

STETSON UNIVERSITY

Institute for the Advancement of Legal Communication

ORAL ARGUMENT: THE ESSENTIAL GUIDE

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STETSON LAW

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Information About the Earlier Version

A 2008 version of this text was written by Brooke J. Bowman, Kirsten K. Davis, and Stephanie A. Vaughan and was entitled, *Beginner's Guide to Oral Arguments*.

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About Stetson's Institute for the Advancement of Legal Communication

Stetson's Institute for the Advancement of Legal Communication is a home for the study of the legal communication issues that face lawyers, judges, other professionals, and the public. It supports an active community of legal communication and writing scholars, and its faculty work to develop innovative and effective methods and programs for teaching legal communication theory, skills, and values to students. The Institute's training programs provide instruction to lawyers, judges, and other professionals to improve their legal communication skills. To read more about the Institute, visit www.stetson.edu/legalcomm.

Chapter 1: Oral Argument Matters: An Introduction

In March 2016, the United States Supreme Court heard oral argument in *Whole Women's Health v. Hellerstedt*, a case that considered whether Texas could impose new requirements on the operation of abortion clinics in the state. Texas argued that a new regulation, which required that abortion clinic doctors have admitting privileges at nearby hospitals, posed no undue burden on women seeking abortions, and, in fact, were necessary to protecting women's health.

At oral argument, Justice Breyer asked the Attorney General for Texas this question:

[G]o back in time to the period before the new law was passed[.] [W]here in the record will I find evidence of women who had complications, who could not get to a hospital, even though there was a working arrangement for admission, but now they could get to a hospital because the doctor himself has to have admitting privileges? Which were the women? On what page does it tell me their names, what the complications were, and why that happened?

The Attorney General answered,

*Justice Breyer, that is not in the record.*¹

The Attorney General's answer was eight-words long. The entire exchange between counsel and the Court could not have taken more than a minute in an oral argument that took more than ninety minutes to complete. Even more importantly, Justice Breyer and his colleagues read hundreds, if not thousands, of pages of briefs arguing the case and record evidence documenting the facts. How important could this single oral argument statement possibly have been to Justice Breyer and the Court in deciding the case?

Turns out, quite important.

This oral argument answer took center stage in the majority opinion in *Whole Women's Health*, which Justice Breyer himself wrote. Striking down the Texas law and finding that the new admitting privileges regulations posed an undue burden on women's access to abortion, Justice Breyer said,

We have found nothing in Texas' record evidence that shows that, compared to prior law (which required a "working arrangement" with a doctor with admitting privileges), the new law advanced Texas' legitimate interest in protecting women's health.

*We add that, when directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case.*²

As *Whole Woman's Health* shows, oral arguments matter to court decisions. In fact, a lawyer's ability to effectively argue orally before the court can make or break a case. Former Assistant Solicitor General of the United States, Frederick Wiener notes that

“[t]he brutal hard fact is that some cases are won and lost on oral argument.”³ The late United States Supreme Court Chief Justice William H. Rehnquist said that oral argument “does make a difference. In a significant minority of cases in which I have heard oral argument I have left the bench feeling differently about a case than I did when I came on the bench.”⁴

Yes, in a sea of written arguments, just one answer in oral argument can provide key information and direction for the captain of the ship. Yes, oral argument matters.

You are likely reading this guide because you want to be prepared for an upcoming oral argument, whether it is your first oral argument in a law school, your first oral argument as a moot court team member, or your first oral argument as a lawyer in practice. You are right to get ready. Your preparation for and performance in an oral argument can make the difference between the court deciding in your favor or, as the Texas Attorney General learned, having a reason to decide against you.

The purpose of this Guide is to give you the tools to effectively prepare for and give an effective oral argument in both trial and appellate courts. The Guide helps you understand oral argument’s purposes, how to prepare for and structure your oral argument, how to answer questions, and how to argue ethically, appropriately, and with style. The Guide also includes an annotated transcript of an oral argument given by two students on an appellate brief problem assigned in a legal writing course that provides useful examples and explanation of how an oral argument works.

This Guide is meant to be concise. That means you can read it multiple times and study its contents. You can highlight, tab it, and use it as a reference as you prepare and practice. And, as you develop your oral argument knowledge and skills, you can use our curated bibliography at the end of the guide to delve further into the expert-level techniques of oral argument. We’ve picked what we think are the best oral argument guides for our bibliography and we encourage you to make one or two of them part of your library as you make your way from oral argument novice to oral argument expert.

Chapter 2: Understanding the Purpose of Oral Argument: Take a Judge-Centered Approach

It is deceptively easy to take a self-centered view of oral argument's purpose and to approach the argument as an opportunity for *you*, the advocate, to say what you want to say to the court on behalf of your client. What you like about your arguments, your evidence, and your speaking style is far less important than what your audience will like about them. **What matters most is *what your audience—the court—wants from you*.** So, what purposes do judges have for oral argument? How do they use it to meet their goals?

Judges use oral arguments to help them decide cases fairly and justly.

Courts do not always grant oral argument, and, at least in some cases, whether oral argument will be heard is at the discretion of the court. So, when courts hear oral argument, you can bet that the judges have a specific purpose in mind. For example, the United States Court of Appeals for the Third Circuit notes in its rules that “judges usually vote for oral argument when, among others, [t]he appeal presents a substantial and novel legal issue [and] [a] judge has questions to ask counsel to clarify an important legal, factual, or procedural point.”⁵ Oral arguments help judges “isolate and clarify core issues in the case,”⁶ determine the outer limits of an advocate's position by posing hypothetical questions,⁷ clear up confusion about the facts or record, examine the logic of the claims, explore the consequences of their decisions, and argue their particular viewpoints to their fellow judges.⁸ Judges use oral argument to “crystallize” their “percolating” ideas about the case.⁹ Judges accomplish these purposes primarily by engaging the advocates in a conversation about the case. In other words, judges want oral argument to be a *conversation* with—rather than a *presentation* by—you. Accordingly, you should be prepared to engage in a conversation with the court about the strengths and weaknesses of your legal position; about the facts, law, and arguments; and about any lingering questions raised but unresolved in the briefs.

Judges use oral arguments to make decisions about lawyer credibility, competence, and likability.

In a recent book on brief writing and oral argument, the late Supreme Court Justice Antonin Scalia and his co-author Bryan Garner write that of the five main purposes judges have for oral argument, three are directed to forming an opinion about the advocate.¹⁰ Accordingly, the lawyer must demonstrate in oral argument that she is credible—“trustworthy, open, and forthright,” competent—thoughtful about the case and “familiar with all its details,” and likable—“not mean spirited.”¹¹ The time during which advocates have to shape these perceptions is short; courts are allowing less and less time for the presentation of oral arguments.¹² Moreover, oral argument may be the only time the court has the opportunity to meet the lawyer face-to-face, and much of the decision-making about personal character, particularly about trustworthiness and likability, is done through first impressions in face-to-face

settings. The pressure is on a lawyer in oral argument to use the few moments she has to *represent her character positively to the court*.

Judges use oral arguments to give citizens confidence in the judicial system.¹³

At one point in the history of both the American and English legal systems, arguments, including supporting materials, were presented only orally. This made the “entire judicial process completely open to public scrutiny: everything the judge learn[ed] about the case [was] presented in open court, which thus diminish[ed] the possibility of out-of-court influence.”¹⁴ Even though much of legal advocacy is now written rather than oral, oral arguments still allow citizens to see the “law in action” and decide for themselves if the judicial system is ethical, fair, and trustworthy. When judicial proceedings are visible to the public, judges and lawyers can more easily be held accountable for their preparation and conduct. This need for accountability is likely in part why many oral arguments are recorded and made available for public review.

You, as a lawyer, also directly benefit from our public oral argument tradition. First, oral argument lets you demonstrate to your client, in a very public and direct way, that you are committed to the client’s cause, that you have been diligent in preparing your case, and that you have ensured that your client gets the fairest hearing of her case as is possible. And, second, while oral argument helps you meet your needs of furthering your client’s case, your competent participation demonstrates to clients and others that the court system is a fair and just way to resolve disputes. In this way, your effective oral argument helps to preserve the both the rule of law and your chosen career path.

Chapter 3: Preparing to Persuade: Get Ready to Argue

Often when we think of persuasive advocacy, we think of oral argument. We picture the lawyer standing in front of the judge, eloquently arguing the law and the facts on behalf of his client. But do we pause to think about the different types of oral argument? How is a pre-trial oral argument on a non-dispositive discovery motion, such as a motion to compel, or different from a pre-trial oral argument on a dispositive matter, such as a motion to dismiss or a motion for summary judgment? How is a dispositive trial motion oral argument different from an appellate oral argument? These critical questions affect the nature, timing, and presentation of the oral argument.

Pre-Trial Oral Arguments: Resolving Non-Dispositive and Dispositive Motions Before Trial

Pre-trial oral arguments are arguments made before the judge in support of and in opposition to written motions and memoranda of law filed before the trial begins. Many of these motions, like a motion to compel discovery or a motion for sanctions, are non-dispositive motions, which means that these motions only resolve the issue or issues discussed in the motion and do not ultimately resolve the case with a final determination. At the trial court's discretion, these non-dispositive motions may be granted or denied without benefit of oral argument before the judge. Other times, rather than a formal oral argument in the courtroom, the judge may hear the attorneys' arguments informally in the judge's chambers or even by conference call. On the other hand, motions to dismiss and for summary judgment are dispositive pre-trial motions upon which oral argument is usually requested and granted by the court. Oral argument is normally allowed as these motions may ultimately resolve the case and result in a final determination from the court prior to trial.

The party arguing in support of the motion, the movant, begins the oral argument with their factual and legal positions and a potential resolution of the issue. The party arguing against the motion, the respondent, then responds with reasons and policies that oppose the position taken by the movant and suggests a different outcome or resolution to the motion. Motion arguments, as they are often called, are made only to one judge, the judge presiding over the trial. Some judges set aside time, often called "Motions Day," during which oral argument is heard on pre-trial motions. Depending upon the court and the judge, lawyers may be allotted a fix amount of time for making an argument, or the court may allow both sides to argue until nothing more is offered. Further, the argument is often not as structured as the appellate oral argument (discussed below). Rather, the arguments may go back and forth with both sides arguing several times. The judge may not ask any questions or may interject a few questions to one or both sides. Regardless of the potentially informal structure of the oral arguments at the pre-trial level, courts still value decorum in the judge's chambers and the courtroom. Lawyers are expected to be polite, respectful, and courteous and not interrupt each other.

Trial Oral Arguments: Resolving Non-Dispositive Motions During Trial

Oral arguments that occur during a trial are typically not referred to as formal oral arguments. They are made in support of motions that lawyers file on behalf of their clients during trial. As with pre-trial non-dispositive motions, the oral arguments may be informal and heard by the judge in chambers (with or without the parties to the case present) or argued in the courtroom prior to trial proceedings beginning for the day. For instance, after the trial begins, a party may move to exclude certain evidence that was to be presented by the opposing party. The judge will often resolve this motion immediately upon hearing the parties' oral arguments on the issue. Oral arguments may also occur if one of the parties moves for a directed verdict at the conclusion of the party's case-in-chief or at the end of the trial with a motion for judgment as a matter of law.

Appellate Oral Argument: Resolving the Case on Appeal

Appellate oral argument is the most formal and structured oral argument. Appellate oral arguments typically are given before a three-judge panel, and each advocate is assigned a specific amount of time for oral argument, often thirty minutes. The appellant (sometimes called the petitioner) speaks first, and then the appellee (or respondent) speaks. Some, but not all, courts allow the appellant time for rebuttal and the appellee time for sur-rebuttal. Appellate judges can (and often will) interrupt with questions for the advocates. Often in appellate oral argument, the advocate will not finish the entire argument as planned. Courts do not typically extend the time for an advocate to finish their argument after the time has expired.

Law School Oral Arguments: Arguing Appeals and Motions

Law school oral arguments are most similar in structure to appellate oral arguments. These arguments can be made in front of one judge or a panel of judges depending on the law school. Professors, teaching assistants, moot court board members, or lawyers and judges from the local community will act as the judges for the case. Students are often paired together, with each student representing one side of the argument. Each advocate usually has between 8 to 20 minutes to argue their side. Movants (for a trial court) or appellants (for an appellate court) will go first. During a law school moot court argument, a bailiff will keep the time for the participants, usually using timecards that show the amount of time students have left to argue and when to stop. After the appellant has argued, the respondent or appellee will then argue for an equal amount of time. The appellant will then engage in rebuttal if it is available; however, there is typically no sur-rebuttal for the appellee.

During the typical law school oral argument, the judges will interrupt the student to ask questions. As with actual appellate oral arguments, students often will not be able to make all the points during oral argument they had hoped to assert.

Getting Ready for Oral Argument - The Seven Steps

No matter whether you are getting ready for a non-dispositive or dispositive pre-trial motion, a trial motion, or an appellate argument, you must be prepared. On the topic of preparation, Abraham Lincoln once said, “[g]ive me six hours to chop down a tree and I will spend the first four sharpening the axe.” The point is clear. The amount of time you spend to complete a task should be far less than the time spent preparing for that task. William K. Suter, Clerk of the Supreme Court for twenty-two years and a witness to over 1,500 Supreme Court oral arguments, identified three things that will make a lawyer a successful appellate advocate: preparation, preparation, preparation.¹⁵ Spending a significant amount of time preparing for oral argument will help you feel more comfortable with your argument and ensure your best performance. “The amount of time spent preparing is directly proportional to the ultimate quality of the oral argument.”¹⁶ Below are the steps you should take to prepare for oral argument.

Step 1: Update Your Brief or Motion

First, although you updated the cases used in your written document, double check your research to make sure the law has not changed since drafting your memorandum or brief. For oral arguments in the legal writing class, the professor most likely has imposed a deadline after which changes to the law will not affect the problem. In the practice of law, however, updating the law up until the time you present the argument is essential. Lexis and Westlaw provide a useful tool for getting updates on the law. Lexis and Westlaw users can set “alerts” that will enable them to receive updates on the law that will make this step simpler.

Step 2: Understand the Procedural Standard at the Trial Court and the Standard of Review at the Appellate Level

You must understand the procedural standard or the standard of review the court will apply to the case and know that standard by heart. At the trial court level, the court will often apply a procedural standard to decide a motion. For example, a federal trial court will apply the standard stated in Federal Rule of Civil Procedure 56(c) to a motion for summary judgment, which states that the summary judgment motion must be granted if “there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.” The movant bears the burden to prove that there is no genuine issue of material fact and that judgment should be granted as a matter of law. Once the movant meets that burden, the burden shifts to the respondent to prove that there is a genuine dispute of material fact or that judgment is not proper as a matter of law. The court won’t make decisions about factual disputes; if there are disputes, the procedural standard requires the court to deny the motion.

At the appellate court level, the court will apply a standard of review that dictates the amount of deference the court should give to the lower court’s decision. For example, appellate courts generally will apply a de novo standard to issues of law.¹⁷ A de novo standard “allows the court to give a full, or plenary, review to the findings below.”¹⁸ When a de novo standard is used, “the reviewing court is willing to substitute its

judgment for that of the trial court or the intermediate court of appeals.”¹⁹ Appellate courts, however, rarely review factual determinations of trial courts, and, when they do so, they apply the heightened standard of review of “clearly erroneous.” Under the clearly erroneous standard, the appellate court will not reverse the factual findings of the trial court absent the firm conviction that an error has occurred.

Expect the court to ask about the standard or standards of review that apply to the case. If the standard is not favorable for your case, be prepared to respond to questions from the court asking why the standard of review does not require the court to find in favor of your opponent. Conversely, if the standard of review does favor your position, plan to refer to the standard throughout your argument to remind the court of how it benefits your argument.

In the example that follows, the advocate draws attention to the standard of review for the appellate court:

Attorney: Your Honors, this is a sexual harassment case. Ms. Coleman was the victim of sexual harassment and her employer, the Defendant, knew about this harassment, had the responsibility and the authority to prevent further harassment, and failed to do so, and seen on pages 25 and 27 of the record. For this, Your Honor, Ms. Coleman respectfully requests that this Court review this case de novo and reverse and remand the district court’s decision for two reasons.

Step 3: Revisit or Revise the Theory of the Case and Theme

As part of preparing for your oral argument, revisit your theory of the case and your theme. Your theory of the case explains the legal reasons that your client should win and illustrates your overall plan for convincing a judge or jury that your argument is “right.” Your theory of the case contains broad, overarching principles that encapsulate your factual and legal arguments into a short statement, usually expressed in a few sentences. The theory of the case developed for your legal brief (whether a trial, pre-trial, or post-trial motion, or an appellate brief) should be your theory of the case for your oral argument. It will evolve as you become familiar with the facts of your case, develop your research, and understand the law. Your theory of the case is usually based on substantive law or on social values and policies. For instance, the theory developed in *United States v. Windsor* under the equal protection clause of the Fourteenth Amendment of the United States Constitution is a theory based on substantive law, and the concept of marriage as a right guaranteed to all individuals, as argued before the Supreme Court in *Obergefell v. Hodges*,²⁰ is a theory based on social values or policies.

A theme should work together with the theory of the case by running parallel to it. Your theme provides the court with a reason to decide in your favor. It is the “moral of the story,” or “the lesson that the author wants readers to take away from the story.”²¹ The theme should evoke an emotional response from your audience. It presents a succinct and easy explanation of your overarching theory. Think of it as the slogan or a bumper sticker of your argument; one that has emotional resonance. It should appeal to the audience’s values and feelings. In other words, a theme is a

concept about your case that appeals to your audience both logically and emotionally. For instance, in advocating for equal protection under the Fourteenth Amendment of the United States Constitution in *Obergefell v. Hodges*, the petitioners did not use the theme of “same-sex marriage” but rather advanced the theme of “marriage equality.”

As you revisit your theme and theory of the case, you should also revisit your narrative story. Telling a story involves introducing the character or characters who will face conflict and, through the course of a series of actions, successfully overcome and resolve that conflict. Revisit the characters and conflict that are the focus of your brief and put them front and center in your oral argument. Using this story in your oral argument involves identifying the character or characters in your story, detailing the conflict that is presented to the characters, and resolving the conflict. The following is an excerpt of narrative storytelling found in the Statement of Facts of the Respondent Edith Windsor’s Supreme Court brief filed in *United States v. Windsor*.

“Years before the modern gay rights movement began, at a time when lesbians and gay men risked losing their families, friends and even their livelihoods if their sexual orientation became known, Plaintiff-Appellee Edith S. Windsor (“Edie”) and her late spouse Thea Spyer (“Thea”) fell in love, became engaged, and embarked upon a relationship that would last until Thea’s death forty-four years later.

* * *

In 1963, Edie met Thea at a restaurant in Greenwich Village that was one of the few places where lesbians were welcome. . . . Edie and Thea later began their relationship during a weekend on Long Island in 1965. After that weekend, when Thea asked Edie what she wanted from their relationship, Edie’s response was simple: “Not much. I’d like to date for a year. And if that goes the way it is now, I think I’d like to be engaged, say for a year. And if it still feels this goofy joyous, I’d like us to spend the rest of our lives together.”

Two years later, in 1967, Thea asked Edie to marry her. Of course, at the time, not only could they not legally marry, but the prospect of their being able to do so in the foreseeable future was nonexistent. Edie, who was then working at IBM, feared what would happen if their relationship was “outed.” So, instead of an engagement ring, Thea proposed to Edie with a circular diamond brooch in order that Edie would not face questions at the office about her fiancée.

* * *

By 2007, Thea’s health had deteriorated to the point that it became clear that she would not live long enough for she and Edie to have the opportunity to marry in New York, as they had long hoped. Thus, joined by a physician and five friends, Thea, then 75, and Edie, then 77, traveled to Toronto, Canada, where they were married at the airport hotel (so Thea could access it by wheelchair). They spent their last two years together as a married couple before Thea died on February 5, 2009.

Weeks after Thea's death, Edie, in her grief, was hospitalized from a severe heart attack and received a diagnosis of stress cardiomyopathy, or "broken heart syndrome."

Thea's will was admitted to probate by the Surrogate's Court of New York County. Thea's entire estate was left for Edie and Edie was appointed executor.

* * *

Whether a couple is married for purposes of applying the estate tax marital deduction depends on whether the couple is considered validly married under the law of the state of the decedent's domicile at the time of death. . . . However, while New York recognized Edie and Thea's marriage, . . . the federal government did not because of DOMA. Consequently, Thea's estate owed \$363,053.00 in federal estate tax, which Edie paid in her capacity as executor.

It is undisputed that if Thea had been a man, the marital exemption would have applied and her estate's federal tax bill would have been \$0.²²

The brief expertly identifies the characters that are at the heart of the dispute—Edie Windsor and Thea Spyer—and creates a narrative that immediately engages the audience and creates an emotional resonance for the “heroes” of the story. It also skillfully weaves the conflict into the story in a manner that invokes themes of injustice and inequality, which were central to the legal arguments involving the Fourteenth Amendment of the United States Constitution.

The themes of inequality and injustice and the equal protection theory of the case that are present in the narrative brief are then revitalized in the oral argument presented to the United States Supreme Court by Roberta Kaplan, who was Edith Windsor's attorney:

MS. KAPLAN: Mr. Chief Justice, and may it please the Court: I'd like to focus on why DOMA fails even under rationality review. Because of DOMA, many thousands of people who are legally married under the laws of nine sovereign States and the District of Columbia are being treated as unmarried by the Federal Government solely because they are gay. These couples are being treated as unmarried with respect to programs that affect family stability, such as the Family [and Medical] Leave Act, referred to by Justice Ginsburg. These couples are being treated as unmarried for purposes of Federal conflict of interest rules, election laws and anti-nepotism and judicial recusal statutes. And my client was treated as unmarried when her spouse passed away, so that she had to pay \$363,000 in estate taxes on the property that they had accumulated during their 44 years together.²³

As evidenced by the above oral argument example, your theory of the case invokes common sense, reason, and the law and is joined with your theme that engages an appeal to emotion. Your theme should run throughout the oral argument by framing

your introduction, contextualizing your argument, and shaping your conclusion.²⁴ Your theme should appeal to core values shared by the court and upon which the law is grounded.

Different theories of your case and themes can be used in different situations.²⁵ In one situation, one might want to evoke sympathy for the client, while, in another, it might be more effective to evoke disdain for the opposing party. In the oral argument example below, the advocate in a sexual harassment civil case advances a theory of “victimization vs. responsibility” to appeal to the feeling of injustice that may occur when an employer fails to protect an employee from a known harm:

Theory of the Case: Ms. Coleman was the victim of sexual harassment. Her employer, the Defendant, not only knew about this harassment, but had the obligation and duty to prevent further harassment. He failed to do so.

The theme that emerges within this theory is “take responsibility and stop harassment.”

The same process is used in crafting a theory of the case and theme in a criminal case. For example, an attorney is representing the defendant in an armed robbery case. To be guilty of armed robbery, the perpetrator must use an offensive weapon to commit the crime. An offensive weapon must be used by the defendant in a manner that is capable of inflicting harm upon another person. The defendant has allegedly robbed the jewelry store by entering it and threatening the owner with an extremely large wooden stick that is shaped to resemble a shotgun. He waves the “gun” around and forces the jewelry store owner into a closet. He then steals three diamond necklaces. The attorney develops the following theory and themes for the case:

Theory of the Case: A simple wooden stick cannot, in any way, be used to inflict harm when the victim was never struck with it or received any physically objective harm.

Theme 1: A bat ain't no gat.

Theme 2: No harm, no foul.

The theory of the case above provides the legal basis for the argument that the client is not guilty of armed robbery. The theme provides the emotional appeal that will resonate with the decision-maker. The above example, however, is provided with a crucial caveat: a theory of the case or a theme that is outrageous or inflammatory may potentially evoke the wrong emotions from the court. Judges will react poorly to attempts to manipulate the story of the dispute or efforts to confuse reason and legal analysis with a purely emotional plea. So it is important to note that while a theory of the case should be conveyed to the audience, your theme may not (and sometimes should not) be explicitly mentioned in your oral argument. It is not the literal content of the theme but rather the *feeling* of the theme that should be conveyed to the audience. Remember your theory of the case and theme must be grounded in the accurate factual record and reasonable interpretations of the law. Accordingly, be sure your theory of the case and the theme accurately reflect the facts

as known and are carefully tied to each of your legal arguments. If the arguments do not “fit” the theory of the case or your theme, then you must adjust your theory and theme to correctly reflect the law and facts.

Step 4: Choose the Most Important Points to Raise

Next, turn to the arguments you made in your legal memorandum or brief. Since the time for your oral argument is limited, you will not be able to make every argument put forth in the memorandum or brief. So be selective and choose two or three arguments that are essential to the case. An essential argument can be (1) an argument that you must win to prevail in the case, (2) an argument that you expect the other side to make on a critical issue that you will need to overcome to win your case, or (3) an argument that you expect the judges to be particularly interested in or have questions about. Be mindful, however, that judges may direct you beyond your essential argument through questions from the bench or because of issues raised by the opposing party that are not central to your argument. You should anticipate these events and be prepared to respond to them and then transition back to your essential arguments.

After identifying your essential arguments, focus on the most important points of support for those arguments. Like to your written arguments, the support for your arguments will come from legal authority, facts, and policy. Be ready to tell your judge or panel of judges what law is relevant to your arguments as well as the key statutes and cases upon which the arguments rely. The legal rules, statutes, and cases are the most persuasive sources, so you should use them for each of your arguments. Rule-based reasoning should be the starting point for the legal analysis of your oral argument.²⁶ Study your key authorities carefully—you must know these sources by heart. Understand how each source supports your argument and how the opposing party may attempt to use those same authorities to undercut your arguments. When your opponent does undercut your argument, be prepared to minimize the importance of any law that negatively impacts your arguments.

Next, think about the facts. After studying the record in the case carefully, you should be able to highlight which facts strengthen or weaken your case. Facts that strengthen your case should be highlighted during oral argument while weak facts may need to be acknowledged and then neutralized with other information that makes them appear less important. Ultimately, you can build a case emphasizing good facts and minimizing bad facts. You can also use analogical reasoning to justify an outcome by making direct comparisons of the facts of your case to the facts of prior cases.²⁷ Commit the key facts to memory, and know their location in the record. The location must be at your fingertips, so tab or highlight the parts of the record where key facts appear as part of your preparation.

Next, consider whether policy or equity arguments support your position. For example, policy-based arguments show that the position you are arguing is best for society at large²⁸ and strengthens your argument by demonstrating the outcome affects not only your client but also society as a whole. Similarly, arguments from equity demonstrate why, as a matter of fairness, your position is correct. Some

questions that you can ask to help determine what your policy and equity arguments are include: What social good underlies your argument? Efficiency? Justice? Equality? Why is the result fair?

Also consider the narrative reasoning of your case. Narrative reasoning underlies the story of your case and justifies its outcome.²⁹ Narrative reasoning, similar to policy arguments, appeals to commonly shared values, such as justice, fairness, and reasonableness.

At this point, do not be overly concerned with the number of supporting points for the argument; the *process* of identifying and summarizing key arguments and the law, facts, and policy in support of these arguments is what is important at this stage. As you practice your argument, it will become more apparent how many points in each of your arguments will fit within the time available.

Finally, review the brief from your opposing counsel. In an appellate brief, start with the Table of Contents or the Summary of Argument section to see what arguments you can expect the opposing counsel to make. In a trial brief, look at the point headings in the Arguments and Authorities section. Think about how you would counter each argument. Also, look for the themes and theories of your opponent's case. Look at the authorities cited. Are there any sources cited with which you are unfamiliar? Read those sources, and think about how to distinguish them or show their inapplicability to your argument.

Step 5: Prepare an Outline

Using your written brief or motion, the evidence or record, and the law, the next step is to prepare a written outline. The outline is both an organizational tool and a checklist to ensure your essential arguments are covered. The outline should not dictate your oral argument and make it ridged like an outline of a formal speech may do, but the outline should be flexible enough to allow you to adapt to various oral argument conditions. Your outline should allow you to quickly identify and efficiently argue your essential points in the time the court gives you to argue. Sometimes the court will ask lots of questions, and you will need to move through your outline points quickly and not in the order you planned. Conversely, if the judges do not ask many questions, then you will be able to move through your outline as you planned and include more detail in each your arguments. To get ready for these possibilities, prepare an outline that can be used to guide you through an argument that takes no more than one-third of your oral argument time as well as an argument you could present in two-thirds of your allotted time.

Start your outline with an introduction/roadmap, address each argument in turn, and end with a summary conclusion that requests relief. For each argument, the best structure for an outline is one based on the paradigm for legal analysis: (1) begin with the conclusion; (2) briefly and persuasively outline the relevant law; (3) persuasively apply the law to the facts—emphasize favorable facts and diminish the importance of weak ones; and (4) revisit the conclusion. In this structure, include the most important law, facts, and policies to make your argument as persuasive as possible. An example outline appears at the end of this chapter.

Create your outline in a bullet-point format. Do not prepare a script or an overly detailed outline. A script creates a tendency to read or look down frequently, which will keep you from having an engaged conversation with the judges. As an exception, you may write at the top of your outline the first sentence that you plan to say, which is especially helpful if you are nervous. It may also help to note details at the top of the outline, like the names of your client and the opposing party, so that you do not embarrassingly forget a basic item. (This can happen when you are nervous!)

Try to limit your outline to one or two pages that you can place flat on the lectern. You may staple your pages into a file folder to avoid shuffling. Typing the outline is helpful to avoid unnatural pauses from deciphering handwriting. You might also use highlighters colors to distinguish between the main and supporting points of the argument, which will assist you in moving quickly through the argument, if needed.

If you use a file folder for your outline, you can also use part of the file folder to keep some details of important cases should you need them. For example, some advocates attach note cards to the inside of their folder that contain case information. Each card includes the case name along with the court, year decided, and a brief summary of the facts, holding, and reasoning. These cards are helpful if you asked about a detail of an important case; you can turn directly to the relevant note card and retrieve the information.

With technology changes, some lawyers have switched from paper outlines to screen-based ones, such as the Apple iPad. Using technology can be advantageous,³⁰ especially for keeping your outline organized and taking quick notes while your opponent argues. The key, however, is to ensure that your technology is not a distraction. If you choose to take a screen-based approach, be sure you have practiced your arguments using the screen, and consider keeping the screen flat on the podium like you would with a paper outline.

If you are tempted to skip the outline and to try to memorize your argument, consider the risks. First, you might sound mechanical and not conversational. If the purpose of the oral argument is to engage the court in a conversation about your case, a mechanical delivery of your points will not further your goal. In addition, it is possible that you could forget something important, and without notes to support you, you have no chance of recovery. Even worse, you could forget something mundane, such as the precise location of a fact in the record, and be unnecessarily embarrassed and thrown off-track when the court unexpectedly asks you for that information.³¹ The principles of good planning and a healthy dose of humility weigh in favor of a written outline.

Step 6: Generate a List of Questions

In preparation for argument, develop a list of questions that the judges might ask. Start with basic questions, such as the following:

- What is the standard of review?
- What law should this Court apply?
- What is your strongest argument?
- What is your opposing counsel's strongest argument, and what is your weakest point or argument?
- What is the best case to support your argument and how do you distinguish the opposing counsel's best case?

Then expand the list to more difficult questions. Consider hypothetical the judges might pose that change the facts in your case, just slightly, to test you on how the law would apply in other factually similar situations. Think of questions that test why it is important to policy or equity that your client win. These types of help you get beyond your client in this specific case and to think about the social policies and larger implications the judges might be concerned about. (Questions are discussed in more detail in chapter 5.)

Step 7: Practice

One of the most effective tools for preparing for an oral argument is practice. By practicing your oral argument in front of others, you learn how different audiences might have different perspectives on your arguments, and you can receive critique on your theme, arguments, and style. (If you are a law student, keep in mind that you may have limits on permissible collaboration for your oral argument assignment.)

When, you practice, have listeners interrupt you with questions so that you can practice transitioning back to your prepared argument. You might even suggest particular questions ahead of time so that you can practice the answers for questions you expect. In addition to practicing before others, practice the argument alone as much as possible to commit the structure of the argument to memory, fit the argument into the allotted time, and refine your arguments. As you practice, it will become more apparent which arguments are essential ones, which points are confusing to your audience, what content needs the most attention, and how to edit the argument to fit within the allotted time. Practice a few times in front of a mirror or video record your practice. As you watch yourself, pay attention to distracting hand gestures and verbal ticks, such as “um,”—those small things that can distract from the substance of your argument.

Depending on the circumstances of your argument, you typically will have at least one and perhaps as many as three or four judges on your panel. You might even have nine or more judges as your audience if you are arguing before an en banc panel or a supreme court. These judges might be “hot” bench—judges who ask numerous questions—or a “cold” bench—judges who rarely, if ever, interrupt. Practicing the “short” and “long” versions of your argument will help you face either type of bench.

Flexibility and audience sensitivity make for a persuasive oral argument. The more you practice, the greater flexibility and sensitivity you have during your argument. In other words, the better you know your arguments and the more comfortable you feel speaking about them, the easier it will be to pay attention to the court's needs and navigate your arguments as needed.

SAMPLE FILE FOLDER OUTLINE

“May it please the Court . . . My name is A.T. and I represent the appellant Mr. Carlton.”
Reserve 2 mins. for rebuttal.

Roadmap: Carlton entitled to receive M. warning as:

1. P. took def. into custody.
2. P. interrogated Def.
3. P. is an agent of the police.

Std. of Review: Prep. of evidence; question of law

Argument:

1. Custody:
 - a. Deprived of freedom of action
 - b. Reas. person in def. shoes
 - c. Reas. person felt could leave

Courts look at:

1. Display of force
2. Inability to leave
3. Police control

Here:

Physical force
unable to leave
control

(Cases: *United States v. Jones* (5th Cir. 2010); *United States v. Smith* (11th Cir. 2004); and *United States v. Johnson* (10th Cir. 2009)).

2. Interrogation: any words or actions police should know reas. Likely to elicit incriminating response.

Courts look at: Totality of circumstances: pressure, quality of questions, agent’s knowledge

Here: (1) Question aimed at def. alleged activity; (2) Should have known reasonably likely; and (3) Pressure due to ID and custody.

(Cases: *United States v. Davis* (4th Cir. 2008); and *United States v. Frank* (6th Cir. 2007))

3. Police agent: Any agent of the state whose purpose of questioning is the ultimate prosecution of def.

Courts look at: Connection with law enforcement; pros. Purpose; acting on behalf of law enf.

Here: Continued working rel. w/ police/loyalty; knew of exposure—turned over immediately.

(Cases: *United States v. Davis* (4th Cir. 2008}); and *United States v. Frank* (6th Cir. 2007))

Policy: Spirit of Miranda—self incrimination, 5th Amend.

1. Protection of individuals
2. Warn of rights
3. Warn of exposure statements invite

Conclusion: Mr. Carlton respectfully requests that the statements be suppressed and this Court reverse and remand the case to the trial court.

Chapter 4: Organizing the Oral Argument: Balance Structure with Flexibility

Strong organization is essential to a good oral argument. A framework is important so that the judges know how your different points relate to each other and how those points support your request for relief. In a trial or appellate brief, judges can actually see the structure of your argument in the point headings and sub-point headings in the Argument section. But, in an oral argument, the judges can't "see" the framework. So the attorney must make the framework of the argument "visible" or clear to the judges through the use of the organizational techniques that let the judge "hear" the organization.

Typically, there are four parts to an oral argument, even though advocates may need to focus only on the first three: (A) the introduction/roadmap, (B) the facts, (C) the argument, and (D) the conclusion. If you are representing the movant/appellant, your oral argument often contains all four parts. If you are representing the respondent/appellee, your argument typically only includes three of the four parts: the introduction/roadmap, the argument, and the conclusion. And the movant/appellant will generally have a rebuttal argument, which also has a specific structure. Occasionally, the respondent/appellee may do a sur-rebuttal, which follows the same structure. (In most courts, besides tax courts and international tribunals, only the movant/appellant has an opportunity to do rebuttal. The respondent/appellee is not permitted to do sur-rebuttal.)

Introduction/Roadmap

The introduction/roadmap has two parts: the introduction and the roadmap. Start with the introduction. Once you are at the podium and it is time to begin the argument, introduce yourself, your client, the matter before the Court, and the relief the client requests. For example, in a motion argument, you might begin with "May it please the Court. Good afternoon. My name is Jane Smith and I represent the Movant X Company. X Company requests that this Court grant its motion to dismiss." For an appellate argument, you might begin with "May it please the Court. Good afternoon. My name is Dan Johnson, and I represent the appellant, Jennifer Carlson. Ms. Carlson requests that this Court reverse and remand the lower court's decision."

If you are representing the movant/appellant, reserve time for rebuttal after the introduction. Say, "Chief Judge/Your Honor, I would like to reserve ___ minute(s) for rebuttal."

The second part is a roadmap of the issues and the arguments. The roadmap is first in the old adage, "Tell them what you are going to say; say it; and then tell them what you said." The roadmap should be a sentence or two that summarizes your argument and shows the order in which you plan for the argument to progress.

In the roadmap, you will cover what will be said, the relief you want, the positions that will be asserted, and the order of the points. For example, you might say “X Company requests that the Court deny the motion for summary judgment for three reasons. First, _____ ; second, _____ ; and third, _____.” Do not make this summary a mini-argument. Just state your reasons concisely and persuasively. You will go into more detail when you address each point.

What follows is an example of a good, basic introduction. It includes the introductory information, a request for rebuttal time, a request for relief, and a roadmap of the argument.

***Attorney:** Chief Judge Anderson, may it please the Court. My name is David Roberts, and I represent the Appellant, Ms. Coleman. Chief Judge, at this time I would like to reserve one minute for rebuttal. Ms. Coleman respectfully requests that this Court review this case de novo and reverse and remand the district court’s decision for two reasons.*

First, the harassment was sufficiently severe and pervasive to all of the terms and conditions of Ms. Coleman’s employment and creates a hostile work environment. And second, the firm is liable because the firm knew about the harassment and failed to take prompt remedial measures to prevent further harassment.

Facts

After the introduction/roadmap, a summary or statement of the facts may come next. In most federal appellate courts, attorneys should “assume [the judge(s) have] a basic knowledge of facts and history, and proceed directly to [their] points of law.”³² But in other settings, expectations may be different. You can determine a court’s preference by checking the local rules or by asking other lawyers who practice before that court. For most oral arguments in legal writing courses, your professor will tell you whether to give a statement of the facts before proceeding to the argument. Whether the court (or your professor) asks for the facts or not, always be prepared to concisely and persuasively summarize the facts, including a few citations to the evidence or the record.

Presentation of the Facts by the Movant/Appellant

As the movant/appellant, it may be necessary, depending upon the audience’s expectations and the issues in the case, to provide the facts. There are three places that the facts can be included: (1) as a summary after the introduction/roadmap, but before the argument; (2) as key facts integrated into the introduction portion of the introduction/roadmap before the request for relief; or (3) as key facts integrated into the roadmap. The first option, after the introduction/roadmap but before the argument, is the easiest place to include the facts, especially for novice oralists. But, it’s often not the most persuasive way to include the facts, and it may not be what the court wants. The second and third options are a little more advanced but are more persuasive. Regardless of where you include the facts, your goal is to use the facts to further develop your theme and theory of the case. For the facts you provide, consider

citing to the evidence or the record. This demonstrates your credibility and your knowledge, both of which make you more persuasive.

1. Summary of the Facts After the Introduction/Roadmap but Before the Argument

The first place to discuss the facts is as a summary after the introduction/roadmap, but before the argument. The goal is to present the legally relevant facts in a persuasive, yet concise, manner. Do not spend too much time discussing the facts (usually a minute or so, depending upon the complexity of the case) because it is more important to move on to your arguments. As discussed above, courts will often discourage this approach to introducing facts.

2. Key Facts Integrated into the Introduction, Before the Request for Relief

Key facts can be provided before the request for relief. Placed here, the facts can be used to effectively advanced your theme. Using this approach requires that you “summarize in one or two sentences what the case is about and why [you] should prevail.”³³ These facts should include your main character, the conflict, and resolution you propose—a short story told in the span of about 15 to 20 seconds. The facts should also evoke an emotional response. For example, if the theme is designed to evoke sympathy for your client, the key facts should make the judges want to feel sympathy. The introduction/roadmap, below, is annotated to show how the facts are integrated into the introduction before the request for relief:

***Attorney: [Introduction]** Chief Judge Anderson, may it please the Court. My name is David Roberts, and I represent the Appellant, Ms. Coleman. Chief Judge, at this time I would like to reserve one minute for rebuttal. **[Statement of the Facts]** Your Honors, this is a sexual harassment case. Ms. Coleman was the victim of sexual harassment and her employer, the Defendant, knew about this harassment, had the responsibility and the authority to prevent further harassment and failed to do so, as seen on pages 25 and 27 of the Record. **[Request for Relief]** For this, Your Honor, Ms. Coleman respectfully requests that this Court review this case de novo and reverse and remand the district court’s decision for two reasons.*

***[Roadmap (reasons why this Court should reverse and remand this case)]** First, the harassment was sufficiently severe and pervasive to all of the terms and conditions of Ms. Coleman’s employment and creates a hostile work environment. And second, the firm is liable because the firm knew about the harassment and failed to take prompt remedial measures to prevent further harassment*

3. Key Facts Integrated into the Roadmap

A third way to incorporate the key facts is to add a key fact or two to the reasons your client is entitled to relief. In the example below, the “second reason” for relief is supported not only by the advocate’s claim but by giving attention to the key facts:

The second reason why this Court should reverse and remand the case is that Mr. Johnson maintained a subjective expectation of privacy in the totality of his movements, and the GPS device that the police officers installed, without a warrant, monitored Mr. Johnson’s every move for a three-week period.

While including the key fact with the reason may be persuasive, remember that the legal reasons in the roadmap still need to be persuasive and concise.

Presentation of Facts by the Respondent/Appellee

As the respondent/appellee, it is usually not necessary to provide a summary of the facts, unless the movant/appellant has left out or misstated a legally relevant fact. Sometimes, however, judges or your professor may ask you to briefly summarize the facts. If that is the case, follow those directions.

In any event, you will want to include key facts in your introduction or in your roadmap and not miss an opportunity for persuasion. Follow the steps above to integrate key facts into your introduction/roadmap.

Argument³⁴

After you have provided your introduction/roadmap and possibly a summary of the facts, the next part is the argument. Organize your argument first by issue, and then within an issue, by starting with the client’s strongest argument unless there is a threshold issue that *must be* addressed first. Be sure to advance your theme and major points quickly—it may be the only opportunity you will have before being asked a string of questions. If you are not asked any questions, you can add more detail on each point.

Start the argument portion with affirmative arguments about why your client wins on an issue. Then address the shortcomings of your opposing counsel’s argument. In other words, do not start your argument: “The other side will probably argue that” Instead, begin your argument with affirmative points about *your* client’s case.

Pay attention to the outline you developed. As you present the argument, fill in the outline with supporting law and facts. Also, be flexible; if the court guides you to your second point before you’ve finished your first, move to that second point. A good outline should allow you to quickly shift from one point to another. For example, the sample outline (found in Chapter 3) allows the advocate to move quickly to their arguments about whether an “interrogation” took place. By numbering the issues in

the argument and outlining issues within those arguments, the advocate can move about seamlessly.

Without focusing on individual authorities, call the court's attention to the rules and policies from the authorities, occasionally referencing the lawmaking bodies that adopt your view. For example, an advocate might draw attention to the court's stated view on the law by beginning with "In this Circuit . . ." or "This Court has said" When deciding which specific authorities to mention in oral arguments, focus first on binding authority and then primary nonbinding or persuasive authority. Secondary authorities, such as treatises and law review articles, will not be as persuasive to the court, so, as you did in the motion or brief, limit reliance on them.

When mentioning cases, give the full name of the case, the court, and the year the case was decided, the first time the case is cited. For example, an advocate, mentioning to the *Katz* case for the first time, would say something like this, "In *Katz vs. United States*, decided by the United States Supreme Court in 1967" Do not give the volume number, the reporter, the initial page, or pinpoint reference, but have that information available if the judge asks for it. (After a full citation is presented, use a short citation when referring to the case again. For example, "similar to *Katz*...." Know the procedural posture of the case.) In other words, know if the case was decided on a motion for summary judgment or a motion to dismiss.

If you must discuss precedent cases in detail, discuss only those facts the court needs to know to understand the case. State the holding, and discuss the court's reasoning. Be prepared to explain to the court how the case applies to your client's case. Be ready to explain *why* the court should rely upon the rationale of the cited case to rule in your client's favor.

Do not forget to advance your policy arguments. They are sometimes the turning point for the court. Policy arguments will help explain the law's broader social purpose. They will deepen the analysis and give the court additional reasons to decide in your favor. Policy arguments are stronger if they are expressly adopted in the law upon which your case is built, but this is an area in which you can become more creative? What societal values will be impacted? How do economics fit into the ultimate decision? Should they? These are examples of the types of questions that raise policy concerns that could affect the court's ultimate decision. Think about why this case matters. Do not focus solely on your client; think about all similarly situated individuals.

Use the arguments to draw the judges' attention to the facts of your case and why they support the advocated outcome or, when discussing issues of legal questions, why the court should apply one rule over another. So, tie the law to the facts. In this example the advocate does a good job of linking law to fact to demonstrate why the required investigation in the case was not done in a timely way:

Attorney: *The investigation was not prompt. Your Honor, this Court in Kilgore v. Thompson in 1996, Mendoza v. Borden in 1999, and Nurse B. v. Columbia Palms West Hospital in 2007, held that action within a week*

is prompt. In this case, Defendant took more than a week before taking any action. . . .

If the judges' questions take the argument in a direction different from what you had planned, be flexible and transition to meet their needs. When you move to a new point, start with a "signpost" that tells the court you are shifting to a new topic. Examples of signposts include "Turning to the second issue . . ." or "Moving to my third point" The statements that follow these transitions should be persuasive statements about your legal argument. For instance, you might say, "Turning to the second issue, the defendant knew about the harassment and failed to take remedial measures." Similarly, each issue within the argument should end with a mini-conclusion. The mini-conclusion incorporates the request for relief and provides a transition into the next issue.

If you are the respondent/appellee, your argument must be even more flexible than the movant/appellant. Your argument must have all your affirmative points, but you must also listen closely to the movant/appellant's argument and try to tailor your argument to respond to what was said. This can be done by inserting—at appropriate places in your argument—phrases such as "Although movant's (or appellant's) counsel argued _____," and then arguing your legal or factual response to this point.

You can also incorporate into your argument answers to questions the court asked your opposing counsel. If one of your arguments is responsive to a question the judge asked your opposing counsel, you might begin by saying, "The Court asked opposing counsel about X." Then, you can give your argument in the form of a response to the question. Remember, however, not to become too preoccupied with responding to the opponent's arguments. Rather, stay focused on advancing the strongest arguments for your position, but incorporate responsive points when appropriate.

Conclusion

The conclusion is your opportunity to "tell the judges what you said." Conclude the argument by telling the court what the client is requesting and why the court should grant that request. Conclude with a sentence or two summarizing your argument and requesting a specific ruling from the court. Revisit your theme. Conclusions should be concise and brief, and not canned or rehearsed. This is an example of a useful conclusion:

Attorney: *If this Court finds Ms. Coleman's sexual harassment was sufficiently severe and pervasive, this Court would set a baseline of actionable conduct that is far lower than that of other circuits. Title VII is not general civility code. White, Jones, and Kent had a duty to take part in remedial action and White, Jones, and Kent affirmably met its duty under the law. That is why White, Jones, and Kent request that this Court affirms the district court and grants the summary judgment in its favor. Thank you, Your Honors.*

Prepare a conclusion, but know that you may not get a chance to give it—or you may not want to. Sometimes it is best to simply end the argument on a strong point and not to worry about a pre-planned conclusion.

If your time has expired before you have had an opportunity to present your conclusion, and you want to give it, do not get flustered. Although it is best to time your argument so that you can give your conclusion before the time expires, advocates sometimes run out of time. When you see the stop card (or in some courts, the red light), stop speaking, and ask, “Chief Judge, I see my time is has expired. May I briefly conclude?” And if permitted to conclude, then very briefly (15–20 seconds) conclude, say “thank you,” and sit down.

If time expired while you were answering a question, ask the Chief Judge, “I see that my time has expired. May I briefly finish answering the question?” And if permitted, briefly finish your answer. After finishing your answer, do not try to give your formal and pre-planned conclusion. Trying to answer the question and then provide the conclusion will likely annoy the court. Finally, if will not allow you to finish answering the question or give a conclusion, simply say “thank you,” and sit down.

Rebuttal

Typically, the movant/appellant has time for rebuttal—a final opportunity to address the respondent/appellee’s arguments. If you are the movant/appellant, take advantage of this opportunity by responding to only major points raised by the respondent/appellee.

Although rebuttal can be longer in real-world oral arguments, in law school, generally reserve no more than two minutes for rebuttal. Usually one minute is sufficient.

Like your main argument, the rebuttal has a framework to follow. First, begin with an abbreviated introduction—“May it please the Court.” Then provide a roadmap telling the court how many points will be addressed in the rebuttal; For example, you might say, “Your Honor(s), I have two points on rebuttal.” The amount of time reserved for rebuttal determines the number of points you should raise. If a rebuttal is short, such as a one-minute rebuttal, the movant or appellant should only raise one point in that minute. If the rebuttal is two minutes, the movant/appellant can raise two or maybe three (but usually no more than three) points. Then briefly state the point that the respondent/appellee made to draw the court’s attention back to the issue it found important. After quickly stating the respondent/appellee argument, tell the court why that argument is incorrect. Here is an example when the advocate had reserved one minute for rebuttal:

Chief Judge, may it please the Court. I would like to make one point on rebuttal. Opposing counsel argued that the harassment Ms. Coleman faced was not pervasive. But, the law establishes even one incident can make the harassment pervasive. And here we have two. Mr. Armani grabbed Ms. Coleman and thrust his pelvis into her. And he sent her a sex video. These incidents created a hostile work environment and thus this matter should be reversed and remanded.

When determining points to make on rebuttal, keep in mind the big picture and try to read the panel's responses to your opposing counsel's arguments. That is, if the court responded positively to one of the opposing counsel's points, then this is the time to address or refute that point. But, if the opposing counsel made arguments that failed to interest the court, resist the temptation to score points at the expense of losing the court's interest. Instead, you should stick to your theme, ignore issues that have little chance of carrying the day, and address only those points that speak to the court's primary concerns. Try to focus on areas which the judges have asked questions. The goal is to end the argument on a strong point.

You can prepare for rebuttal by preparing a list of five to six rebuttal points. Do this by picking out points you believe your opponent will argue and will be particularly interesting to the court. Then during the argument, listen carefully to your opposing counsel and decide which rebuttal points will be most effective in response to what your opponent has said. Sometimes, however, your opposing counsel will raise points you did not anticipate and to which you will need to respond. Rebuttal requires you to be mentally agile and to think on your feet. Always adapt your rebuttal to what your opposing counsel has argued. Be careful to avoid attacking the opposing counsel or arguing directly with them. When you speak, address the court, and not your opposing counsel.

Give a brief explanation and support for your points. If time permits, repeat your client's request for relief. By this time in the argument, the judges are tired. Do not use rebuttal to raise arguments you did not have time to argue in your original argument or try to complete portions of your original argument you did not have time to complete or rehash original points. And because rebuttals are supposed to be short and snappy, avoid topics likely to draw questions. In other words, do not "go for the kill" on rebuttal.

Chapter 5: Answering Questions: Know What You Are Being Asked

An oral argument is a *conversation* between the advocate and the judge or judges deciding the case, not a presentation. Questioning the advocate is the primary means by which judges engage in the conversation. The judges use questions to help clear up confusion, press important points, and communicate with each other about the case. Accordingly, you should be prepared to directly, clearly, and persuasively answer all of the judges' questions. "Success [in oral argument] seldom depends on eloquence. It turns instead on anticipating the inevitable, skeptical questions, and preparing effective answers."³⁵

Three Steps to Answering Questions

Step 1: While this is easier said than done, stop speaking when a judge begins to ask a question.

As human beings, we tend to dislike interruptions in everyday conversations, and we like to finish our ideas before we cede the floor to another speaker. Yet stopping immediately when asked a question serves two purposes: (1) it shows deference to the court, which enhances your credibility as a speaker, and (2) it allows you the opportunity to listen *and* hear the question and identify what issues are most pressing for the judge, which is to your advantage. If the goal of oral argument is to allow the judges to focus on those points most troubling to the court and to guide the resolution of those issues in your favor, then knowing what is causing concern for the court is important. In other words, you *want* the judges to ask questions. So, keep eye contact with the judges, and watch for nonverbal signals that might indicate an intent to ask a question, such as leaning forward, making eye contact, or taking in a breath. As soon as you pick up on these signals, stop talking. And you should never interrupt a judge. Patiently wait for the judge to finish the question before answering.

Step 2: Actively listen to the question.

Advocates frequently fail to listen to the question and end up answering a question that is different from the one asked. For example, an advocate was once asked, "Where did you go to college?" The advocate answered, "I majored in economics."

An advocate can listen more effectively by using the techniques of active listening. Orient yourself toward the judge asking the question and make eye contact. Try to stop thinking about what you were just saying or wanted to say next and focus on the question. Be present in the moment. If you are confused by the question, it is appropriate to ask for clarification. You might say, "I'm sorry, Your Honor. I do not understand the question. Would you please repeat it?" Or you might try restating the question according to your understanding. That is, you might say, "What I understand Your Honor to be asking is" Being clear on the question asked is better than to trying to answer a question you do not understand. Other than asking questions for clarification, however, advocates do not typically ask questions during oral arguments.

One way to more actively listen to questions is to have some idea of the types of questions you may be asked. If you can identify the type of question being asked while listening to the question, it may be easier for you to formulate an appropriate answer. Moreover, you can prepare for oral argument by anticipating questions that fall into the various categories and sketching out answers to those questions beforehand. Although there are many types of questions, some of the most common categories are described below.

- **Questions to elicit information:** A judge may ask you a question to get some needed information. The judge may ask about the facts in the evidence or record, and you should be able to accurately cite to the evidence or record where the information is located. Consequently, you will want to include a list of key facts and citations in your outline or tab the important parts of the evidence or record for reference, so that you can access the information quickly.

Judges may also ask for basic information about authorities, parties, or background. In response to these questions, provide the information requested. Be aware, however, that requests for information may also be an invitation to provide argument about that information. If you can simultaneously further your position and provide relevant information, do so. For example, if a judge says, “tell me about the *Smith* case,” do not simply recite the facts, holding, and reasoning. Expand upon *Smith* by explaining how and why it applies to your case.

- **Questions about the applicability of authority or the reach of legal principles:** Judges sometimes ask about how precedent applies to your client’s facts or how far legal principles extend. Judges are also interested in hearing how the authority you cite or the principles you advocate for fit into existing authority.

The judges might also ask how authorities are similar to or distinguishable from the case at hand. Questions of this type might include, “How does *Jones v. Smith* apply here?” “Why isn’t the reasoning in the *Jones* case applicable?”; “Does the *Doe* case control this issue?”; or “Isn’t the *Doe* case distinguishable?” One commentator advises, “The judges will question you on the scope of [your] underlying principles. Know the limits of your principles in advance. . . . Avoid radical arguments that extend your principle too far. Instead, offer some neutral basis for distinguishing cases that are not within your principle.”³⁶

In addition, if you are asking the court to depart from the holding of persuasive authority, be sure to know the rules you would like the court to create and why the persuasive authority was wrong.

- **Hypothetical questions:** Judges ask hypothetical questions for the same reason that professors pose hypothetical questions in law school—to see just how far a legal position will reasonably reach. Judges are concerned about the consequences of their decisions, so the advocate should address any hypothetical question directly and honestly and help the judges understand the parameters of the decision.

When asked a hypothetical, you should not answer by saying, “But those are not the facts in this case.” Instead, you should respond to the question in light of the facts the judge provided in the hypothetical. The judge asking the question knows the facts in the question are different from the facts in your client’s case. The judge simply wants—and expects—an answer to their hypothetical. After you have answered the hypothetical, refocus the judges on your facts and argument.

- **Questions about your opposing counsel’s arguments:** Because an oral argument provides time for a judge to get pointed answers to pressing questions, the judges will likely ask you questions about your opposing counsel’s argument. Questions like, “What about the argument that the appellant raises . . . ?” or “How do you respond to the other side’s assertion that . . . ?” These questions will be designed to probe the weaknesses of your argument, and you should be prepared with answers that shore up those weaknesses and bring the conversation back to your affirmative arguments.
- **Policy questions:** Judges want to know how their decisions will impact society. So be prepared to answer questions that deal with the policy ramifications of the position you advocate.
- **Questions that seek concessions:** Because judges like to narrow the legal and factual questions in the case and to determine just how far the consequences of a decision will reach, a judge may ask you to concede a point. On one hand, do not concede a point merely because a judge suggests it. It is perfectly acceptable to say, “Your Honor, I understand your point, but I disagree because” On the other hand, it is acceptable to concede a factual or legal point if you are careful not to concede too much such that you undermine your argument. For example, if the judge asks, “If we find X to be true, do you lose?” and you feel you must answer “yes” to the question, be sure to state the reason why this concession does not affect the validity of your argument. Concessions, so long as they do not affect the validity of your argument, are acceptable. Making minor concessions shows that you are a reasonable and reliable advocate.
- **Softball questions:** Softball questions are friendly questions designed to help you further your argument. Typically, these questions are easy to answer. These questions are also easy to miss, but if you can identify them, you can—as their name suggests—hit them out of the park. Softball questions can come from judges who agree with you and want to help you make your point to their fellow judges,

and they can come from judges who are trying to help you recover from a difficult line of questioning. Advocates sometimes miss softball questions because they are quick to conclude that every question is one that challenges the advocates' position and because are not listening carefully.

- ***Irrelevant Questions:*** Sometimes judges will ask questions that are not relevant, in your opinion, to the case at hand. As politely and completely as you can, answer the question and try to quickly transition back to the points you want to make.

Step 3: Answer the question as directly and accurately as possible.

When you do give your answer, give a direct answer to the question, show deference to the court ("Your Honor"), and explain the answer, incorporating law and facts as necessary.

Many questions posed by judges will suggest a "yes" or "no" response. If the question calls for a "yes" or "no" answer, answer "yes" or "no," and then explain. For example, if you are asked, "Does the rule in *Smith v. Jones* apply to this case?" Answer "Yes, Your Honor. However, the *Smith* case does not control the outcome here because" If the direct answer is not given first, the judges will have a harder time listening to the explanation and will be frustrated because they did not hear the answer in its expected form. In addition, not answering directly may suggest you are evading a question. Never begin your response by saying, "That is a good question." Judges say that they are skeptical of this comment, and it rings of false praise.

If it helps you be direct and accurate in answering your question, it is fine to pause to gather your thoughts before answering. In fact, by pausing to think, "you [are] show[ing] respect for the depth of the question asked and indirectly for the judge who asked it."³⁷ When you are ready to answer the question, make eye contact with the judge who asked the question, take a deep breath, and begin.

If you do not know the direct answer to a question, you have three options.³⁸ First, if the question is one for which you can quickly find an answer, find it. This would apply, for example, when a judge wants to know where a fact is in the evidence or the record and you can quickly look up that citation. Second, if you do not know the answer and the question is not significant to the case, simply say, "I apologize, Your Honor, I do not have that information available," or "I'm sorry, Your Honor, I do not know the answer to that question." Then, simply transition back into your argument. Third, if the issue is significant to the case, you can try to answer the question to the best of your ability using the facts and the law that you know. Your answer could start like this: "While I am unfamiliar with case Y that you just described, our facts show . . ." Bluffing is never an option when you do not know the answer; judges are not easily fooled, and you immediately damage your credibility (and the fair and efficient functioning of the judicial system) if you bluff.

The explanation of your direct answer should advance your argument. When explaining your answer to a question, incorporate the law and facts to make the

answer stronger. The following is a good example of a first-year law student supporting the answer to a question with both facts and authority:

Judge: *Did the employer ever take any action that was sufficient?*

Attorney: *Your Honor, actually, they did. When they started the investigation, however, it was too late. It was not prompt. Your Honor, this Court in Kilgore v. Thompson in 1996, Mendoza v. Borden in 1999, and Nurse Be v. Columbia Palms West Hospital in 2007, held that action within a week was prompt. In this case, the Defendant took more than a week before taking any action.*

Use judgment regarding the length and/or depth of your answer explanations. Sometimes a “yes” or “no” answer will suffice and no explanation is needed. Some answers may require a one-sentence explanation, and others will be longer. However, avoid long-winded explanations, as they will re-direct your argument, invite additional questions and ultimately use up precious argument time.

Sometimes a judge will ask a compound question, or one judge will ask a question and another judge will immediately ask another question before you have an opportunity to answer the first question. In both instances, remain calm, and to remember to provide a “roadmap” before answering the questions. For example, before answering the compound question, you could start with, “Your Honor, there are two points in your question. First, I will address . . . , and second, I will address”

When you have multiple questions waiting to be answered, indicate which question you are going to answer first. For example, you might say, “Chief Judge, I will answer your question first.” Usually, if the chief judge/justice asks a question, answer that question first. Other times, it may be better to first answer the first question asked. And at other times, you can answer the questions simultaneously. In that instance, you might say, “Your Honors, I can answer both questions together.” Be thoughtful and flexible in deciding your answer order.

Sometimes judges will ask questions with a hostile, sounding tone. In these situations, “Don’t raise your voice, improve your argument.”³⁹ Even though it is called “oral argument,” your real duty is to *educate* the judges—to *explain* your position, not *argue* with the judges. So, even if you are agitated by a seemingly hostile question, be calm. Do not raise your voice, make a face, or use aggressive body language. See the judge as an intellectual equal with an important question; keep a positive outcome for your client in mind. Those thoughts can help minimize the temptation to respond aggressively or to get flustered. “Frustrating” questions are an opportunity to show the court how prepared you are, how knowledgeable you are on this area of law, and how the question is either helpful to your argument or irrelevant to the issue being argued.

When you get a tough question, remember, are questions all gifts—yes, gifts. “Welcome [questions]. They allow you to truly know your audience”—what is on the judges’ minds, where the judges’ misunderstandings are, and what parts of the argument the judges are interested in.⁴⁰ Questions are truly gifts because they let you address something that is bothering the judge while doing so in a manner that

advances your position. The alternative is that the judge could keep quiet about a concern, and you would lose your opportunity to persuade the judge on that point.

If you are asked a question that moves you to a different issue or point in your argument, let the question move you there. Because the judge has asked about this point, they are interested in hearing about it. Even if a judge has asked you a question about an issue you have already covered, answer the question asked and reinforce your previous argument. When you are finished answering the question, you can come back to earlier points if they were not fully developed. However, remember, time is of the essence in an oral argument. Your goal is to make your points once and only repeat a point if that point needs to be emphasized or a judge asks a question about a previous argument. The key here is to be flexible, but also to remain in control of the argument.

When you are finished answering a question, do not wait for the judge to give you permission to continue the argument. And do not ask the judge whether you have answered the question. Simply transition back into your argument. Relatedly, never put off a question or say, “I’ll get to that in a moment.” Instead, shift gears and answer the judge’s question immediately.

Answering questions well is part of an advocate’s “controlled flexibility.” The advocate’s answers are “controlled” because the advocate has an outline of points they want to make in the argument, and the advocate gets to choose where to transition to after answering a question—regaining control of the argument. The advocates’ answers are “flexible” because when a judge asks a question about another point in the argument, the advocate can directly answer the question presented at the time it is asked. Anything else defeats your purpose of addressing the judges’ concerns and resolving them in your favor.

Chapter 6: Communicating with Style: Master the Delivery

Style and content go hand in hand; “style is impossible to achieve without worthy ideas. Conversely, ideas remain lifeless without stylistic distinctions.”⁴¹ That is, *how* something is said is as important as *what* is said. Furthermore, what constitutes an effective and persuasive communication style is not merely a matter of opinion. The efficacy and persuasiveness of how a speech, or an oral argument, is delivered has been studied by lawyers, scholars, and scientists for decades.⁴² And, of course, the art of argument itself has been studied since ancient times.⁴³

Style focuses on the elements of the delivery. Four of the most important style elements are eye contact, speaking pace, speech inflection, and body language. If an oralist’s body language is distracting, or the pace of speech too rapid, then the content, no matter how sound, may be lost. However, a well-structured argument, delivered with appropriate pace and emphasis, while engaging the eyes of the listener, will almost certainly convey the content of the argument to the listener. This chapter focuses on these four style elements and also addresses a few other best practices that have generally been found to make an argument more persuasive.

Eye Contact⁴⁴

The importance of eye contact is quite real. Your audience remains engaged and focused on the argument more easily if you are making eye contact. When following a complex argument, an engaged focus may make the difference between your audience understanding and missing your point. Look the judges in the eye for signs of understanding or confusion and adjust your presentation accordingly. Eye contact also enhances your credibility with the judges.⁴⁵ If someone looks another directly in the eye, that speaker is perceived to be more credible. Additionally, the Supreme Court discourages—and may even prohibit—a speaker from looking down and reading from their materials, so that the speaker engages in eye contact with the Justices.⁴⁶ If you must glance at notes, do it quickly and infrequently.

Speaking Pace

If you speak rapidly, it may be as if the substance was never argued.⁴⁷ To control a rapid speaking pace, focus on pauses. Pauses in the oral argument serve as audible “punctuation.” A short pause is a “comma,” a longer pause is a “period.” An even longer pause represents a point where you are shifting from one section to another. You can also use pauses for emphasis; if you want someone to remember something you say—pause—before you say the words. If you have a tendency to speak quickly or pick up speed, you can write “pause” or “slow down” at the top of your outline to remind yourself to do just that. On the other hand, studies show that speaking too slowly is less persuasive than speaking at a moderate pace.⁴⁸ This is one of those “Goldilocks and the Three Bears” situations. Not too fast, not too slow, just right.⁴⁹

Vocal Inflections and Hesitations

Certain vocal inflections have been shown to negate the power and believability of speech. Researchers have found that several forms of “powerless language,” when used by witnesses in a courtroom, “strongly affects how favorably a witness is perceived and by implication suggests that these sorts of differences may play a consequential role in the legal process itself.” Powerless language includes using hedges (such as “sort of,” “kind of,” “a little”), hesitations (such as “ah,” “um,” “let’s see”), answering a question with rising intonation (“thirty-five?”), and polite forms (“please,” “thank you”).⁵⁰ Avoid weak language such as “I believe” or “It is our position that . . .” Get directly to the point. “Present your argument as truth, not as your opinion.”⁵¹

Any oral advocate can avoid using powerless language, but it takes practice—and if you are particularly guilty of using any form of powerless language, it may take a lot of practice. Especially beware of hesitations like “um,” “uh,” or “like” and eliminate them. Hesitations are not intentional pauses, which can be used to emphasize a point. Instead, they are unnecessary vocal interjections that tend to annoy most listeners. Many moot court judges take pleasure in keeping a running tally of the number of “ums” or “uhs” in a presentation and letting you know how often you used such hesitations. Recording yourself and watching the video is usually one of the most highly effective methods of dealing with this. It can be painful, but it is effective. The same tool can be used to eliminate answering a question with rising intonation, using hedges and being overly polite to the court by saying “please” and “thank you” too often. (Generally, the only time you will say “thank you” in an oral argument is when you conclude your argument.) Finally, always be thinking about the volume level of your voice. You want to make sure you are speaking loud enough for the judges to hear you.

Body Language⁵²

The formality of the oral argument setting dictates which nonverbal cues and body language are appropriate when arguing in front of a judge.⁵³ Ultimately, you should avoid doing anything that might distract the judge from listening to what you say or showing negative emotion directed at the judge or your opponent. Because you are trying to engage the judge in a dialogue rather than give a speech, you should be conversational while still maintaining an air of formality appropriate to the symbolic importance of the court. Even if you think opposing counsel’s argument is substantively stronger, your body language can have a positive effect on the overall presentation to the panel of judges.⁵⁴

In addition to keeping eye contact and speaking slowly enough to be understood, the following body language essentials will enhance your credibility with the court:

- Stay at the podium while speaking. Some courts will find it disrespectful if you move away from the podium.
- Eliminate distracting or forced hand gestures. Watch yourself in the mirror when practicing; if you distract yourself, you will likely distract the court as well. Most often, it is best to place your hands at your sides or on the podium and gesture naturally. Arms folded across the chest is a closed posture that is almost always interpreted as being defensive⁵⁵ and is less persuasive than placing your hands naturally at your side or on the podium. Do not place your hands in your pockets (it looks too casual), or cross them behind or in front your body because it inhibits natural gestures. “Clasping your hands behind your back makes you look like you’re facing a firing squad.”⁵⁶ Placing hands on the hips suggests aggression and should also be avoided.⁵⁷
- Be aware of your facial expressions. Your face is one of the most important nonverbal communicators.⁵⁸ A relaxed, but engaged, expression is the goal.
- Stand straight with both feet on the floor, but without being stiff. Don’t hunch forward, lean backward, sway back and forth, or slouch. Any stance other than a straight stance will lessen your credibility.⁵⁹
- Avoid sighs that can signal irritation with the court or opposing counsel.
- Try to relax. A tense posture is associated with self-doubt.⁶⁰

Other Best Practices

The elements of delivery discussed above are extremely effective tools to use when presenting an oral argument. In addition to these tools, there are a few other mannerisms that might have an adverse effect on the delivery of your argument. Avoid the following:⁶¹

- Fidgeting
- Playing with a pen or with keys
- Flipping pages on the podium. Instead, use a folder for your notes. Leave any non-essential documents at counsel table.

All of the above actions are distracting to judges.

In essence, these style considerations help you to speak with conviction. Speaking with conviction means balancing enthusiasm for your position with the demeanor appropriate for a courtroom. One might think of the appropriate oral argument style as “conservatively passionate.” Quintilian, a lawyer and rhetorician in first century Rome, said that an orator is a “good [person] speaking well.”⁶² Quintilian’s words remind us that the public speaking skills described above are important to the orator if he or she is to “speak well.” Likewise, as is discussed below, the advocate must be mindful of being a “good man”—that is, being professional and appropriate for the courtroom.

Chapter 7: Overcoming Oral Argument Anxiety: Harness the Butterflies

There are two aspects to oral arguments—the content and the delivery of the content. And as the previous chapters have explained—both are equally important. Attorneys are judged on both. Oral argument anxiety or nervousness typically manifests itself in the delivery of the content and can really impact the overall oral argument. “The way you stand, move, breathe, gesture, and focus your gaze significantly affects how listeners perceive you.”⁶³ This is why this chapter has been included.

In fact, it is well known that the fear of public speaking is common. “[T]here is [a] joke that most people would rather be in the casket at the funeral rather than delivering the eulogy.”⁶⁴ But, attorneys are public speakers. There is no way around that, so learning to “harness the butterflies” is necessary.

Because the fear of public speaking is so common, there is a lot of literature on this topic. A simple Google search of the phrase “public speaking fears lawyers” results in almost two million hits. There are books and law review articles on the topic, and a variety of websites offer tips and advice. There are companies that offer classes in overcoming the fear of public speaking. Consequently, the goal of this chapter is not an exhaustive discussion of the topic of oral argument anxiety; the goal is a brief discussion of the butterflies and tips on how to overcome the anxiety so that you can present the best oral arguments you can.

First things first: Mark Twain once said, “There are two types of speakers: those that are nervous and those that are liars.”⁶⁵ We all need to understand that everyone gets nervous; everyone has “butterflies.” And how the nervousness appears is individual. So the goal is determining how the butterflies will appear for you individually, and then learn how to harness them.

Determining how the nervousness will appear is not as easy as you would expect. Some of us have had the benefit of having someone tell us, “You roll your eyes when someone asks a question that you think is stupid,” or “you were biting your lip or making a face during that presentation,” or “your hands were shaking, or your voice was wavering, as you were discussing that case in class.” While feedback like that is difficult to hear, appreciate the person who told you that! Once you know how the nervousness will manifest itself, then you can be cognizant of the problem and figure out ways to correct or minimize the nervousness.

But you may not have had someone provide feedback like that. What should you do to figure out how the nervousness will manifest itself? You can, of course, self-diagnose—“when I am speaking in class (or at the meeting, or in court), I noticed or felt ____.” You can also ask a friend to share their observations with you the next time you have an opportunity to do a presentation, lead a discussion at a meeting or in a study group, etc. Or you can record yourself. Many of us are adamant about not wanting to do this, but by recording yourself, you can make notes on how to make the

delivery of the argument better. You can also watch other oral arguments and “critique” the advocate. Think about what non-verbals are getting in the way of the delivery of the content.

Let’s address the two aspects of oral arguments in separate steps. First, the content.

Step 1: Have confidence in the content of your oral argument.

Being confident in your argument can help with anxiety. How do you gain confidence in the content of the oral argument? You should have confidence in the content, primarily because you have written a trial or appellate brief on this! You have read and re-read the evidence or the record; you have researched and read dozens of authorities; you have drafted, prioritized, crafted, and written arguments; and you have edited and proofread the brief several times. This is part of the preparation for oral arguments. Your time and preparation that you put into writing the brief should give you confidence in your arguments.

Is there anything else you can do to have confidence for oral argument? Yes! The top tips include the following:

- Re-read/study the evidence or record (yes, again!) and make a timeline of events and key facts, including citations. Include this timeline in your oral argument notes.
- Re-read/study the authorities that you plan to cite in your argument and any authorities that appeared in the courts’ opinions in the record. Make a “case list,” including citations to the authorities, with a quick description of the authorities. For cases, this description should include the key facts, the court’s holding, and the court’s reasoning. For constitutional provisions, statutes, rules or regulations, this description should include any particularly relevant language. And if there has been some time between the writing of the brief and the oral argument, Shepardize the authorities to double check that they are still good law.
- Repeat the step above, but think about what authorities your opposing counsel may be relying on. Think about how to distinguish those authorities.
- Think about the weaknesses in your client’s case and how you will overcome those weaknesses, if and when the judge(s) ask questions about them.
- Make a list of anticipated questions and draft answers to those questions.
- Know your audience—in other words, get to know the court. This can be as simple as visiting the courtroom in which you will be arguing and getting a “feel” for the room. Stand at the podium, if possible, and talk, so that you can judge the acoustics of the room. This also includes finding out about the judge or judges you will be arguing in front of. “Ask other lawyers about the customs of the court and the habits of the judges,”⁶⁶ to better understand the judges’ style during oral arguments.

- Create an outline of your argument. In fact, create two outlines—a long outline, if the judge or judges have very few questions, and a short outline, if the judge or judges have a lot of questions. Also think about what material you need at bring to the podium.
- Practice! In fact, practice, practice, practice! The more you practice, the more comfortable you will feel presenting the argument. Ask colleagues to serve as judges, to ask questions, and to provide feedback. (If you are a law student, follow your professor’s rules on collaboration.)

Bottom line, you should—and will—know the facts and law better than the judges. Have confidence in that and let that knowledge help calm you.

Step 2: Let the confidence in the substance show through in the delivery.

The hurdle between knowing the content and the delivery is fear—fear of failure, fear of the unknown, fear of embarrassment, fear of being judged, for example. Fear causes us to no longer have confidence in the content of the argument, and that lack of confidence will manifest itself to the audience primarily as non-verbal communication. These non-verbals cause the listener or judge(s) to think that the advocate is nervous, whether they are or not. Some of the common “nervous non-verbals” include the following:

- Poor eye contact. Poor eye contact includes excessive reading from your notes, not looking at the judges, and looking anywhere but at the judges—the floor, the ceiling, the walls, or all around. Eye contact is important. It is how an advocate can tell when a judge is getting ready to ask a question, is listening, or is confused. Eye contact is necessary, but you do not need to stare at the judges.

There are tricks you can use if you are uncomfortable with eye contact. If you are arguing in front of a panel of judges, scan the bench. After five seconds or so (or 2 to 3 sentences), make eye contact with a different judge. And so forth. If arguing in front of one judge (but this tip will also work with a panel of judges) and you don’t want to look at the judge the whole time; look over the judge’s shoulder. With a panel of judges, look at the wall in between two judges.

- Talking too fast. When we are nervous, we speed up the rate of speech. Besides making it difficult for the judges to understand the argument and to interrupt you with questions, talking too fast interferes with your breathing. You breathe less, and this may cause you to feel panicked and nervous. If this happens to you, slow down the pace by occasionally pausing and taking a deep breath.
- Exhibiting a lot of body movement, including hand gestures. Nervousness can cause excess energy and can cause excess movement. Recording yourself is the best way to address this problem because you can fast forward the recording to see the type of movements there are and whether the movements

are distracting. The goal is to keep your body still at the podium by finding a comfortable position in which to stand, with a straight posture. Ensure that any movement—body or hand gestures—is done with purpose. Watch for nervous hand gestures, such as tapping, or repetitive movements that serve no purpose. To help decrease the non-purposeful hand movements, you can place your hands flat on the podium, on your notes.

- Exhibiting distracting facial expressions. Once you become aware of the expressions you use when you are nervous, you can begin to address them. Awareness is half the battle. Ask someone to tell you every time you roll your eyes, for example, so you can sense when it is happening and can then stop it all together.
- Using filler words like “um,” “like,” “well,” “you know.” Typically, filler words appear because an advocate is afraid of a silent pause. Don’t be. Replace the filler word with a pause and work on becoming comfortable with silence. It is not necessary to fill all the time with arguments. Pauses can be used for emphasis or thought.
- Exhibiting voice wavering. This is one reason to visit the courtroom in which you are going to argue, in advance. Check out the acoustics. If you need to speak louder in the room, you will need to speak slower and enunciate. Practice presenting your introduction/roadmap over and over again, but in a slow, deliberate manner. The introduction/roadmap should be memorized, so that the beginning of the argument is presented using full eye contact.

Trust us; you don’t look as nervous as you feel. Preparation is the best piece of advice for harnessing the butterflies, because “[p]ublic speaking is a skill, not a talent.”⁶⁷ So practice, practice, practice; have confidence in your knowledge of the material and your preparation; and look for opportunities to become more comfortable in presenting oral arguments.

Chapter 8: Being Ethical and Professional: Strive for Intellectual Honesty, Respectfulness, and Cooperation

Every system for resolving conflict—including war, for that matter—has a set of rules that govern the fair play of the participants. We call those rules of fair play *ethics rules*. In addition, every conflict resolution system has a set of expectations that govern the behavior, attitude, and demeanor of those involved in resolving conflicts. We call those expectations *professionalism expectations*.

As participants in oral argument, which is a part of our conflict resolution system, lawyers are required to follow the court's ethics rules and professionalism expectations. Without these rules and expectations, the court system could not operate—there would be no basis for trust and goodwill among the participants, and courts would be challenged to decide cases fairly. Without ethics rules, courts would not know, for example, whether lawyers were misstating the law or misrepresenting the facts and would have no recourse against a lawyer who did either. Without professionalism expectations, courts and court staff would be left to endure lawyers shouting at or insulting each other—or the court and its staff—during oral argument. None of these outcomes further the courts' goal of fairly resolving disputes under the rule of law.

Your choices in following the ethics rules and professionalism expectations send messages to the court about your trustworthiness and likeability, both of which impact your persuasiveness as an advocate. **In sum, being ethical and professional, that is, trustworthy and likeable, makes you a more effective oral advocate.**

Ethical Behavior: Showing That You Are Trustworthy

Behaving ethically in oral argument shows the court that you know and will honor the mandatory rules of fair play in the legal system. A lawyer who demonstrates fair play can often earn the court's benefit of the doubt; that is, the court will be more likely to believe that your representations of the law and facts are accurate, complete, and forthright. This means the court can focus its attention on the merits of your legal arguments rather than questioning whether you are being honest and trustworthy in your conduct. Your ethical behavior sends a message to the court that you are a lawyer who can be trusted and believed, and this reputation can enhance the persuasiveness of your argument by making you more credible from the start.⁶⁸

The ethical requirements for oral argument come from a few places. First, the rules of professional conduct adopted by the highest court typically guide the lawyer's conduct.⁶⁹ Violating these rules can result in professional discipline including, but not limited to, disbarment. In addition, the court's rules of procedure, including local rules, can also set forth rules that have ethical implications. Violating these rules can result in the court sanctioning a lawyer and, perhaps a referring the conduct for a professional discipline investigation. For example, Rule 46(c) of the Federal Rules of

Appellate Procedure allows courts of appeals to discipline attorneys who engage in misconduct before the court.

Ethical requirements also come from the common law rules of conduct that courts have crafted as part of their inherent power to manage the cases that come before them. Finally, civil and criminal statutes can codify ethical requirements for lawyers. An example of a criminal statute would be one that prohibits jury tampering. Violating a civil or criminal statute can subject a lawyer to civil liability and criminal penalties, including fines and incarceration.

Although there are a number of places a lawyer will find the rules governing their fair play, for oral argument, the overarching ethical theme for lawyers during oral argument can be summed up this way: “be intellectually honest.” What does it mean to be intellectually honest in oral argument?

Accurately represent the law.

While it is expected that you will state the law persuasively, framing it in a manner that supports your position,⁷⁰ you must also not falsely state, misrepresent, or distort the meaning of the law.⁷¹ Similarly, if you learn that you have misstated the law, you must correct the misstatement.⁷² You must accurately express the holdings and reasoning of cases and the language of statutes and regulations. If you know the court has misunderstood a point of law, you should correct that misunderstanding. And, while you may not be required to correct an opponent’s false statements about the law,⁷³ doing so will enhance your credibility. Importantly, if you know that the court is unaware of controlling authority that is adverse to your position and your adversary has not disclosed that authority, you *must* disclose that authority to the court.⁷⁴

Be careful about overstating the reach of an authority. A court can easily see your overstatement as a lack of candor. For example, you might want to argue that a case from the supreme court in your jurisdiction on the duty of a landowner to protect invitees extends to Pokémon Go players. If the case does not specifically address Pokémon Go players, it would be an overstatement to say that “X case held that Pokémon Go players are invitees.” Instead, it is more accurate to say, “The reasoning in case X extends invitee status to Pokémon Go players.” By being careful in your language, you remain honest while being persuasive.

Accurately represent the facts.

At the trial level, an oral argument on a pre-trial, trial, or post-trial motion will be supported by evidence in the form of documentary evidence, physical evidence, and witness statements. At the appellate level, the evidence supporting your appeal will be found in the court record that has been transmitted by the trial court clerk to the appellate court. Typically, it is improper for a lawyer making an oral argument in trial court to rely on facts not in evidence. Similarly, facts not in the appellate record typically cannot be argued on appeal.

For facts in evidence or in the record, it is your job to be precise and accurate about these facts during oral argument. Know where the facts can be found in your evidence

or in the record, and refer the court to those locations when necessary or when asked.⁷⁵ You must not misstate the facts or offer to the court any facts you know to be false.⁷⁶ If you happen to make a false statement about a material fact, correct it as soon as possible.⁷⁷ When you discover your error, you might simply stop your argument and say, for example, “Your Honor, I realize that I made an error in my statement about [a fact]. I’d like to correct that now and point you to page 5 in the record which provides the correct information.” Then, you can go on to briefly explain your error and correct yourself. After you make your correction, you can resume the argument.

Do not overstate the facts. If the case involves a dispute about ten shipments of hazardous materials, be precise—say “ten shipments,” not “a dozen,” although “nearly a dozen” may be acceptable as “honestly imprecise.” Be prepared, however, if you decide to be “honestly imprecise” about a fact in an effort to be more persuasive *and* the court questions you about it (“Counsel, you said ‘nearly a dozen’—isn’t it really ten shipments?”), be prepared to provide the precise facts. Also be prepared after this exchange for the court believe that you have a penchant for stretching the truth.

Generally, the lawyer’s ethical rules say very little about whether a lawyer has a duty to reveal during oral argument facts adverse to his position or to correct an opponent’s misstatements about material facts in the case. Our view is that when one’s opponent has failed to introduce facts into evidence that the lawyer knows are adverse to her client, the lawyer is not compelled by a duty of honesty to provide those adverse facts to the court.⁷⁸ The point of the adversary system is for both parties to introduce facts that support their positions, not undermine them. But, when a court misunderstands adverse facts that are *already* part of the evidence in the case or are in the record on appeal, a lawyer should correct the court’s misapprehension about those facts, even if the correction does not support the lawyer’s case.⁷⁹ A lawyer who does so will improve his or her reputation for trustworthiness by ensuring that the court has an accurate understanding of adverse facts that are already in evidence.

Be willing to admit the weaknesses in and alternatives to your arguments.

Although it is not required or expected that you will spend your oral argument pointing out the weaknesses of your case to the court, you should be ready to admit that—just like all legal positions made in oral argument—your position has weaknesses. Similarly, you should be prepared to acknowledge that there are reasonable arguments that the court might consider that are alternatives to yours. Admitting a weakness or an alternative argument does not mean that you are conceding your position or suggesting that opposing arguments are favorable to yours. Instead, by acknowledging that there is more than one way to view the case before the court, you are demonstrating that you have a realistic and reasonable understanding of the case and that you are someone the court can rely on to help resolve the case in a just and efficient way.

United States Supreme Court Justice John Roberts has said that he “take[s] more seriously” the argument that admits to the court that “this case [presents] a close question and there are good arguments on the other side. . . . but [that then goes on to] answer [the other side’s arguments.]”⁸⁰ In other words, a good oral advocate is first prepared to admit weaknesses and alternatives but then to show the court why the weaknesses and alternatives do not change the outcome the advocate supports.

Professional Behavior: Showing That You Are Likeable

Being professional during oral argument demonstrates that you are the kind of lawyer the court can like. Yes, as described above, the court should *like* you, or, in other words, believe that you share the court’s characteristics and values and are a lawyer who will (1) meet the court’s expectations for conduct and (2) help the court fulfill the court’s purposes in holding oral argument. Being likeable makes you more credible and persuasive.⁸¹

Likeability is not about selling the court a false persona. Instead, being likeable means establishing a common ground with the court and emphasizing the characteristics and values you share with it. How is this common-ground established?

First, reduce the court’s initial uncertainty about whether you share its members’ characteristics and values. At the early stages of interactions, particularly where the participants do not know each other well, likeability is often low. At this stage, participants are motivated to reduce uncertainty about each other; as soon as participants see similarities in each other, likeability is increased. One way to reduce uncertainty and become likeable more quickly is follow the rules for interactions that the audience recognizes. So, early on in your oral argument, demonstrate that you know the rules for interacting with the court and that you share its values in pursuing justice.

Second, adapt your communication patterns to the patterns the court expects for oral argument to help your message get through more easily. Success in communicating with a powerful audience can be improved by matching your ways of communicating with approved ways of communicating. If the audience’s communication expectations are violated, the audience will pay more attention to the character of the speaker rather than staying focused on message. Thus, communicating in the formal and respectful patterns that the court expects for oral argument makes you more likable because you can match your communication, meet expectations, and keep the court focused on your message.

In sum, to be professional and likeable, and thus more persuasive, you must know what the court expects of you in your interactions with it and quickly conform your conduct to those expectations. But, how do you know what the court’s professionalism expectations are? *Explicit* statements of a court’s professionalism expectations can be found in its rules of procedure,⁸² in its internal operating procedures (if any), and its local rules (including rules that are explicitly described as professionalism or courtesy standards, rules, or expectations).⁸³ Typically, these rules can be found on the court’s website. *Implicit* instruction about professional behaviors comes from a court’s local practices, which are “the customs and behaviors

that are unwritten but practiced by experienced local lawyers.”⁸⁴ Local practices are learned by visiting the court and talking to attorneys who practice before the court.

For oral argument in a legal writing course, gather relevant professionalism information by asking your professor about anything you do not understand, visiting the room where you will argue, asking other students about their oral argument experiences, or visiting a moot court team practice, if permitted. In some programs, the professor or student assistants will have practice rounds before the “real thing.” Take those practices as an opportunity to get familiar with professionalism expectations.

Although the sources of professionalism expectations are plentiful, generally, “being professional” (and thus more likeable, credible, and persuasive) during oral argument falls into two categories.

First, a lawyer must demonstrate respect for the court, the judges, the court staff, and the litigants. Respect is demonstrated in oral argument in a number of ways. Being on time for oral argument and turning off all electronic devices shows respect for the court’s time and that the court has the lawyer’s full attention. Dressing appropriately for the courtroom by wearing formal courtroom attire, such as a navy blue or black suit, modest blouse, or white shirt and conservative tie, demonstrates the lawyer understands the formality and sober nature of the setting. Demonstrating restraint by never personally attacking anyone in the courtroom⁸⁵ and never showing frustration, contempt, or anger shows the lawyer respects the dignity and autonomy of others.⁸⁶ The lawyer also demonstrates respect by addressing the judges as “Your Honor,” answering judges’ questions immediately, and avoiding interrupting the judges.

Second, a lawyer must show they intend to help the court meet its goal of fairly and justly deciding cases by working cooperatively with others and avoiding undue interference with the legitimate acts and advocacy of others. Lawyers show this cooperativeness by complying with the court’s requests or requests by court staff, answering questions directly and honestly, presenting all law and facts honestly, staying within the time for oral argument, complying with the court’s rules for presentation of argument, paying careful attention when opposing counsel is arguing so that the lawyer can appropriately address the arguments that are made, and maintaining a demeanor that shows a commitment to resolving the legal issues fairly rather than in a self-interested fashion.

Lawyers who conduct themselves respectfully, efficiently, and cooperatively reinforce for the public that lawyers intend for the rule of law to govern outcomes in disputes and for those outcomes to be fair and just. Oral argument is one of the lawyer’s most publicly visible activities. While lawyers don’t always remember that “the people are watching,” they most certainly are, and as such, lawyers and judges are the first line of defense in securing the public’s trust in this branch of government. Without this trust, the judicial system cannot function, and the rule of law is compromised. While you may not initially think that your professionalism makes a difference to the public, remember, you are the physical embodiment fairness and

justice, and the public makes decisions about those ideals in the legal system by watching *you*.

In sum, being ethical and professional in oral argument means being (1) intellectually honest with the court about the law, facts, and your arguments, and (2) demonstrating that you are likeable as a lawyer because you know what the court expects of your conduct and you are willing to behave in that way—respectfully, cooperatively, and honestly. By being ethical and professional, your reputation for trustworthiness and credibility is enhanced, which keeps the court focused on the substance of your arguments and makes you more persuasive. You should know the ethics rules and professionalism expectations of the court hearing your oral argument and follow them to the letter.

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Another example is Florida's Second District Court of Appeal, which provides live streaming of oral arguments, at <http://www.2dca.org/OralArgumentCalendar/oa-streaming.shtml> (and other District Courts of Appeal provide live streaming as well) and the Florida Supreme Court provides live streaming at <http://wfsu.org/gavel2gavel/>.

- And the Stetson Moot Court Board has a handful of instructional videos about different components of the oral argument. These videos are posted at <http://www.stetson.edu/law/academics/advocacy/moot/instructional-videos.php>

Appendix A: Oral Argument Annotated Transcript

This is an example of an appellate argument from a legal research and writing course. The students' names have been changed. The first two columns are the transcript of the oral argument. The final column is some instructive commentary.

		Instructive Commentary
Court Clerk:	<p>All rise.</p> <p>The United States Court of Appeals for the Eleventh Circuit is now in session. All persons having business before this Honorable Court give attention and you shall be heard. Please be seated.</p>	
Chief Judge:	<p>Good evening. Welcome to this session of the Court. We're glad you're here. And we're ready when you are.</p>	
Attorney for Appellant:	<p>Chief Judge Anderson, may it please the Court. My name is David Roberts, and I represent the Appellant, Ms. Coleman. Chief Judge, at this time I would like to reserve one minute for rebuttal.</p>	<p>Here, the attorney uses appropriate courtroom etiquette in his introduction/roadmap, and he remembers to reserve time for rebuttal.</p>
Chief Judge:	<p>So reserved.</p>	
Attorney for Appellant:	<p>Your Honors, this is a sexual harassment case. Ms. Coleman was the victim of sexual harassment and her employer, the Defendant, knew about this harassment, had the responsibility and the authority to prevent further harassment,</p>	<p>A good introduction that includes persuasive facts (with citation to the Record) and a roadmap.</p> <p>Notice the theory emerging here—this employer should</p>

	<p>and failed to do so, as seen on pages 25 and 27 of the Record. For this, Your Honor, Ms. Coleman respectfully requests that this Court review this case de novo and reverse and remand the district court’s decision for two reasons.</p> <p>First, the harassment was sufficiently severe or pervasive to alter the terms and conditions of Ms. Coleman’s employment and creates a hostile work environment. And second, the firm is liable because the firm knew about the harassment and failed to take prompt remedial measures to prevent further harassment.</p>	<p>have done something about this situation and did not, and we should be upset about this and see Ms. Coleman as a victim of the firm’s lack of action.</p> <p>Notice, too, that the appellant draws attention to the favorable “de novo” standard; this signals to the Court that it owes no difference to the lower court’s adverse decision.</p>
<p>Judge 1:</p>	<p>What more should Mr. Berg have done?</p>	<p>This is a question that asks for information and also invites argument. It is also a bit of a softball question because the advocate would like the opportunity to talk about the firm’s failure to follow the policy; the judge has given the advocate a nice, easy “pitch”—and the advocate can hit this one out of the park.</p>
<p>Attorney for Appellant:</p>	<p>Your Honor, initially he should have at least followed his own policy. He did not follow his own policy.</p> <p>Then, Your Honor, the need for an investigation is a trend in this jurisdiction. After an initial complaint, start an investigation.</p>	<p>The advocate starts out well here, but then shifts gears to facts that are not particularly related to the answer. A way to improve this answer would be to weave in some law about how the failure to follow one’s own policy is a</p>

	<p>Your Honors, the facts of the case are very simple. Ms. Coleman was hired in December of 2005. Shortly after being hired, Mr. Armani started making advances towards Ms. Coleman. Every week for three months, he approached her, as seen in the Record on page 35. And every week she rejected him, also seen in the Record on pages 36 and 37. Then his advances became aggressive. He grabbed Ms. Coleman by the hips and thrust his pelvis into her rear-end causing her to fall forward and hit her head on the printer. Then he sent her a sex video.</p>	<p>failure to take remedial measures.</p> <p>The answer did, however, include facts—persuasively presented, with Record citations.</p>
Judge 1:	<p>Would it have made any difference if she didn't hit her head?</p>	<p>This question is a bit of a hypothetical combined with a request for a concession. In other words, the Court wants to determine whether, if we change the facts of the case just a little, the outcome of the case would change.</p>
Attorney for Appellant:	<p>Your Honor, it would not have made a difference in this case. Then he sent her a video with a message that said, "This will be us," as seen on page 37 of the Record. Your Honors, Ms. Coleman complained twice about this conduct and this is where a genuine issue of material of fact comes into play.</p> <p>We don't know why Mr. Berg took so long to take action. But he took 17 days before taking any action and 72 days before taking remedial action.</p>	<p>A concession, but the answer further explains why it does not matter.</p>

	The first reason this Court should reverse and remand is the conduct was severe and pervasive because Ms. Coleman endured sexually aggressive physical contact.	Example of controlled flexibility—the advocate is trying to transition back to the first point in his outline.
Judge 2:	Are the requests for dates to be considered sexually aggressive conduct for our consideration?	This question asks for a legal opinion on specific facts of the case.
Attorney for Appellant	Your Honor, it shouldn't be considered aggressive, but it should be considered pervasive. Pervasive or severe is the element required for this, Your Honor. She needs to establish that the conduct was severe or pervasive. It is significant to note that the Supreme Court in <u>Meritor Savings Bank v. Vinson</u> back in 1986 and again in <u>Harris v. Forklift Systems</u> in 1993, determined that the required element is severe or pervasive either one will suffice. Therefore, Your Honors, even one act of sexual harassment is enough to create a hostile work environment.	Here, the advocate uses authority to further his argument. To improve the answer, counsel can link that authority more clearly to the Court's factual question about "requests for dates," by discussing the facts in the cited authority.
Judge 2:	Take me back to the 17 days for a minute. I thought that Ms. Coleman went to Mr. Berg on March 9 and he didn't do anything till March 30th. Am I wrong?	This is a clarification question.
Attorney for Appellant:	No, Your Honor, you are not wrong. She went to him on March 13th actually, Your Honor.	

	The conduct happened on March 9th. Mr. Armani grabbed her on March 9th.	
Judge 2:	So she just waited until the next Monday?	Another clarification question.
Attorney for Appellant:	<p>Yes, Your Honor, the next Monday. At the time she cried and she went back to her job and she missed the deadline. The next day she said she was in shock and she did not know what to do. The following Monday, she complained to Mr. Berg. Then he waited 17 days before taking any action, as found on page 38 of the Record.</p> <p>Your Honors, in order to establish severe or pervasive, there is a subjective standard and a objective standard. Subjectively, there is very little doubt that Ms. Coleman perceived this action as severe or pervasive.</p> <p>Objectively, we need to look at the totality of the circumstances considering all of the facts to include the frequency of the conduct, the severity of the conduct, whether the conduct is physically threatening or humiliating, and whether the conduct unreasonably interferes with Ms. Coleman’s job performance.</p> <p>When looking at the frequency, Your Honors, this Court in <u>Johnson v. Booker T. Washington</u> in the year 2000, held that fifteen separate instances are pervasive.</p>	<p>Here, the advocate combines fact and law to further the argument. Notice the advocate starts with a “yes” answer to a “yes/no” question and then explains. The advocate then uses the explanation to further the argument about the pervasiveness of the conduct, highlighting both the “subjective” and “objective” components of the rule, both of which are relevant to this particular legal question.</p>

	<p>In that case, Your Honors, they are following the lead of the Supreme Court and looked at every minor act as a separate incident. In that case, Your Honors, the Court looked at minor acts such as the accused winking at the plaintiff, or the accused commented on her voice, as a separate act. Similarly, Your Honor, in this case, we need to consider every time Mr. Armani approached Ms. Coleman. That's at least nine separate times. Plus the printer incident, plus the video. That's eleven separate incidents, Your Honor. According to the reasoning in <u>Johnson</u>, that is pervasive.</p>	<p>Here, the advocate uses analogical reasoning to further his points.</p>
<p>Chief Judge:</p>	<p>You had said that Armani's requests for dates were considered severe. If they were severe, why didn't she bring them to the attention of Mr. Berg earlier rather than waiting until the next instance?</p>	
<p>Attorney for Appellant:</p>	<p>Your Honors, originally, I said the request for dates was actually pervasive. At that time, it wasn't severe. She thought she probably handled it, but when the conduct became aggressive, that's when she went to Mr. Berg.</p> <p>Your Honor, the second reason this Court should reverse and remand is the Defendant failed to take prompt remedial action because the Defendant waited 17 days before taking any action and 72 days before taking remedial action. When looking at this</p>	<p>Here, the advocate answers the question about severity and pervasiveness and then moves the argument to the question of remedial action (controlled flexibility).</p>

	<p>issue, Your Honor, the Court needs to decide what is prompt and what is remedial.</p>	
Chief Judge:	<p>Did they ever take any action that was sufficient?</p>	
Attorney for Appellant:	<p>Your Honor, actually they did, when they started the investigation. However, that was too late. It was not prompt.</p> <p>Your Honor, this Court in <u>Kilgore v. Thompson</u> in 1996, <u>Mendoza v. Borden</u> in 1999, and <u>Nurse B. v. Columbia Palms West Hospital</u> in 2007, all held that action within a week is prompt. In this case, the Defendant took more than a week before taking any action. When looking at what is remedial, Your Honor, this Court held remedial action should be reasonably calculated to prevent further harassment. That raises the question what is reasonable.</p> <p>This Court in <u>Farley v. American Cast Iron Pipe</u> in 1997 and <u>Nurse B. v. Columbia Palm West Hospital</u> in 2007, held that the investigation or some form of disciplinary action is reasonable. In this case, there wasn't an investigation and there was no disciplinary action.</p> <p>Your Honors, when Mr. Berg called Mr. Armani into his office, that was not disciplinary action. He read him the policy verbatim. The policy specifically states that if such an incident should occur a record should be placed in the</p>	<p>The advocate makes a concession here, but then goes on to describe why that concession is not legally relevant. He furthers his argument with both law and facts.</p>

	<p>file. He did not follow his own policy. That sends a message that if the employer will not follow his own policy, why should the employee? Your Honor, Ms. Coleman had established that she was subjected to unwelcomed sexual harassment that was severe and pervasive and the employer knew about this harassment and failed to take prompt and remedial action. Therefore, Ms. Coleman respectfully requests that this Court reverse and remand the district court's decision. Thank you.</p>	
Chief Judge:	<p>You're welcome. Counsel for the Appellee, we're ready.</p>	
Attorney for Appellee:	<p>May it please the Court. Good evening, Chief Judge Anderson, Your Honors. My name is Susan Briggs. I represent White, Jones and Kent as the Appellee in this matter. White, Jones and Kent respectfully request that this Court affirm the district court's grant of summary judgment in its favor for two reasons. Number one, Barbara Coleman cannot show that the alleged harassment was sufficiently severe or pervasive to give rise to a hostile work environment claim. Secondly, Your Honors . . .</p>	<p>Notice the Court did not allow the advocate time to even get through her introduction/roadmap. This is not that unusual—particularly for the respondent/appellee because, now that the Court has heard some of the argument, the judges are likely anxious to hear from the other side on particular points that came up in the opponent's argument.</p> <p>Don't be discouraged when this happens—remember, questions are a gift!</p>
Judge 2:	<p>Let me stop you right there. He presses his body against her backside and presses her against a copy machine such that she</p>	<p>Here's a question the advocate might not have been expecting—a question about battery in an employment discrimination case. We</p>

	bumps her head. Isn't that a criminal offense?	might consider this to be an irrelevant question.
Attorney for Appellee:	No, Your Honor. In this case, it is not a criminal offense.	Here, the advocate tries to address the judge's question.
Judge 2:	That's not a battery?	Apparently, the first answer was insufficient—the judge presses the point.
Attorney for Appellee:	Your Honor, that is beyond the scope of this Record. In this case, we are dealing with a civil action. This Court held in <u>Mendoza v. Borden</u> in 1999, which is a case with very strikingly similar facts as this case, that the Plaintiff complained that another employee brushed against her, hit, and sexually harassed her. However, every single judge on the panel of this Court held that that conduct was not severe.	The advocate tries again to get the argument back on track. She explains—very gently—why battery isn't important here, and then she transitions to her argument, which effectively distinguishes her client's facts from the facts of precedent.
Judge 2:	Isn't there a difference between a brushing and grabbing and a pressing? He grabbed her hips then he pressed his pelvis into her backside?	This time, she is successful, and the judge moves on to another point.
Attorney for Appellee:	Yes, Your Honor, there can be and there may well be a distinction. However, the Supreme Court in <u>Harris v. Forklift Systems Inc.</u> in 1993, held that four factors must be considered. The frequency of the conduct, the severity, whether or not the conduct was physically threatening or humiliating, and whether or not it unreasonably interfered with the plaintiff's job performance. No one factor is determinative of this issue. Ms. Coleman cannot meet the frequency factor. The conduct only occurred once and	Here, counsel uses her answer to remind the Court of the relevant law. She reminds the Court that even if the conduct was severe, it was not pervasive—this shifts the Court's attention to the part of the part of the law that is more helpful for this advocate's position.

	the Supreme Court stated in here that that isolated incidents are not actionable under Title VII.	
Judge 1:	Are you talking about “once” being the episode at the copying machine?	
Attorney for Appellee:	Yes, Your Honor, the physical conduct only occurred once. And as this Court held in <u>Mendoza</u> one time of physical contact is not enough.	The advocate responds succinctly but fully here—she ties the law and facts together to make her point.
Judge 2:	What about the sexually explicit video?	
Attorney for Appellee:	Your Honor, the sexually explicit email also occurred one time. She only received one email and was not physically threatened. Ms. Coleman stated in the Record on page 15 that the email was not violent in any way. Now White, Jones, and Kent agree that ...	
Judge 2:	It was simulating sex between her and the unwanted co-worker correct?	
Attorney for Appellee:	Yes, Your Honor, it was. However, Ms. Coleman cannot meet all four factors in <u>Harris</u> . The video did not unreasonably interfere with her job performance. The Record reflects, on pages 17-20, that Ms. Coleman has been a successful paralegal with the firm. She has received several raises; she has	Again, counsel weaves legal argument into her answer by reminding the Court again of the four factors.

	<p>never been denied a promotion; Ms. Coleman is still currently employed with White, Jones, and Kent. Now White, Jones and Kent agrees with Appellant that this behavior is deplorable, this is absolutely unprofessional; however, it is not sufficiently severe or pervasive to give rise to a valid hostile work environment.</p>	<p>The advocate makes an effective point here—distinguishing the legal point from the emotional response to inappropriate behavior. This furthers her argument.</p>
Judge 1:	<p>Is it dischargeable?</p>	
Attorney for Appellee:	<p>Your Honor, could you rephrase the question?</p>	<p>The advocate uses a request for clarification to help her better answer what starts out as an unclear question.</p>
Judge 1:	<p>Is the attorney—Mr. Armani—subject to automatic termination of employment?</p>	
Attorney for Appellee:	<p>Your Honor, the Record does not indicate that. No, it is not automatically subject to termination of employment. This case deals with hostile work environment ...</p>	
Judge 1:	<p>Your firm policy says that if an employee has an unwelcomed or unwanted sexual advance they must immediately report. Correct?</p>	
Attorney for Appellee:	<p>Yes, Your Honor, that is correct.</p>	

Judge 1:	If it is immediately reportable, shouldn't it be immediately investigated?	
Attorney for Appellee:	Your Honor, the circuit courts have not defined what prompt remedial action is. Now should this Court decide that Ms. Coleman's actions were not sufficiently severe or pervasive, but Ms. Coleman cannot still prevail because White, Jones, and Kent did take prompt remedial action. This Court stated in <u>Walton v. Johnson and Johnson Services</u> in 2003, that prompt and remedial measures should stop the harassment and ensure that it does not reoccur. That is exactly what happened. On March 13th, Ms. Coleman complained about the alleged date requests and she complained about the physical contact at the printer. Ms. Coleman can see on page 14 on the record that after Mr. Berg's took those adequate measures to read the policy and to assure that Mr. Armani leave Ms. Coleman alone, Ms. Coleman concedes that no further action was taken by Mr. Armani. He did not ask her on social date request nor did he make any physical contact with her.	<p>We might imagine that, on her outline, the advocate has a point about "prompt remedial action." That is, she likely wanted to remind the Court that her client took prompt remedial action. Here, the advocate uses a question to springboard her into that argument. She uses both facts and law to make her point.</p> <p>She does a good job here making specific references to the record here—if the references are accurate, this can enhance the advocate's credibility.</p>
Judge 1:	But then he did send her the email.	
Judge 2:	Yeah, what about the email?	Sometimes, multiple questions can be answered in one answer.

Attorney for Appellee:	Yes, Your Honor, on March 13th, Ms. Coleman did not complain about the email. On March 13th, Ms. Coleman complained about the requests for dates and the physical contact which did in fact end. Now on March 28th, Ms. Coleman did complain to Mr. Berg about a harassment of a different nature, which was a sexually explicit email.	
Chief Judge:	So just because it is a different type of potential harassment, we shouldn't consider it as part of the first group?	
Attorney for Appellee:	No, Your Honor, you should definitely consider it. Unfortunately this second complaint did occur. However, at that time Mr. Berg knew it was time to get higher management involved.	
Chief Judge:	How much higher could you be than Mr. Berg?	
Attorney for Appellee:	At the law firm, Mr. Berg is one of the senior and managing partners. It was time to get Human Resources involved; it was time to get other managers involved and begin an in depth investigation. They began an in-depth investigation and suspended Mr. Armani without pay.	

Chief Judge:	But didn't that take several weeks?	A request for a concession.
Attorney for Appellee:	Yes, Your Honor. It did take about three weeks; however, the Sixth Circuit stated in <u>Dornhecker v. Malibu Grand Prix</u> in 1997 that an employer needs time to respond to harassment complaints. Now where a response isn't immediate, what should consider practicable consideration such as business demands, lines of command, and time to adequately assess the situation.	Here, the advocate concedes the time it took, but then explains why the concession doesn't matter to her case.
Judge 1:	So 17 days is an adequate period to do nothing when one employee has physical contact with another employee?	
Attorney for Appellee:	Your Honor, actually on page 13 of the record reflects that after Mr. Berg received Ms. Coleman's complaint, he immediately set an appointment with Mr. Armani. Now the first available time was 17 days later; however, this Court stated in <u>Walton v. Johnson and Johnson Services</u> that it is important that the prompt remedial measure stop the harassment and ensure that it doesn't reoccur.	More good use of record citations.
Judge 2:	You don't think the video was a joke, do you?	In this line of questioning, the Court is very persistent. Notice how the advocate remains calm under what

		could be perceived as more aggressive questioning.
Attorney for Appellee:	Your Honor, Ms. Coleman stated that perhaps some other people could reasonably think that it was a joke. And ...	
Judge 2:	No, the question that was asked was whether you think it's reasonable that some people think this video is a joke? That was the question your law firm asked. Do you think it is a joke?	The judge persists with questions here.
Attorney for Appellee:	No, Your Honor, it depends on the circumstance.	
Judge 2:	So is that an imprudent question?	
Attorney for Appellee:	No, Your Honor, I do not think it's a joke, however	
Judge 2:	My question was "was that an imprudent question?"	
Attorney for Appellee:	Perhaps, Your Honor, perhaps it was. Ms. Coleman stated that it might be reasonable that other people would consider it to be a joke. However, the Supreme Court in <u>Harris</u> stated that a plaintiff's objected perception must be objectively reasonable. Your Honor, if this Court decides sexual harassment cases based on a plaintiff's subjective perception every single employer	The advocate uses a policy argument and a legal argument here. She reminds the Court of the consequences of focusing solely on the subjective test.

	in American would be standing before you . . .	
Chief Judge:	Was the episode at the copy machine subjective or objective?	
Attorney for Appellee:	Your Honor, the courts view it using both ...	
Chief Judge:	Was the episode at the copy machine subjective or objective?	
Attorney for Appellee:	Your Honor, the episode at the machine was subjective. However, Ms. Coleman's subjective perception must be objectively reasonable.	
Judge 2:	Counsel, just the episode at the copy machine was the unwanted touching of another was a battery, so let's be clear. You discussed earlier about how the clock runs on a remedial nature and I am paraphrasing a little bit. requirements. Where is employee safety there, 17 days to investigate a battery counsel you consider that remedial nature? What is the policy?	Here, the judge hints a little at a policy question—balancing employee safety against the requirements of the employer's business.
Attorney for Appellee:	Your Honor . . .	
Judge 2:	What does that say?	
Attorney for Appellee:	Your Honor, the Court states it must be reasonable under the circumstances. It was reasonable	In addition to the factual argument, the advocate could

	under the circumstances because during that time after April 28th, Ms. Coleman conceded that on page 16 of the Record Mr. Armani did not harass her anymore. And therefore, the harassment was indeed remedied during the 17 days after Mr. Berg took those adequate corrective measures.	have also taken up the policy question raised by the Court.
Judge 2:	But then there was the sexually explicit video. So I'm sorry; I have pause about how adequate the remedy was.	
Attorney for Appellee:	Yes, Your Honor.	
Judge 2:	Thank you, Counsel. Thank you.	
Attorney for Appellee:	Yes. Your Honor, that is why Mr. Berg decided to get higher management involved. Sexual harassment is a very serious matter and on page 7 of the Record it reflects that the "no harassment policy" does not condone sexual harassment. Now if this Court finds that Ms. Coleman's sexual harassment was sufficiently severe and pervasive this Court would set . . . Your Honor, I see my time has expired, may I have a few more minutes?	Here, the advocate offers her conclusion. In the middle of it, however, her time runs out. Notice, she stops and asks the Court for additional time to finish the conclusion. And, although she asks for a "few more minutes," she uses only a few more seconds—at most 20 seconds. Using 20 seconds is exactly what should be done in this circumstance. The advocate could have asked, "may I have a moment to finish my thought?"
Chief Judge:	You may.	
Judge 2:	Please.	

Attorney for Appellee:	If this Court finds Ms. Coleman’s sexual harassment was sufficiently severe and pervasive, this Court would set a baseline of actionable conduct that is far lower than that of other circuits. Title VII is not general civility code. White, Jones, and Kent had a duty to take part in remedial action and White, Jones, and Kent affirmably met its duty under the law. That is why White, Jones, and Kent request that this Court affirm the district court’s grant of summary judgment in its favor. Thank you, Your Honors.	The advocate correctly summarizes her arguments and requests relief. Notice the advocate’s statement about the civility code—this theme has been running through the argument and has been reinforced here.
Chief Judge:	Thank you.	
Judge 1:	Thank you.	
Judge 2:	Thank you, Counsel.	
Chief Judge:	Rebuttal?	
Attorney for Appellant:	Chief Judge Anderson, may it please the Court. I would like to raise one point in rebuttal. Your Honors, this case was decided on summary judgment. All Ms. Coleman has to show is a genuine issue of material fact to win summary judgment. Opposing counsel just gave you those genuine issues. She says it’s reasonable. What is reasonable? She said this jurisdiction has not decided; what is the law? This case was decided on the law, Your Honors. There is no set standard as to what is	Notice that the attorney raises only one point rebuttal, and he tells the judges he is making only one point in his introductory/roadmap. He also identifies his opponent’s argument and then responds to it.

	<p>reasonable. What is prompt? What is a remedial measure? That is a question of fact. Therefore, Your Honors, Ms. Coleman respectfully requests that this Court reverse and remand the district court's decision to grant summary judgment. Thank you.</p>	
Judge 1:	Thank you both. Very well argued.	
Judge 2:	Very well.	
Chief Judge:	We will take a short recess and come back and hear the next case.	
Court Clerk:	All rise.	

Endnotes

Chapter 1

¹ Oral Argument Transcript at 47, *Whole Woman’s Health v. Hellerstedt*, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/15-274_d18e.pdf (U.S. March 2, 2016).

² *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2231 (2016).

³ Frederick Bernays Wiener, *Oral Advocacy*, 62 HARV. L. REV. 56, 58 (1948).

⁴ WILLIAM H. REHNQUIST, *THE SUPREME COURT* 243 (2001).

Chapter 2

⁵ 3D CIR. R. 2.4, I.O.P.

⁶ DAVID C. FREDERICK, *THE ART OF ORAL ADVOCACY* 2 (2003); Andrew L. Frey, *Preparing and Delivering Oral Argument*, http://www.adi.sandiego.com/practice/mcle/MCLE_Oral_Argument_Materials_1.pdf (last visited Jan. 10, 2018).

⁷ Frey, *supra* note 6.

⁸ *Id.*

⁹ John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 70, 70 (2005).

¹⁰ ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 141 (1998).

¹¹ *Id.*

¹² *See e.g.*, William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 MERCER L. REV. 1015, 1015–16 (1983) (noting the declining amount of time allocated to oral argument).

¹³ FREDERICK, *supra* n. 6, at 2.

¹⁴ DAVID C. FREDERICK, *SUPREME COURT AND APPELLATE ADVOCACY* 15–16 (2003).

Chapter 3

¹⁵ William K. Suter, *Today’s Supreme Court*, 73 MONT. L. REV. 241, 242 (2012).

¹⁶ CAROLE C. BERRY, *EFFECTIVE APPELLATE ADVOCACY: BRIEF WRITING AND ORAL ARGUMENT* 145–56 (3d ed. 2003).

¹⁷ MARY BETH BEAZLEY, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY* 14 (3d ed. 2010).

¹⁸ *Id.* at 15.

¹⁹ *Id.*

²⁰ 135 S. Ct. 2584 (2015)

²¹ RUTH ANNE ROBBINS ET AL., *A CLIENT’S STORY* 45 (2013).

²² Brief for Appellee at *3, 4–5, 6–7, *Windsor v. Bipartisan Legal Advisory Group of the U.S. House of Representatives*, Nos. 12-2335-cv, 12-2435 (2d Cir. Aug. 31, 2012) (citations omitted).

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- ²³ Oral Argument Transcript, *United States v. Windsor*, <https://www.npr.org/2013/03/27/175456870/transcript-supreme-court-arguments-on-defense-of-marriage-act> (U.S. Mar. 27, 2013) (No. 12-307).
- ²⁴ BRADLEY G. CLARY ET AL., *ADVOCACY ON APPEAL* 60–61 (2d ed. 2004).
- ²⁵ MICHAEL H. FROST, *INTRODUCTION TO LEGAL RHETORIC: A LOST HERITAGE* 66 (2005).
- ²⁶ LINDA H. EDWARDS, *LEGAL WRITING AND ANALYSIS* 55 (2003).
- ²⁷ *Id.* at 56.
- ²⁸ *Id.* at 58.
- ²⁹ *Id.* at 60.
- ³⁰ Sharon D. Nelson & John W. Simek, *The iPad for Litigators: Storming the Courtrooms*, https://apps.americanbar.org/litigation/litigationnews/trial_skills/113012-tips-il-pad-litigators.html (last visited January 28, 2018).
- ³¹ James D. Dimitri, *Stepping up to the Podium with Confidence: A Primer for Law Students on Preparing and Delivering an Appellate Oral Argument*, 38 *STETSON L. REV.* 75 (2008).

Chapter 4

- ³² ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 168 (2008).
- ³³ DAVID C. FREDERICK, *THE ART OF ORAL ADVOCACY* 9 (2003).
- ³⁴ A good portion of this discussion has been adapted from Dean Darby Dickerson’s *Legal Research and Writing II Supplement*.

Chapter 5

- ³⁵ Paul R. Michel, *Effective Appellate Advocacy*, 4 *LITIG.*, Summer 1998, at 19, 22.
- ³⁶ MayerBrown.com, *Preparing and Delivering Oral Argument*, <https://www.mayerbrown.com/preparing-and-delivering-oral-argument/> (last accessed Jan. 8, 2018).
- ³⁷ ALAN L. DWORSKY, *THE LITTLE BOOK ON ORAL ARGUMENT* 66 (9th prtg. 2007).
- ³⁸ In the real world, there could be a fourth option—to file a supplemental brief. In other words, if you are unable to answer the question, you may say, “Your Honor, I apologize, I do not know the answer to the question, but I am happy to file a supplemental brief on that point.” If this option is available, make sure to follow the local rules when filing the supplemental brief.
- ³⁹ Desmond Tutu, *Quotes, Quotable Quote*, goodreads, <https://www.goodreads.com/quotes/213415-don-t-raise-your-voice-improve-your-argument-address-at-the> (last accessed Jan. 10, 2018).
- ⁴⁰ DWORSKY, *supra* note 37, at 64.

Chapter 6

⁴¹ MICHAEL H. FROST, INTRODUCTION TO LEGAL RHETORIC: A LOST HERITAGE 40 (2005).

⁴² See e.g., John M. Conley et al., *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375; Bonnie Erickson et al., *Speech Style and Impression Formation in a Court Setting: The Effects of “Powerful” and “Powerless” Speech*, 14 J. EXPERIMENTAL & SOC. PSYCHOL. 266 (1978).

⁴³ STANLEY FISH, CRITICAL TERMS FOR LITERARY STUDY 206–09 (Frank Lentricchia & Thomas McLaughlin eds., 1990).

⁴⁴ A portion of this discussion has been adapted from Dean Darby Dickerson’s Legal Research and Writing II Supplement.

⁴⁵ Jansen Voss, Comment, *The Science of Persuasion: An Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom*, 29 L. & PSYCHOL. REV. 301, 319 (2005).

⁴⁶ “Oral argument read from a prepared text is not favored.” U.S. SUP. CT. R. 28.1. “Under no circumstances should you read your argument from a prepared script.” GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES 8–9 (2015). (available at <https://www.supremecourt.gov/casehand/guideforcounsel.pdf>).

⁴⁷ Michael J. Higdon, *Oral Argument and Impression Management: Harnessing the Power of Nonverbal Persuasion for a Judicial Audience*, 57 U. KAN. L. REV. 631, 661 (2008–2009).

⁴⁸ A 1976 study testing a variety of messages, speakers, and environments concluded that faster speech contributes to the credibility of the witness. Norman Miller et al., *Speed of Speech and Persuasion*, 34 J. PERSONALITY & SOC. PSYCH. 615, 621 (1976). The researchers found that speaking rapidly tends to be more persuasive than speaking slowly because faster speech can “increas[e] the effort required to process and comprehend speech adequately.” *Id.* at 622.

⁴⁹ Higdon, *supra* note 47, at 661.

⁵⁰ JOHN M. CONLEY & WILLIAM M. O’BARR, JUST WORDS 64 (2d ed. 2005); WILLIAM M. O’BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM 75 (Donald Black ed., 1982).

⁵¹ ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 184 (1998).

⁵² A portion of this discussion has been adapted from Dean Darby Dickerson’s Legal Research and Writing II Supplement.

⁵³ Higdon, *supra* note 47, at 633.

⁵⁴ *Id.* at 635.

⁵⁵ Deepika Phutela, *The Importance of Non-Verbal Communication*, 9 IUP J. OF SOFT SKILLS 43, 45 (2015).

⁵⁶ ALAN L. DWORSKY, THE LITTLE BOOK ON ORAL ARGUMENT 39 (9th prtng. 2007).

⁵⁷ Gerald Lebovits et al., *Winning the Moot Court Oral Argument: A Guide for Intramural and Intermural Moot Court Competitors*, 41 CAP. U.L. REV. 887, 920 (2013); Susan Krauss Whitbourne, *The Ultimate Guide to Body Language*, PSYCH.

TODAY. June 30, 2012, <https://www.psychologytoday.com/blog/fulfillment-any-age/201206/the-ultimate-guide-body-language>.

⁵⁸ Higdon, *supra* note 47, at 639 (discussing “facial primacy.” An audience pays more attention to a speaker’s face than any other form of nonverbal communication).

⁵⁹ *Id.* at 657–58.

⁶⁰ “[A]n overly stiff posture can make it more difficult for a speaker to influence a receiver” and “[A] tense posture is frequently associated with self-doubt.” *Id.* at 644. However, Higdon notes that slouching is not beneficial either. *Id.*

⁶¹ *Id.*

⁶² M. FABIVS QUINTILIAN, *INSTITUTES OF ORATORY* XVII (trans. John Selby Watson 1856).

Chapter 7

⁶³ BRIAN K. JOHNSON & MARSHA HUNTER, *THE ARTICULATE ATTORNEY: PUBLIC SPEAKING FOR LAWYERS* 10 (2d ed. 2013).

⁶⁴ Bruce Stachenfeld, *7 Tips on How Lawyers Can Get over the Greatest Fear of All—Public Speaking*, *abovethelaw.com*, <https://abovethelaw.com/2017/11/7-tips-on-how-lawyers-can-get-over-the-greatest-fear-of-all-public-speaking/> (Nov. 9, 2017, at 4:45 p.m.).

⁶⁵ JOHNSON & HUNTER, *supra* note 63 at v.

⁶⁶ ALAN L. DWORKSHY, *THE LITTLE BOOK ON ORAL ARGUMENT* 10–11 (9th prtg. 2007).

⁶⁷ Catherine Clifford, *13 Ways to Overcome Your Fear of Public Speaking and Win the Room*, *CNBC MAKE IT*, <https://www.cnbc.com/2016/10/11/13-ways-to-overcome-your-fear-of-public-speaking-and-win-the-room.html> (Oct. 11, 2016, at 9:46 a.m. ET).

Chapter 8

⁶⁸ “[M]ost people use reputation as a proxy for integrity” or trustworthiness. David DeSteen, *Who Can You Trust*, *HARV. BUS. REV.*, Mar. 2014, <https://hbr.org/2014/03/who-can-you-trust>.

⁶⁹ For an example of ethical rules adopted by a state supreme court see Rules Regulating the Florida Bar, Chapter Four: Rules of Professional Conduct.

⁷⁰ Lawyers acting as advocates in court have “an obligation to present the client’s case with persuasive force [and are] not expected to make a disinterested exposition of the law.” MODEL R. OF PROF’L CONDUCT 3.3 cmts. 2, 4 (Am. Bar. Ass’n 2018).

⁷¹ “A lawyer shall not knowingly . . . make a false statement of law to a tribunal.” MODEL R. OF PROF’L CONDUCT 3.3(a)(1) (Am. Bar. Ass’n 2018).

⁷² *Id.*

⁷³ The Model Rules of Professional Conduct provide that lawyers have a duty to correct false statements about the law only if the lawyer herself has made them to the court. *Id.*

⁷⁴ MODEL R. OF PROF’L CONDUCT 3.3(b) (Am. Bar. Ass’n 2018).

⁷⁵ At least some appellate court rules require that appellate briefs cite the record for every factual assertion. *See, e.g.*, FLA. R. APP. PROC. 9.210(b)(3).

⁷⁶ “A lawyer shall not knowingly . . . make a false statement of fact [or] offer evidence the lawyer knows to be false.” MODEL R. OF PROF’L CONDUCT 3.3(a)(1), (3) (Am. Bar. Ass’n 2018). Note that the rules on what a lawyer is to do if they become aware that a *client* has offered false evidence is complex and beyond the scope of this Guide.

⁷⁷ Model Rule of Professional Conduct 3.3(a)(1) requires lawyers to correct any false statements of material fact they themselves make.

⁷⁸ Arguably, the Model Rules duties of loyalty and confidentiality prohibit a lawyer from *introducing* evidence that is adverse to a client. See MODEL R. OF PROF’L CONDUCT 1.2, 1.6. However, once that evidence has been introduced, whether the lawyer has a duty to point out misapprehensions about that evidence is less clear.

⁷⁹ Some professionalism standards address this topic, although not all professionalism standards are enforceable as ethics rules. See, e.g., 13th Judicial Cir., Hillsborough Co., *Standards of Professional Courtesy*, at Rule M 32, <http://www.fljud13.org/LegalCommunity/ForAttorneys/StandardsOfProfessionalCourtesy.aspx> (last visited Jan. 28, 2018). “Attorneys should not knowingly misstate, misrepresent or distort any fact or legal authority to the court or to opposing counsel and shall not mislead by inaction or silence. Further, if this occurs unintentionally and is later discovered, it should immediately be disclosed or otherwise corrected.” *Id.*

⁸⁰ Tony Mauro, *Roberts on Brief-Writing: ‘Be Concise’*, NAT’L L.J., Sept. 24, 2014.

⁸¹ Research has shown that credibility and persuasiveness turn, at least in part, on likability. See, e.g., Laurie Kuslansky, *Like it or Not, Likability Counts for Credibility in the Courtroom*, <http://www.a2lc.com/blog/bid/69509/like-it-or-not-likeability-counts-for-credibility-in-the-courtroom> (Jan. 16, 2014, at 7:00 a.m.).

⁸² For example, Federal Rule of Appellate Procedure 34(c) states that the expectation that “[c]ounsel must not read at length from briefs, records, or authorities.”

⁸³ For example, the Standards of Professional Courtesy, Thirteenth Judicial Circuit Court, Hillsborough County, Florida, *supra* note 79, include professionalism standards such as “Counsel should address all public remarks to the court, not to opposing counsel. . . . A lawyer should avoid disparaging personal remarks or acrimony toward opposing counsel. . . . Counsel should refer to all adult persons, including witnesses, other counsel, and the parties by their surnames and not by their first or given names.”

⁸⁴ MARY BETH BEAZLEY, *A PRACTICE GUIDE TO APPELLATE ADVOCACY* 166 (4th ed. 2014).

⁸⁵ If any outburst or action is meant to disrupt, a lawyer can be disciplined for conduct that is intended to disrupt a tribunal. See, e.g., MODEL R. OF PROF’L CONDUCT 3.5(d) (Am. Bar. Ass’n 2018).

⁸⁶ In one case, for example, a lawyer’s outburst and angry display during court was sanctioned by the court. *Nordberg, Inc. v. Telsmith, Inc.*, 82 F.3d 396, 396 (Fed. Cir. 1996).