

How to Argue Bankruptcy Issues to Courts of General Jurisdiction

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Office of the U.S. Trustee, Region 13; Kansas City

Hon. Karen Arnold-Burger

Kansas Court of Appeals; Topeka, Kan.

Hon. Duane Benton

U.S. Court of Appeals for the Eighth Circuit; Kansas City

Hon. Kevin P. Moriarty

Johnson County, Kansas District Court; Olathe, Kan.

Hon. Brian C. Wimes

U.S. District Court (W.D. Mo.); Kansas City

Oral argument



Does oral argument matter?

Year-long survey, 163 cases,
by two circuit Judges:

“Did oral argument change my mind?”

One – **17%**. The other – **31%**. (!)

Myron H. Bright & Richard S. Arnold,
Oral Argument? It May Be Crucial!,
70 A.B.A.J. 68 (Sep. 1984).

Before argument

How does the court work?

Rehearse – moot court?

Check your authorities on the eve of argument

Arrive early, as if you were the first case

Ask courtroom assistant, co-counsel the rules

Does the lectern adjust?

How does the clock work? How reserve time?

Can you “know your audience”?

WHEN PANEL JUDGES ARE PUBLICLY DISCLOSED

D.C. and Eighth circuits identify panels a month before argument.

MON	TUE	WED	THU	FRI	SAT	SUN
		1 D.C. CIRCUIT EIGHTH CIRCUIT	2	3	4	5
6	7	8	9	10	11	12
13 SIXTH CIRCUIT	14	15	16 ELEVENTH CIRCUIT	17	18	19
20 THIRD CIRCUIT NINTH CIRCUIT TENTH CIRCUIT	21	22	23 FIRST CIRCUIT SECOND CIRCUIT FIFTH CIRCUIT	24	25	26
27	28	29	30 ARGUMENT DAY! FEDERAL CIRCUIT FOURTH CIRCUIT SEVENTH CIRCUIT			

If you can know your audience

- ✓ Personal and professional background
- ✓ Opinions by your judge(s)
- ✓ Articles, speeches?
- ✓ Approaches to cases generally
- ✓ Mannerism in courtroom
- ✓ Trial vs. appellate

Your case in one (not too long) sentence

The first sentence of any argument is critical

Begin with the main issue

Maybe your only chance to state the case as you see it

Judges will remember what's first

Especially if you're the appellant, plaintiff, objector, movant, party with the burden, etc.

Yes, or No - not Maybe

Do not underestimate the power of a
“yes” or “no” answer

If in doubt, say “yes, but”
or “no, but”

Some times, “maybe” can bail you out

“Salute” a question

But never praise a question

Pause if you’re asked a question

Do not interrupt, or talk over, the judge

Take notes – OK

Do not “fake” an answer

Once an argument, you can use the 28(j) escape

Letters to the court

Citation of Supplemental Authorities.

If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

F. R. App. P. 28(j)

Helpful question

View each question as helpful

- To making your case
- To finding out what the judge is thinking
- To leading to your next point

Take advantage of a truly softball question

Appellee's (respondent) argument

Listen to what the appellant says

Begin with your strongest point

But try to link to what the appellant ends with

Don't use a prepared text

But have a "pyramid" of your arguments

Don't read at oral argument

Order and Contents of Argument.

The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.

Federal Rule of Appellate Procedure 34(c)

Rebuttal argument

Usually a missed opportunity

Take notes during respondent's argument

Compare to your points

Make specific, short statements

Closing of each argument

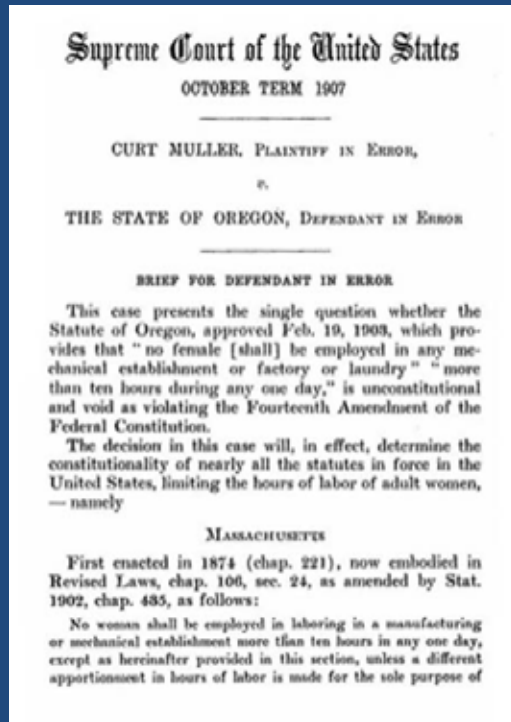
Have it prepared

Don't be apologetic, or just fade away

Say specifically what you want the court to do

Be confident

Briefs



Overcoming writer's block

Outline the brief.

Start writing when you feel comfortable to get the juices flowing and before exhaustive research.

- ✓ Do a quick first draft early.
- ✓ Avoid the “research trap” — looking at one case, which refers you to another case with a somewhat related point, which refers you to still another case with a point even more remote. Research can lead to interesting issues that have nothing to do with the case.

An outline and a draft will focus your research.

Richard B. Klein, Opinion Writing Assistance Involving Law Clerks: What I Tell Them, 34 Judges' J. 33, 35-36 (1995).

References to statutes, rules, reg's

If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.

Federal Rule of Appellate Procedure 28(f)

References to Parties

In briefs and at oral argument, counsel should minimize use of the terms “appellant” and “appellee.” To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as “the employee,” “the injured person,” “the taxpayer,” “the ship,” “the stevedore.”

Federal Rule of Appellate Procedure 28(d)

References to other briefs

Briefs in a Case Involving Multiple Appellants or Appellees. In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

Federal Rule of Appellate Procedure 28(e)

Citing authority favorable to the adversary

A lawyer shall not fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

Rule of Professional Conduct 3.3(a)(2)

The ethics of stating the facts

A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

Rule of Professional Conduct 3.3(1)

Tone

“[I]t isn’t necessary to...put down the judge who wrote the decision you are attempting to get overturned. It isn’t necessary to say anything nasty about your adversary or to make deriding comments about the opposing brief. Those are just distractions. You should aim to persuade the judge by the power of *your* reasoning and not by denigrating the opposing side.”

– Justice Ginsburg

Proofread, Proofread, *Proofread*

A good brief is not finished when the last word is written.

Put it aside for a while and then review it.

The quality of an brief varies directly with the number of times it is reviewed.

Hon. Richard B. Klein, *Opinion Writing Assistance Involving Law Clerks: What I Tell Them*, 34 JUDGES' J. 33, 36 (1995).

Standards of review

Harmless error

Facts – sufficiency, whole record, clearly erroneous

Evidence rulings – abuse of discretion

Mixed questions of fact and law – de novo

Conclusions of law – de novo

Plain error

Fundamentally harmful (“structural”) error

Key sources

BRYAN A. GARNER, *THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS* (3d ed. 2014).

BRYAN A. GARNER, *THE WINNING ORAL ARGUMENT: ENDURING PRINCIPLES* (2D ed. 2009).

BRYAN A. GARNER & JUSTICE ANTONIN SCALIA, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* (2008).