

Class 5 – Oral Argument

I. Basics

For the Introduction to Appellate Advocacy competition, students will each present two oral arguments, one on each side of the case. You will present argument only on your own issue. Each person has 15 minutes of argument time, which includes the statement of the facts and rebuttal if applicable. Arguments will proceed in the following order: Appellant 1, Appellant 2, Respondent 1, Respondent 2, Rebuttal (one member of Appellant team may do a rebuttal to be decided by members of the team). During each student's oral argument, judges will be asking questions, which you should be prepared to answer and then transition back into your argument. Bailiffs will keep track of time, but advocates must be aware of time and be prepared to stop when the stop card is displayed. Advocates may request brief additional time to conclude after the stop card. Such time may be granted at the discretion of the court.

At the conclusion of all arguments, the bailiff will ask advocates and any observers to leave the courtroom while they finish scoring. Once the judges are ready, they will call the advocates back into the courtroom for a brief critique. Advocates will receive their scoresheets with any comments made by the judges on the Monday following the arguments.

Arguments are open to the public, although it is very infrequent that anyone attends. Advocates may not attend the arguments of other students in the competition until you have completed both of your arguments.

Introduction to Oral Argument¹

Oral argument is the second part of the two step process of presenting one's case to the court. In many respects, the goals of your written advocacy and oral argument are the same, but for numerous reasons, these aspects of appellate practice must be discussed separately.

As in brief-writing, the first questions you as an advocate should ask yourself in thinking about oral argument are the following: why am I here, what role do I play as an advocate and what can the court do for me. Until you realize that you must convince the court **both why** your client **should** win and **how** your client **can** win, you are not ready to begin preparing for argument. Fundamentally, therefore, the first step in beginning to approach an oral argument is

¹ Excerpted from Suni, "Effective Oral Argument," appearing in UMKC/KCMB, The Dynamics of Appellate Practice (Spring 1987).

asking yourself what the court needs to know in order to make a favorable decision.

By the time you orally argue your case, the court will have received your brief and, hopefully, read all or part of it. Given that courts provide limited time for oral argument, the key question to ask at this stage is what can I add in the short time I have available that will enhance what the court already has before it and will help me win my case. Although judges vary in their views on the importance of oral argument and although there are some who believe such argument is a waste of time, most judges will concede that oral argument can make a difference in the outcome in some cases. Because it is impossible to predict accurately in advance which cases those will be, adequate thinking about and preparation for argument is essential in any case worth taking to an appellate court.

Preparation

Perhaps the most important part of effective oral argument is thorough and effective preparation. This includes analyzing goals, obtaining full knowledge of the facts and the law, and development of the argument itself. In addition, it requires consulting the relevant rules of court to determine time limitations and specific requirements for argument.

A. Analyzing Goals

In analyzing both long and short term goals of argument, there are at least three questions you must ask yourself:

What am I doing here?

What am I trying to accomplish? What
can I accomplish?

Answering these questions leads to several important realizations. Your role as an oral advocate is to assist the judges in resolving doubts or concerns that they may have about your case and/or to assure the judges that their original thinking about the case (in your favor, of course) is correct. In order to do so, it is crucial to hit home the most important points of your case, those that are most likely to lead to or prevent a decision in your favor.

In order to determine what individual judges are likely to need to know, or what concerns they are likely to have, it is imperative that you know your court. Of course, the "court" is really several judges who are most likely not all of the same mind. If you are able to do so, it is desirable to determine in advance of argument, and in advance of extensive preparation if at all

possible, who the judges sitting on the case will be. Although it would be a mistake to focus your arguments too narrowly toward a particular judge, preparation regarding the court can be helpful and occasionally essential.

In assessing the court, the advocate should attempt to determine what kind of arguments are likely to appeal to the members of the panel. Do they have particular concerns in the area of your case? Have they decided related cases, and what do these cases tell you about their thinking in this area? This will help in assessing how you can structure your arguments to fit into an existing framework consistent with your client's interests. It will also help identify what judge or judges you need to "hook" and how to do so. ²

Moreover, in assessing the court, it is crucial to keep sight of the power that the court you are addressing has. Your argument of the same case will obviously be different before the Court of Appeals or the Supreme Court. It is essential to identify and respect the power of the court in preparing your argument.

Once you have identified your goals - who you need to convince and how to go about doing so - you are ready to begin actual preparation.

B. Knowledge of the Facts and the Law

The record is the aspect of your case that you will clearly know better than the court. It is crucial that you know the facts and where to find them. An effective advocate has a fluid facility with the important facts of the case and is able to refer to those facts without consulting the brief or other documents during argument. S/he is also able to find facts about which the court asks with relative ease. The ability to do so adds to your credibility and helps to convince the court that you have done your homework.³

Knowledge of the relevant law is also essential. At a minimum, you should have read all authority cited in all briefs filed. Shortly before argument, reread those statutes and cases on which you primarily rely. Also read any notes you prepared regarding other authorities. In reviewing cases, you should consider the kinds of questions the court may have about your

² See generally Lynn, Appellate Litigation § 10.8 (1985).

³ See Davis, The Argument of an Appeal, 26 A.B.A.J. 895 (1940) (Commandment #9: Know your record from cover to cover).

authority: how is this case relevant here? Is this a correct rule? Are there any significant legal or factual distinctions between this case and your case?

C. Nuts And Bolts of Preparation

You are now ready to prepare the argument. Before you begin to draft the argument itself, however, you must ask yourself and answer several questions.

1. What is my most important point (or points - but **no more** than three)? You should identify what points you *must* make in order to make your case.
2. Is there a theme to my case that I can develop for the argument? How can I structure my argument around this theme to insure the idea gets across?
3. What are the limits of my authority and the limits of the policy arguments I plan to make? How can I anticipate the parade of horrors and draw meaningful distinctions?
4. What is my "bottom line"? How far can I give in without giving up? What point can I always come back to when pressed to the wall?

Once you have identified your most important points, you have determined the "heart" of your case. Now you must identify and flesh out the basic "shape" of your case. To do so, you must ask yourself "What is this case really all about? Why should my client win? What truly underlies the positions I take?" The answers to these questions lead to development of the theme.

In many respects, your theme is the most important aspect of your argument. Although in some cases with two or more truly unrelated points it may be difficult to isolate one theme, usually the good advocate can identify a thread that runs through the case. Is your case based primarily on controlling law (statutory or case law)? Your theme may then relate to the sources of law and balance or separation of power. Is your case based primarily on justice and equities or on the peculiar nature of the facts? Each of these considerations can provide your basic theme.

Development of the theme assists in getting a sense of organization for the argument. It assists in determining what must be addressed, what should be addressed, and what basics the court must know to understand any of it. This leads to the basic structure of the argument and a sense of logical progression. The theme also prepares the advocate to understand and

appreciate the limits of the case and the need for an effective bottom line.

After the theme has been identified and the limits understood, you are ready to begin actual preparation of your argument. Although there are many different ways to prepare an argument, some drafting should be undertaken. Few effective advocates truly "shoot from the hip." Most effective argument, although it may appear spontaneous, is the result of careful planning and preparation.

Most experienced advocates do not write out the entire argument in advance, because the more that is written, the greater the risk that it will be read. Prettyman suggests preparing two arguments: one for an active court and one for a court that does not ask many questions.⁴ At a minimum, an outline of key points should be prepared. At most, paragraphs containing key words and phrases should be developed.

The format of your argument notes is a matter of personal choice. Many advocates write out fully their introduction and conclusion, frequently on separate pages. In between, they will outline the major points, often on separate pages or in different colors. Although I have seen index cards used effectively, I prefer individual sheets of letter size paper for my arguments. I color code major points for ease in finding my notes on a point if questioned by the court and taken off my game plan. I leave room in the margins for additions as I practice or have new thoughts, and immediately before argument, I underline in red those key words or phrases that I feel are most crucial.

After you have prepared the first draft of your argument, you should begin to rehearse. This can be done by yourself - mirrors are handy to ensure eye contact. Ask yourself questions. Get anyone to listen to you, whether law-trained or not, and to ask questions. Most importantly, talk informally with others about your argument and your case. This is excellent preparation for a conversational, collegial "argument" with the court. Through this preparation, you should aim to become comfortable with your case and your argument: to obtain a working knowledge of your case, an ability to discuss it without extensive reference to notes, and an ability to answer difficult questions easily. Armed with this preparation and your notes, you are now ready

⁴ Prettyman, *Supreme Court Advocacy: Random Thoughts in a Day of Time Restrictions*, 4 *Litigation* #2, at 16 (1978).

to appear before the court.

One final step, however, remains before you journey to the courthouse. You should update your research to make sure no relevant legislative or judicial activity occurred after you wrote the brief. Ideally, this updating should occur within twenty-four hours of argument.

Presentation

Having determined that your role as an advocate is to assist the court in making a correct decision (defined, of course, as a decision in favor of your client), you are now ready to do so. But, you have limited time and the inherent limitations of the spoken word. Thus, it is essential that you make the most of what you have.

A. The Big Beginning

The most important thing in an oral argument is to get the court to listen to you. The most prosaic words of wisdom are not worth much if the court is not listening. It is essential to get and keep the court's attention for the entire period you have for argument. This is not easy, but it is crucial. This leads to the need for a "big beginning."

I attempt to begin all my arguments with a new twist. If the judges have read my brief, they have an idea about what I'm likely to say. If they think they know what I am going to say, they may think it is not essential that they listen to me. As a result, I believe it is helpful to begin with something that is not quite expected. This may be a new approach to the issue, or an opening that acts as an "attention-getter." Frequently, my big beginning will be the introduction to my overall theme but will be a creative means of getting the idea across.

B. Statement of the Case

Once you've introduced your case with the "big beginning," you're ready to address the facts. The statement of the case is necessary to set the stage for your argument so that the court can follow where you are going. The statement of facts is your opportunity to tell the court a story. Davis has set out three essentials for the statement of facts - **chronology**, **candor**, and **clarity**.⁵ There is not much more to be said.

C. The Argument Itself

It has often been said that the advocate should "go for the jugular," and I certainly agree.

⁵ Davis, 26 A.B.A.J. at 897

This is not the place to save the best for last, because the best may never come. Once the facts have been given, move immediately to a clear presentation of the most compelling point of your case. In doing so, assume the court is familiar with basic principles of law and its own recent decisions, but make sure that all your arguments progress logically and do not require knowledge the judges do not have or major leaps of faith. If the bench is quiet, stick to your outline; if you get questions, be flexible but make sure all your key points are made.

Nuts and Bolts of Presentation

Although the substance of your presentation is most important, the style of your presentation is important to the extent that it adds to or detracts from your persuasiveness and the force of your argument. Each person's individual style will, of course, vary. There are certain foundational, objective truths about public speaking, however. The following points provide a framework from which you can develop your own speaking style.

- *Because your goal is to assist the court in making a decision, you should always maintain a helpful, cordial, collegial attitude toward the court; be conversational, but always advocate

- *Never read**

- *Be pleasant, not overbearing

- *Talk with the court, not at it; don't lecture

- *Talk with the entire court; maintain eye contact with all judges

- *Be loud enough to be heard, but don't yell

- *Establish a comfortable but understandable pace; don't go so fast the judges can't follow you, but don't make them wait endlessly for your words of wisdom

- *Use pauses, emphasis and intonation to maintain attention without being obvious; avoid monotone or sing-song voices

- *Use precise, active language that conveys the picture you are trying to get across; create visual images with your words

- *Adhere to formalities, but don't overdo it - don't ingratiate yourself or appear afraid; show respect but don't "cow" to the court

- *Show some personality - be interesting and interested; show you care - about your client and the court reaching the right result

*Don't attempt humor, but if it happens, take advantage of it - don't be afraid to smile or laugh if appropriate in the circumstances, but never appear to take your role lightly

*Read your audience (but never to it) - if you're dying, change your approach

*Be natural, not artificial; use natural hand movements for emphasis if they are comfortable and not distracting; avoid moving around beyond the confines of the podium; avoid mannerisms that distract attention from what you are saying and focus attention on you

*Keep track of your time - make sure you leave time at the end for your conclusion and prayer for relief; if you finish early, sit down!

One quote effectively sums up the essence of effective presentations: "Be clear, so the audience understands what is being said. Be interesting, so the audience will want to listen to what is being said. Be persuasive, so the audience will agree with what is being said."⁶

Questions

All commentators appear to agree that advocates should "rejoice" when the court asks questions. Not only do questions assure you that the judges are alive, well and listening; they also give you some insight into the judges' interests and concerns regarding your case. In addition, the process of question and answer allows you to engage in a discussion with the court, rather than a lecture or presentation, and provides an opportunity to utilize conversational skills with which most of us are more comfortable. It is essential to take advantage of the opportunities provided by questions from the bench.

Initially, it is helpful to identify the type of question asked from two perspectives: what is the motive of the questioner, and what type of response is requested. In order to identify the type of question and answer it effectively, it is crucial that you *listen* to the judge. Don't assume you know what the judge intends to ask; listen carefully and make sure you understand precisely what s/he wants you to address. If you are not clear about what the judge is asking, politely request clarification.

A. Assessing the Motive of the Questioner

Prettyman identifies four types of questions that judges ask and notes that "not all of

⁶ Cripes, Effective Appellate Argument, 70 A.B.A.J. 56, 59 (1984) (quoting Cicero).

them are of equal value or importance."⁷ Those that assist the advocate in presenting his or her case to the court must be fully answered, but those that are asked for other reasons and do not advance decision of the case must be answered cordially but quickly. The advocate must attempt to differentiate on the spot which type of question s/he is dealing with and respond accordingly. The four types of questions he identifies are:

1. The question the judge really needs answered in order to decide the case. This type of question must be answered carefully and fully.
2. The question from the curious judge that just happens to spring to mind but that will have little or no bearing on the court's decision. The advocate must satisfy the judge's curiosity without losing the interest of the rest of the panel and without spending too much valuable time.
3. The question that the judge asks just to see if you can answer it. This is the type of question advocates frequently get during moot court competitions, where the judge is testing the advocate and frequently enjoying him or herself in the process. Although successfully engaging in a battle of wits with a judge during competition can be rewarding, such conduct frequently adds little to arguments before real courts in real cases. Again, the advocate should attempt to answer the question and move on or risk having the entire argument taken completely off course.
4. The question the judge asks just because s/he is bored. If a judge asks you this type of question, it's time to rethink how your argument is going!

B. Types of Questions

Questions that Ask for Authority

Frequently, a judge will ask a question that seeks information regarding authority governing your case. Examples of such questions are: "Do you have any support for that proposition?" or "What about X v. Y?" If you have fully prepared your case, you should have no difficulty answering such questions. Usually, you can refer to material cited in your brief. If, however, you are unaware of the answer, it is better to say so than to side-step and give a partial response or an answer to something the judge really didn't ask. If the question relates

⁷ Random Thoughts, 4 Litigation at 18.

to a case about which you are unaware, offer to address the judge's concern aside from the specific case to which s/he referred. Remember, the better your preparation, the less likely this type of question will cause you grief.

Questions asking for factual information raise similar issues. Thorough knowledge of what is and is not in the record is essential. Although it is usually not required to actually cite the page in the record to the judge, it is helpful to have your transcript and other materials tabbed or otherwise marked so you can find the precise cite if the judge requests it. An ability to identify where objections were taken and procedural requisites met is also important if the standard of review is at issue.

Questions that Test the Limits of Your Position

Judges are concerned with the issues involved beyond merely the decision in your particular case. Thus, they frequently want assurances that the decision they render in your case will apply properly to other fact situations. They will look to you for such assurances.

As you prepare, you must anticipate the implications of your argument. What are the logical extensions if your position is accepted? What "parade of horrors" might be seen as springing from the rule you urge? How can these "horrors" be prevented? What distinctions can be drawn that really make a difference? How can acceptable lines be drawn, assuring that your client is on the proper side of the line? What, ultimately, is your "bottom line"? If you have adequately prepared your argument, you should be ready for, and happy to answer, this type of question. Your ability to do so may be a significant factor in whether the court is willing to rule in favor of your client.

Confusing Questions

If you are uncertain what a judge is asking, ask for clarification rather than attempting to answer the wrong question and appearing unresponsive. This is an area, however, where tact is helpful. While it is entirely appropriate to apologize and admit you did not understand the question, sometimes it is more productive, and better for your credibility, to paraphrase what you believe the question to be and ask the judge if that is what s/he is asking. Unless you are way off base, the judge will frequently allow you to respond in this manner and will follow up with another question if more needs to be said.

Tangential or Irrelevant Questions

As noted earlier, sometimes you will receive questions that you believe to be irrelevant or worse. Such questions place the advocate on a tightrope, because often the motivation of the questioner is uncertain. You don't want to offend the judge who asked the question, but you don't want to bore the other judges or have them believe you think the question to be important to your case. If appropriate, you may want to demonstrate why the judge's apparent concern is unfounded in this particular case. In any event, you should attempt to answer the question directly, but use it to move on to those matters you believe are important to address.

Helpful Questions

These questions can also be difficult to answer where the motivation of the questioner is unclear. Usually, the judge is in general agreement with your position and wants to restate it just to make sure s/he understands. This type of question merely calls for a "yes" answer if the judge has your position stated correctly, or a minor clarification if needed.

On occasion, however, what appears to be a helpful question is really the first step in a trap to set you up. If you sense that this is the judge's direction, do not accede to restatements of your position containing even minor deviations unless you are sure that they cannot undercut your ultimate theme. Before you engage in semantic or technical bantering with a judge, however, be sure that this is what is going on. You can turn off a judge who was with you by refusing to allow that judge to be correct.

If you get too many of what appear to be helpful questions during an argument, you may want to assess why this is happening. Two possibilities come to mind: you are not making yourself clear, and the judges feel the need for clarification, or you sound as though you need help and the judges are willing to oblige. Either of these possibilities suggests the need to rethink how you are coming across.

C. Nuts and Bolts of Responding To Questions

In answering questions, you should *always* respond directly first and then explain. If the question calls for a yes or no answer, always answer yes or no first and then give the reasons. Otherwise, you keep the judge guessing as to the relevance of what you have to say.

Moreover, unless you are certain that there are three and only three parts to your answer, do not tell the judge that your answer will be in three parts. Although there are former debaters

who can outline an answer and stick to the outline, most of us are unable to do so during an argument. Rather than risk leaving the judge wondering about what number three was supposed to be, I suggest that you avoid this approach.

Don't be afraid to concede during your answer in response to a question from the court if you are sure that the concession doesn't hurt you in the long run. Many judges feel that an advocate who is willing to give in on a weak point appears reasonable and has more credibility than an advocate who refuses to give in on anything or who sees all arguments as of equal weight. Before you concede too freely, however, attempt to ascertain where the judge is going with his or her questions so you avoid taking little steps toward what may turn out to be a major hole.

When answering questions, there is a tendency to address your response primarily or exclusively to the judge who asked the question. Especially where one judge is particularly active, this can lead to a dialogue between you and that one judge rather than a presentation to the court as a whole. This is usually undesirable, and unless you have an important strategic reason for not doing so, you should address your answers to the whole court.

After you have completed your answer to a question or series of questions, you should quickly assess what you have covered in the process and where you ought to be in your argument. It is usually not desirable simply to return to the same place in your prepared text where you stopped to answer the questions. Doing so makes you sound like an interrupted recording. Be flexible and use the questions to insure coverage of your major points. Also use the questions to help you determine where your emphasis should be placed in the time you have remaining time.

Conclusion

If you've followed the guidelines set out and were lucky enough to have both a good case and a good panel of judges, your argument should have gone well and you are now ready for the big close. Your final statement to the court should pull together your theme and request specific relief. It should clearly set out what it is you want and the alternatives you are willing to accept. By the time you sit down, the court should know what you want, why you are entitled to it, and why it is the correct result. If you have accomplished that much, you should say thank you and go home.

II. Oral Argument: Forensics and Presentation⁸

In addition to the formalities that are essential to a successful oral argument, the presentation aspects of oral argument are important. While we always say that there is not one “right” way to approach presentation, there is one consistent aspect of truly great speakers – the ability to convey confidence without treading into arrogance. Regardless of its setting, much of public speaking involves the ability to seem at ease even if you are shaking on the inside. The question becomes – how do you do that?

Body Language

There are several different aspects of your physicality that you can and should evaluate to determine if you are projecting confidence. Even before someone speaks, their body language can tell the audience a great deal of information. Take a look around you for the individuals that seem to appear the most confident. Analyze how they stand when they speak. Now, take a look at those that do not convey confidence and see if you can determine the difference. Some of the below information may help you convey confidence even when you lack it.

A. Upper Body Posture

Many of us from the computer generation have a tendency to slouch and roll our shoulders forward. It just feels natural. At the same time, it can convey the wrong message of insecurity, slothfulness, or a lack of interest. None of these is the message that you want to convey during an oral argument.

Although it does not feel natural, a confident posture involves standing very straight. Imagine a string running from the top of your head to the ceiling. Now imagine that the string is being pulled tight. That feeling will help you stand straight and project a feeling of confidence. At the same time, think about your shoulders and try to roll them backwards. I do not believe that you can actually roll them backwards, but the feeling that you are will actually make you think about keeping your shoulders even rather than hunched in. These tricks will help you have the same kind of posture that was drilled into some of us by placing books on our heads.

B. Lower Body Posture

Posture seems like a funny term for your lower body, but it is just as important as your

⁸ This material was prepared by Professor Abdel-khalik when she was a co-advisor to the Appellate Advocacy Program.

upper body. In particular, some of us show our nervousness most clearly in our legs. Some people shift their weight from side to side. Others may cross their legs or shuffle them about. Still others may have shaking knees. All of these actions can telegraph to the audience that you are nervous.

There is one step you should take to address most of these problems. Once you settle yourself behind the podium, try to stand with your feet shoulder-width apart and set directly under your hips. Think about the Peter-Pan stance (but not quite as wide apart and don't put your hands on your hips). It will be harder for you to shift your weight or move around unless you deliberately move one of your feet. Of course, the trick is to avoid moving your feet as well.

C. Hands

Hands are another body part used to communicate with your audience. Unlike the prior sections, there is no one way that you should use your hands to convey confidence. It is true that you can often use hand gestures to emphasize your points, reengage a sleepy panelist, or otherwise demonstrate your command of the material. However, not all hand gestures are useful or helpful. You should be aware of the following:

Talking Hands: Some people use their hands to talk – as much as they do with their mouths. As a result, their hands are constantly in motion, and I call these “talking hands.” During oral argument, talking hands can be a distraction for the judges. They are so busy looking at your hands that they miss the eloquent words coming out of your mouth. Most of us with the talking hands syndrome do not even notice how often we use our hands. During semester, you must actively watch yourself to see if you move your hands constantly during conversations. If so, you may have the talking hands syndrome. To resolve, you should not try to eliminate all hand movement because it would seem artificial. During oral argument, you want to move your hands to emphasize but otherwise keep them still. It takes practice to be aware of your hand movements without pausing in your speech to think about your hands, and you must practice this skill throughout the day in your everyday life.

A related but distinct issue is using your hands to pound on the podium or table. This move can be very powerful but really should be applied sparingly. It is too easy to hit the table or podium with excessive force and surprising your panel. Worse yet, it is too easy to use this pounding too often, and then, not only will you distract your panel, but the action will lose its

advocacy impact. Consider carefully before pounding the table or podium for emphasis.

The Grip of Death: The opposite of the talking hand syndrome is the grip of death. This consists of someone walking up to the podium and grabbing the edges with their hands so tightly that their knuckles turn white. Usually, this occurs when a student is nervous. It is not improper to rest your hands lightly on the edges of the podium and, in some circumstances, can convey a great deal of confidence. In fact, some may choose to do so rather than use their hands to emphasize points. Again, there is no one easy answer for this issue, and each person must determine what he or she needs to do in order to convey confidence. However, the grip of death is a very obvious sign. If this is your weakness, you have a couple of options. You can train yourself to lighten your grip until it looks like you are just resting your hands. Alternatively, you can move your hands to rest inside the podium so that your knuckles aren't visible. Finally, you can train yourself to be a moderate hand talker.

Busy, Busy, Busy Hands: This category really encompasses a variety of actions. Although these individuals are not hand talkers, their hands are always moving or shuffling things around. For example, they may pick up and drop their writing utensils (which you can avoid by leaving them at the table). They may rustle around their papers. They may just shake. Regardless, the hands are always in motion in a way that creates sound and, therefore, distracts your panelists. More importantly, it will be perceived as a way of directing your nervous energy. To keep your hands occupied, consider adopting the light podium grip discussed in the previous paragraph.

As you can see, there are a variety of options available if you have any of these issues. Whichever approach you take must be natural to you. The only way to determine what will work is for you to be very conscious of the signals that you are sending and then see what you can do to modify those signals to denote confidence.

D. Eyes and Facial Ticks

Other than through your tone, your face and eyes can provide the most nuanced, expressive portion of the non-substantive part of your presentation. Most people have probably heard that the eyes are the windows to the soul. Certainly, they are windows for judges, and it can be one of the most difficult body language issues to assess. After all, rarely do people actually look themselves in the eyes. The most common eye issue is the darting eyes— they move from side to side while their brain is processing the new question. Others demonstrate a

variation on that theme. Rather than darting from side to side, their eyes may roll up to the ceiling or down to the floor while the presenter is thinking. Neither is helpful in portraying confidence.

To manage your eyes, there are some things you can do that are unique to the presentation setting. To appear confident, you should try to make eye contact with the judges on a regular basis. Moderation is essential in that you don't want to stare at each judge. Likewise, you probably want to avoid the sprinkler system approach – making eye contact with each judge in order and then swinging around to start at the beginning. Anything that mechanical will feel artificial. Instead, remember that this is a conversation and act as you would when having a conversation with three people. Make eye contact with the judges in a varied pattern. If someone asks you a question, look at them during the question and then during part of your response. However, because you want to include the whole panel in the conversation, try to make eye contact with the other judges during your answer as well.

Other than your eyes, there are some facial and hair ticks of which you may not even be aware until you look in a mirror while you are thinking about new questions. Some check, lick, or bite their bottom lip. Others may have a “resting face” (the face you have when you are listening to a question) that appears arrogant, condescending, or confused. Finally, some people demonstrate their anxiety by playing with or flipping their hair. Especially if you have longer hair, this can be a very distracting habit.

You must determine if you have any of these nervous ticks before starting your oral argument, or you may be surprised by the bench's response to your oral argument. One option feels artificial but can help you identify your specific problem. You may want to stare at yourself in a mirror while practicing your oral argument (even if you have someone asking you questions). Alternatively, you may want to ask one of your brutally honest friends for some assistance.

Ultimately, you will be most successful in projecting confidence if you have undertaken a two-step process: (1) become conscious of your body movement and your specific signs of anxiety and (2) practice to overcome them with sufficient regularity such that the audience is not aware that you are conscious of your body movement. It is a tough thing to do, but practice is the only solution.

Vocal Projection

Not surprisingly, vocal cadence is the other aspect of your presentation that can easily project the speaker's emotional state. A few steps will help you sound confident.

We have all been in the situation where someone is presenting material by droning through it in a monotone – like Ben Stein's character in *Ferris Bueller's Day Off*. Certainly, I would expect that no one aims to do so (absent an attempt to imitate the movie character). The trick is to determine what you can do to avoid sounding monotonous. While it sounds simple, variation is the key. There are three aspects of your voice that you can vary, and should consider doing so, in a presentation: speed, pitch, and volume.

Speed is relatively self-explanatory. Unfortunately, there is no one rate of speech that works for everyone. For some, talking very quickly would denote a lack of confidence whereas for others, it would show complete mastery of the case. One way to determine what rate will work best for you is to be conscious of the speed at which you normally converse with your friends. Some of us naturally talk at an excessively high or low velocity. You should not do so during oral arguments. However, if you are a naturally fast talker, trying to talk very slowly will appear artificial and vice versa. Instead, you want to polish your natural speed to one that lends itself to comprehension by the judges and comfort for yourself. Remember, the idea is to have a conversation. Also, you must avoid "stepping" on the judge's questions, meaning that you should avoid interrupting the judge when the judge is still asking his or her question. It is easier to avoid stepping on the judge if you are cognizant of your speed and take a breath before answering.

Most importantly, perhaps, is to make sure that you are changing your speed at various points throughout your presentation. Consider speeding up or slowing down your speech at key points. More importantly, take a breath or two to break up your sentence. Additionally, while you do not want to have an extended, dramatic pause, taking little breaks can be an effective way to emphasize something. Consider the following: you are asking the court to interpret a statute that has a general rule and three exceptions. You would like to focus the court on the third exception. In your initial presentation of the three exceptions, you pick up speed on the first two and then pause before stating the last one, where you speak at a slower rate. In so doing, you have focused the court's attention on the relevant exception without ignoring the other two.

Pitch is a little more difficult unless you are a trained singer or otherwise have practiced conscious control of your voice. However, pitch is important because sometimes people change the pitch of their voice when they are nervous- it ranges unusually high or unusually low. The most important thing to do is be aware of whether this is a problem for you. Absent that issue, I would suggest that you do not try to change your pitch too much unless you have had some prior training.

Volume is the final vocal characteristic that you can vary easily. Of course, you want to avoid either shouting or whispering at the judges. However, much like speed, volume can be used subtly to emphasize points. When you want the court to focus its attention on a particular point, raising your volume a little can be very effective. Moderation is key, but it also helps to avoid the problem of monotony.

Dress

Although it seems obvious, your dress can also be an important part of your presentation. Unlike the other aspects discussed in this section, however, you do not want to emphasize anything with your outfit. You want the court to focus on your argument rather than on your clothing. Therefore, consider wearing an outfit that is neutral in tone and style.

Counsel's Table

There is one final piece of advice to remember. When you are in the courtroom, you are always "on." By this, we mean that you must think and act as if the judges are watching you before you begin your oral argument, when someone else is at the podium, and until the point when you leave the room at the end of the oral argument. As a result, BE POLITE AND RESPECTFUL. This mandate is not only towards statements of the bench but also applies towards statements from your co-counsel and opponents. Although it seems like simple advice, it can be very hard to implement.

After the judges have taken the bench, you should try to avoid speaking or whispering with your co-counsel while seated at your table – and certainly avoid any vocalization during anyone's oral argument. Additionally, when your co-counsel or opposing counsel is speaking, you should avoid making any outward signs of distress, anger, or disbelief, which often manifest as eye rolls, sighs, or angry writing. While you may intend to convey to the court the futility of opposing counsel's argument, the effect is often the opposite, and you will lose credibility. On

the other hand, if you are the Respondent or preparing for Appellant's Rebuttal, then it is appropriate (and often warranted) to take some notes while opposing counsel is speaking. The key is to look studious, intent, or engaged rather than vengeful, dubious, or arrogant.

Again, posture and body language is essential. While at counsel's table, you want to avoid slouching, moving your feet restlessly, tapping your pen or other writing implement, or rustling papers needlessly. Instead, you should aim to sit with poise (and with the same good posture used for oral argument). Do not be afraid to make eye contact with the judges but do not stare at them either. Regardless of how you feel inside, you want to convey to the court that you are confident in your (and your partner's) arguments, have considered the opposing side's arguments, and will be able to refute them effectively. In truth, projecting confidence is half the battle towards having it (being prepared is the other half). Practice makes perfect, so start practicing.