower opinion that might be more palatable for Justice B and others.

Stay on message.

Once you know your territory and thematic core, emphasize these points at argument. Develop transitions that will lead you from the judges' questions back to your core, and use them with aplomb! Chief Justice Roberts, when preparing for argument as an advocate, used to write

the most difficult questions he could think of on index cards. If you have seen him on the bench, you know that these questions were not softballs. He would then shuffle the deck and moot himself. As you can imagine, these cards took him hither and yon within his planned argument, so he learned how to leap from one topic to the next and always return to his version of the case theme. You should always be responsive and direct in your answers to questions, but the flow of the argument should always be in your control.

Structure your request for relief narrowly on appeal. You can push the limits of the appeal on remand.

Appellants

If you represent the appellant, you are asking for something. And you're telling the court that the judge below got it wrong. This can be an uncomfortable position, but there are some things you can do to improve your likelihood of success. First, structure your request before the court as conservatively as possible. In other words, assure the panel that what you are asking for is eminently reasonable, fits squarely within precedent, and requires nothing out of the ordinary. You will also want to explain to the appellate court why it should be outraged at the result below, and why letting the decision stand would lead to serious consequences. It is your burden (which may be heavier or lighter, depending on the standard of review) to overcome the presumption of regularity in the district court. An appellate court is not the forum for relitigating nitty-gritty disputes from below, but a reviewing court is well-prepared to reverse an anomalous district court decision. You must point to the anomaly and distinguish your case from those in which a losing party is merely upset that it did not prevail below.

Appellees

If you are the appellee, you have the luxury of agreeing with the judge below. This allows you to focus on the fact that the war you are fighting has already been won. By you. You can use the reasonableness of the trial court's findings of fact to your advantage and explain to the appellate court that "there is nothing to see here," and affirmance is in order. This is all fine and good until you are confronted with a poorly-reasoned opinion below. Should you find yourself protecting a quirky or legally mistaken judgment, explore the doctrines of harmless error and waiver to explain to the court why any error is not important or is outside the competence of the forum.

Rebuttal or How I Learned to Stop Worrying and Listen.

Rebuttal is invaluable. It gives the appellant the last word and allows him to frame crucial issues in the case immediately before the case is submitted. It is also impossible to plan in advance. Appellant often reserves a very short period of time, and one question could entirely consume those precious minutes. So strategy is required. Rebuttal is not the time to fight opposing counsel on his mischaracterization of the record or on his incorrect citation to precedent. LEAVE IT ALONE. The clerks will find most errors committed by counsel and allow you to focus on more important issues. Choose one. Two at the most. Use this time to return to your thematic core. If you have listened attentively during your opposing counsel's argument and can incorporate the panel's unstated or stated concerns about his position, that is all for the best. The important thing is to use this time to advance your argument, not to fight petty battles over minutiae. If at all possible, begin with a roadmap: "I'd like to briefly address two points. First, X. Second, Y." If you get a question, answer it directly and quickly, as you would during your

argument in the main. If you have roadmapped and then exceed your time, a judge may ask you to briefly address the second issue you mentioned, allowing you to briefly conclude.

If you represent the appellee, do not buy in to the idea that rebuttal serves only the appellant. If your opposing counsel has reserved rebuttal time, it is true that you will not have the last word. However, you may very well be able to control what is on the judges' minds when that last word is spoken. An artful and attentive advocate for the appellee will conclude his argument by "serving up" an issue that he knows is important to the panel and problematic for opposing counsel.

It is important to realize that each argument will present novel difficulties—and no one technique will be a quick fix. Effective oral advocacy is born of experience, and you will develop your own strategies to take advantage of your unique style. Remember that your work as an appellate advocate is that of a translator. You are responsible for packaging your client's case in a way that is palatable to a panel of intelligent, generalist judges. You will go through much iteration of your argument and experience frustrations and breakthroughs. In the end, your goal is to communicate the clearest articulation of why your client should win. Be rigorous with yourself, be open to change, and enjoy the ride.