

North Carolina Appellate Advocacy Training  
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# **PERSUASIVE ORAL ARGUMENT**

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## I. What Should You Try To Accomplish With Oral Argument?

A. Don't just repeat your brief. Use the medium of personal argument to accomplish things you cannot do with a written brief:

1. Be more personal and interactive -- have a conversation with the court about the case.
2. Be more graphic -- use more personal language.

B. Address and resolve the court's concerns about the case

C. Create a mood/theme that makes it easier for the court to accept your theory of defense.

1. Don't just repeat your legal theory.
2. Make the fairness of reversal the keystone of your argument.
3. Show the court in human terms why it is right for them to rule in your favor.
  - a. Develop the emotional theme that will make the court feel good about reversing.
  - b. Use the most important facts of your case to reinforce your emotional theme.

FREQUENTLY ASKED QUESTION: Don't appellate judges always say that they don't want us to talk about the facts and they don't want us to make emotional arguments?

ANSWER TO FAQ:

Sure they say that. They learned that in the same law school classes we did. But judges are notoriously unaware of what persuades them. And judges, like everyone else, are persuaded by factual arguments with honest emotional impact. Remember, every time we lose a case on "harmless error" or "no preservation" grounds, the court is really telling us that regardless of the legal issues, they don't think it is fair to reverse our client's conviction. We win a lot more cases when we convince the court that reversing is the fair thing to do. And fairness is a factual and emotional argument -- not a legal doctrine.

## II. Components of a Successful Oral Argument

### A. The First 30 Seconds -- The Most Important Part of Your Argument

The first 30 seconds of your argument will set the tone for everything that follows. If you don't use that time to define what the case is about, the court will jump in with questions about whatever they think is important. Then you will be stuck spending the entire argument discussing issues defined by the court. Even worse, if you don't immediately establish the grounds for the argument, the court might sit quietly and wait for the prosecution to tell them what the case is really about.

The beginning of your argument is an opportunity to define the turf on which the entire battle will be fought. Be sure to use it that way.

#### **1. Start by telling the court what went wrong at trial. Why was the conviction unfair?**

- a. Be direct**
- b. Be factual**
- c. Be graphic**
- d. Be concise**

**If after the first thirty seconds of your argument, the court does not know exactly why you should win the case – you have to re-do those first thirty seconds.**

2. Don't waste time by starting your argument with empty formalisms:  
EX: My name is; my client's name is; my client was convicted of \_\_\_\_; he was sentenced to \_\_\_\_.

### B. After Your Opening, Get to the Point of Your Argument Quickly

1. Decide what is important -- you don't have to include everything that was in your brief.
2. Address the issues you need to win.
  - a. Don't run away from the tough issues.
  - b. If preservation or harmlessness is an issue, but sure to address it.
3. Be sure to support your legal argument with facts. Remember -- in most cases, there is no real controversy over the law -- everyone agrees about what the law is -- the only controversy is over how the law applies to the facts of your case.

### C. Don't Take Impossible Positions

1. If there are unpleasant facts or legal doctrines that you can't get around, then don't destroy your credibility by taking an impossible position.
2. Be sure to prepare your argument by deciding what law and facts you can't avoid, and figuring out how to distinguish them.
3. Try to prepare answers in advance for the tough questions you know you will be

getting.

D. Use clear, graphic, descriptive language.

1. No legalese.
2. Don't talk like a cop.

### III. Answering Questions from the Court

A. *Always prepare by doing a moot court.* The importance of a moot cannot be overstated. Moot courts will almost always expose the weaknesses in your argument, and help you prepare good answers to the most difficult questions. A moot will also give you a good idea of what parts of your argument are working, and what parts could be made more persuasive. Virtually every oral argument disaster comes in a case where the lawyer did not bother to do a moot court.

B. Answer all questions directly.

1. The first word out of your mouth should be either "yes" or "no." It is essential to give the court the impression that you are directly answering the question. Otherwise the judges will keep asking that same question over and over, and you will not be able to get on with your argument.
2. After answering "yes" or "no," elaborate or explain your answer.
3. Always end an answer by looping back to what you want to be talking about.
  - a. Your theory of defense.
  - b. Your emotional theme.

The idea of "looping back" to your theory and theme at the end of an answer is probably the most critical skill to develop when answering questions. If you can do this successfully, you will control the subject that is discussed after you finish answering the question, and you can have the court spend most of its time thinking and talking about those aspects of the case that you think are most important.

C. Answer hypothetical questions directly.

1. Never say, "that isn't our case." The court knows this.
2. Don't be thrown off by the stupidity of the hypothetical.
3. Answer the hypothetical in a way that is consistent with winning your case.
4. Don't be afraid to agree with the questioning judge on aspects of the hypothetical that don't hurt your case.
5. Remember that it's OK to point out that the hypothetical is based on a faulty premise.

## IV. Rebuttal Argument

A. Don't use this as a game of "last tag." Only rebut if there was something in the State's argument that you believe should be answered. For example:

1. Material misstatements of fact.
2. Material misstatements of law.
3. An argument for which you have a clear, strong refutation.
4. The prosecutor falsely accuses you of misconduct.

B. Only use rebuttal on subjects that are important to the case.

C. Keep it short and focused on the prosecutor's statement that you are rebutting.

D. If possible, quote the record as the source of your rebuttal.

E. Don't personalize it.

## V. Demeanor During Argument

A. Never be subservient.

The goal of oral argument is to establish a conversation about your case with the court. This can only be done if you approach the court as an equal partner in the conversation. If you grovel, the court has no reason to respect you or accept your arguments as the thoughts of an equal.

1. Be respectful, but not overly deferential.
2. Only flatter the court when they earn it.

B. ALWAYS BE HONEST AND STRAIGHTFORWARD WITH THE COURT

1. Don't euphemize, sugarcoat or minimize the crime.  
NOTE: You can minimize the impact of the crime facts by being straightforward, but using dull language.
2. Answer all questions directly.
3. ANSWER ALL QUESTIONS HONESTLY
4. Show some class. Don't make personal attacks on the prosecutor or trial judge.