

# **CHAPTER 10**

## **Oral Argument**

### **§ 10.1 Introduction**

Oral argument can intimidate some and spark enthusiasm in others. However you view it, when you receive notice that your case has been placed on the oral argument calendar, there are a few steps you can take to ensure the effectiveness of your oral advocacy.

This chapter suggests methods of preparing for your argument, provides information as to the hearing procedures followed by the Kansas Supreme Court and Kansas Court of Appeals, and discusses tips and practices you might use in argument.

### **§ 10.2 Preparation**

Preparation for oral argument is at least as important as the argument itself. Several weeks ahead of time, check for supplemental authority and any developments that have occurred since the filing of your brief. Inform the court and your opponent of any new developments by filing and serving a letter pursuant to Rule 6.09(b). Your letter should include the relevant citations, the page or pages of the brief intended to be supplemented, and a brief statement concerning application of the citations. One or two days before argument, check for supplemental authority again and be prepared to address any such authority at argument. Fax file this letter pursuant to Rule 6.09(b) and serve by fax as well to make certain your opponent has advance notice of any late-discovered authority to be cited at argument.

Review and study all significant cases cited in the briefs, and be prepared to discuss factual distinctions between your case and the cases cited.

Read and re-read the record on appeal. One of the most common mistakes in oral argument is lack of familiarity with the record. This is equally true whether you were the attorney of record in the trial court or appellate counsel only.

Develop an outline of your argument in a form and on a medium that is comfortable for you. Large index cards work well, as shuffling papers can be distracting. In preparing the outline, determine the issues you want to focus upon and develop your key points with respect to those issues. Some attorneys find it works well to develop two outlines of their argument—one long and one short. Then, if you are lucky enough to be asked multiple questions by the court, you can resort to “Plan B” and utilize the short version of your argument in the time remaining.

In developing your outline, consider developing a theme or story line that will engage the court, hold the judges’ attention, and hopefully command questions. This is the time to look at the big picture and ask yourself what the case is really all about, and consider how it fits into a particular area of the law.

While understandable, it is a mistake to try to touch on all of the issues and arguments covered in your brief. Rather, consider which issues would benefit from clarification and exploration, and develop your argument around those issues. Anticipate your weakest arguments and contemplate how you might respond to questions from the court.

The bottom line in preparing your argument outline is to be a minimalist—i.e., be prepared to say all that you need to say in the shortest time period, thus allowing for maximum flexibility during argument.

You should also prepare for argument by anticipating questions the court will ask. The best way to do this is to know the weaknesses—or what *look* like weaknesses—of your case.

Consider conducting a moot court. It doesn’t require a large time commitment but can yield great results. Ask a few friends or colleagues to read your brief, and then present your argument to them. Encourage questions. Following your presentation, ask your “judges” for comments

about your demeanor and presentation style, as well as the substantive aspects of your argument.

### § 10.3 Format of Hearings in the Supreme Court

Oral arguments before the Kansas Supreme Court are held before the full court in the Supreme Court Courtroom. Counsel are notified at least 30 days in advance of the date and time they are to appear for oral argument. Rule 7.01(d). The Supreme Court holds a formal docket call at the commencement of the morning and afternoon sessions; if counsel fails to appear at the appropriate docket call, oral argument is waived. Rule 7.01(d).

Oral argument is limited to 15 minutes for each party. Rule 7.01(e). However, either party can request 20, 25, or 30 minutes simply by printing “oral argument;” followed by the desired amount of time on the lower right portion of the front of the brief cover. Rule 7.01(e). See § 12.35, *infra*.

The oral argument calendar will indicate the amount of time granted for oral argument, with both sides receiving an equal amount of time. Rule 7.01(e).

If there are multiple parties on either side who are not united in interest as to the issues on appeal and who are separately represented, the court will, on motion, allot time for separate arguments. However, if the parties are united in interest as to the issues, they must divide the allotted time among themselves by mutual agreement. If a party does not file a brief, that party may not argue before the court. Rule 7.01(e).

In the Supreme Court, a timer is displayed on the podium, so counsel knows at all times how many minutes remain for argument. Appellant’s counsel must advise the court at the start of the argument how many minutes, if any, are requested for rebuttal.

### § 10.4 Format of Hearings Before the Court of Appeals

The Kansas Court of Appeals may hear argument *en banc*, but generally sits in panels of three judges, as designated by the Chief Judge, at varying locations throughout the State. Rule 7.02(a) and (c). Generally, four to five panels are scheduled each month, and each panel hears approximately 12 to 15 arguments over a 2-day period.

As in the Supreme Court, oral argument before the Court of Appeals is limited to 15 minutes for each party. Either party may request 20, 25, or 30 minute arguments by printing “oral argument;” followed by the desired amount of time, on the lower right portion of the front of the brief’s cover. Rule 7.02(e). See § 12.35, *infra*.

Not less than 30 days prior to argument, the Court of Appeals issues an oral argument calendar that indicates the amount of time granted for argument. Rule 7.02(d). Both parties are granted the same amount of time. Rule 7.02(e).

Like the Supreme Court, the Court of Appeals will permit parties on the same side, who are not united in interest as to the issues on appeal and who are separately represented, to request separate arguments. However, if the parties are united in interest, they must divide the allotted time among themselves by mutual agreement. Rule 7.02(e).

The Court of Appeals places many cases on “summary calendar.” Appeals placed on summary calendar are deemed submitted without oral argument. Rule 7.01(c)(2). Any party seeking argument on a summary calendar case must file a motion within 15 days after notice of the calendaring was mailed by the clerk setting forth the reasons why oral argument would be helpful. Rule 7.01(c)(4).

Unlike the Supreme Court, there is no formal docket call in the Court of Appeals. However, all attorneys are expected to be present at the beginning of the morning or afternoon session in which their arguments are scheduled, as the court sometimes makes last minute changes in the schedule to accommodate the parties or to reflect a change in the argument schedule.

Keep in mind that, in the Court of Appeals, there is no timer on the podium. Although the presiding judge will advise counsel when the time for argument has ended, counsel must keep track of how much time has been used. Consider placing your watch or timer on the podium, where it is visible to you.

## **§ 10.5 Introductory Phase of Argument**

If you are the appellant, introduce yourself and your argument with clarity and assertiveness. Let the court know what action you want the court to take and why the court should take the action you seek. The

introductory portion of your argument is your opportunity to provide the court with a “hook,”—*i.e.*, something memorable that will jog the court’s memory when your case is conferenced.

Give the court a brief description or road map of where you will go in your argument. It is entirely acceptable to let the court know that some issues will not be covered in argument but that you do not concede those issues. The introduction is your opportunity to narrow the playing field and make sure the court is in the same ballpark with respect to the issues.

If you are the appellee, you can use the introductory portion of your argument to introduce the court to your point of view of the case and to frame the issues as the appellee sees them. Your focus should be on quickly bringing the court back to where it should be—*i.e.*, emphasize what the case is *not*. Briefly discuss the appropriate standard of review and remind the court that the burden is on the appellant to establish the impropriety of the trial court’s action.

## § 10.6 Body of Argument

Whether you are the appellant or appellee, keep in mind that you are educating the court about what it doesn’t already know or understand. You want the court to think about the result you wish to achieve. You must convince the court that your result is fair, just, and correct.

Limit your presentation of the facts, as the court is generally familiar with the facts of your case. If you need to discuss facts, try to discuss them conversationally, as they pertain to the issues, rather than in a chronological and detailed fashion. Account for unfavorable facts, as you will most certainly be asked about them. It is important that you don’t rely upon or reference facts not in the record on appeal or that weren’t before the district court.

The court may interrupt your argument with questions almost immediately or within a few moments of your introduction. If that happens, view it as a positive circumstance, rather than an interruption. Questions from the court are an indication of interest from at least one judge and may prove helpful in getting the other judges to talk about that aspect of the case, as well as other aspects. So be entirely flexible throughout your argument, and understand that you may be required to vary partially, if not entirely, from your prepared outline or text.

Never use the fact that you were not the attorney of record in the trial court as an excuse for lack of familiarity with the record. Similarly, if you are asked a question that requires you to discuss information that was not before the trial court and thus is not before the appellate court, you should respond to the question if you can, but advise the court that the information the court seeks is not part of the record on appeal and thus not pertinent to the issues on appeal.

When asked a question by the court, it is essential that you fully and directly answer the question asked and that you answer the question *when* asked, rather than putting it off until it comes up in your outline. Moreover, the court appreciates candor. If you do not know the answer to the question, consider offering to research the answer and provide a letter to the court pursuant to Rule 6.09(b), if appropriate.

You may be pressed to concede a point or issue, thus providing you with the opportunity to implement what has been referred to as the “Kenny Rogers’ rule”—*i.e.*, “you got to know when to hold ‘em, know when to fold ‘em.” To refuse to concede an obviously negative point risks your credibility and may indicate to the court that you are not as familiar with the case or the case law as you should be. On the other hand, the court may extend a concession you make in argument and, in the subsequent opinion, take your concession to a place you never meant it to go. The bottom line is that when you make a concession, limit it as much as possible, and explain why the concession you have made does not hurt your argument.

Avoid citing cases in your argument, unless you are citing a case that has not been included in your brief. Otherwise, you risk breaking the rapport you have developed with the court. If you must discuss a specific case, simply refer to it by its caption, rather than the legal citation. Keep in mind that oral argument is an opportunity to develop your position conceptually; you must rely upon your brief to provide the in-depth support for your argument.

## § 10.7 Delivery and Style

Speak clearly and at a pace that the court can understand and follow. While it may be tempting to get as much information to the court as quickly as possible, the court cannot process the information as quickly as you can speak it. So slow down, and make sure the court understands

the points you are trying to make. Be conversational, rather than preachy, and try to avoid using legalese.

Make eye contact with each of the judges throughout your argument, even if only one judge is asking most of the questions.

Use direct language and avoid using language that indicates a lack of confidence—“I may be wrong, but...” or “it is our position that...” Avoid sarcasm and overly emotional appeals to the court. Remember, you are not speaking to a jury but to an appellate court. It is likely that righteous indignation will not have the effect you desire.

Similarly, if you receive questions from members of the court that you perceive as hostile or personal in their tone, try to stay focused. Take the high road, and respond professionally and courteously. Hopefully, you will make points with the remaining members of the court, regardless of the seemingly hostile or inappropriate questions of one judge.

Along that same line, it is essential that you pay attention to the judges’ demeanor. If the court is looking bored, dazed, or confused, consider the possibility that your argument is not keeping their attention or is not being comprehended. This might be the time to move on to a different issue or vary your delivery.

## **§ 10.8 Conclusion**

Counsel often forget a simple rule—know when to sit down. If you have made all the points you intended to make but still have a few minutes of time, don’t feel compelled to continue. Just conclude, and sit down. Random repetition eats away at your reputation and detracts from the points you have made. Concise, interesting argument is always more effective.

On the other hand, if a “hot” court has taken up most of your time, consider asking for one or two minutes to sum up the key points you planned to make in your argument. The worst that can happen is the court can reject your request, in which case, you can simply refer the court to the arguments in your brief.

Your conclusion, like your introduction, should be memorable and should leave the court with the “hook” the judges can remember when they are conferencing your case. You should very briefly highlight the

strengths of your argument, and remind the court of the action you want the court to take.

You might consider developing a concise and dispositive paragraph that you would like to read if you were writing the opinion. Make that your exit line.

### **§ 10.9 Rebuttal**

If you are the appellant, it is a good idea to reserve a few minutes for rebuttal. Do not feel compelled to use the reserved time, however, because unless you have a forceful point to make, you stand to lose more than you might gain. This is especially true if the appellee has not successfully responded to your argument.

If you do utilize your reserved rebuttal time, keep your rebuttal very short and to the point, and don't repeat your initial argument.

### **§ 10.10 Final Thoughts**

As you walk or drive back to your office following your argument, take the time to really listen to yourself. You are your own best critic. If your argument was before the Kansas Supreme Court, you can review and analyze the archived argument at <http://www.kscourts.org/supct/sclive.htm>. If you listen to your own mental feedback and self-analysis, your next argument will be easier, more effective, and more enjoyable than the last.