

## E. Practicing Oral Arguments

Once the team submits its brief, its members must then turn to oral argument. Like any skill, a good oral argument takes practice. The good news is that practice does significantly improve the quality of a competitor's oral argument at competition.

### 1. Oral argument basics

Most oral arguments at a moot court competition are fifteen minutes per advocate, with both advocates for the appellant or petitioner's team going first, followed by both advocates for the appellee or respondent's team.<sup>45</sup> The competition's rules, however, may provide a different sequence and may allot a longer or shorter time period for the oral arguments. Accordingly, read the rules carefully to see how the oral arguments are structured. If the rules don't provide that information, then call the competition chair to learn more.

Each advocate presents his or her argument in three parts: the opening, the body of the argument, and the closing.<sup>46</sup>

#### a. *The opening statement*

Judges often allow students to get through their opening statement before asking questions, but students should practice being interrupted. The opening statement should be between a minute and two minutes long.<sup>47</sup> Students should weave in a theme word or phrase and their theory of the case to hook the judges' attention and center their argument on a focal point.<sup>48</sup> This theory should be encapsulated in a sentence or two. They should also highlight the two or three most important points they plan to cover using numbered points for structure.<sup>49</sup> During the opening, the student arguing first may mention that his or her team has reserved a certain number of minutes on rebuttal.<sup>50</sup> See Appendix C for a sample fill-in-the-blank opening statement.

45. See *id.* § 13.2, at 289. Chapter 13 of BEAZLEY provides a comprehensive guide to oral argument. See *id.* ch. 13, at 287–310.

46. *Id.* § 13.5, at 295.

47. *Id.* § 13.5.1, at 295.

48. *Id.*; see also DAVID C. FREDERICK, *THE ART OF ORAL ADVOCACY* § 5.3, at 92 (2d ed. 2011) (discussing how to develop a mantra).

49. BEAZLEY, *supra* note 19, § 13.3.1, at 290; § 14.5.1, at 321.

50. See *id.* § 13.5.1, at 296.

Memorizing the opening statement helps students to gain confidence at the competition and to pace their speech. An advocate should speak a bit more slowly during the opening statement so the judges can pay attention to what the student is saying and can jot down the points the student plans to argue.<sup>51</sup> This advice is especially good for your speediest talkers—if an advocate starts the argument by speaking more slowly than is comfortable for that advocate, he or she may naturally speed up, but will tend to maintain a slower pace than would normally be the case. Be sure to record your team on video and play the recording back. This helps an advocate realize that his or her pace is too fast and helps the advocate slow down at the next practice.

### *b. The body of the argument*

The body of the argument is devoted to setting forth the arguments in favor of the rule of law the student is asking the court to adopt<sup>52</sup> (for most competitions are set up to require students to argue for the adoption of a new rule or the modification of an existing rule). Students should also prepare to address their opponent's counterarguments. While the advocates should begin with and emphasize the arguments in their favor, they should weave in responses to their opponent's counterarguments as they go along.<sup>53</sup> Incorporating those responses may also draw out a dialogue with the judges, especially if the bench is cold.

Sometimes, a team can tell if the judges are following their arguments by how many questions the judges are asking. A lively and engaged bench often is a sign that the advocate is doing a good job of connecting the dots for the judges. But sometimes a bench is just cold, and a student shouldn't feel bad about it. In real life, sometimes benches are cold, and there may be multiple reasons for that. Sometimes judges want to hear more of the argument before jumping in and asking questions. Judges who are more used to trial practice may be particularly prone to wait to ask questions. You can prepare a team for the possibility of a cold bench by holding cold-bench practices where the judges ask few or no questions.<sup>54</sup>

51. See *id.* § 13.5.1, at 298 (discussing how an advocate should pause after articulating the thesis).

52. *Id.* § 13.3.2, at 292.

53. See *id.* § 14.5.2a., at 322 (noting that an advocate should keep in mind the "tough questions" that favor the other side and address those as the advocate moves through his or her argument).

54. *Id.*

Because a moot court competition is a fictional argument setting, students don't have the benefit of reading the opposing side's brief before "going to court." However, a number of competitions post the briefs online, and your team should read through those briefs carefully to assess the strongest arguments on the other side. As noted above, the team will find it helpful to outline the other side's arguments and the responses to those arguments. As soon as your students find out which teams they will face in the competition, they should review those opposing teams' briefs (if provided) to make sure they have thought about good responses to the other side's arguments. The team going first should bring up anticipatory responses to the second team's argument. The team going second in the round should practice weaving in specific responses to the other side's argument. Brainstorming the other side's arguments also is a good way to prepare to argue off-brief.

### *c. The closing statement*

The closing should be no more than a minute long, summarizing again the key points and emphasizing any special thematic points of significance.<sup>55</sup> Students should practice launching their closings when they see the one-minute marker.<sup>56</sup> If a student has been allowed to go beyond the allotted time, the student should be prepared to ask the bench for permission to give a brief conclusion.<sup>57</sup> Alternatively, the student may just end by saying "thank you."<sup>58</sup>

### *d. The rebuttal*

After the second team has argued, one of the students from the first team should provide a short rebuttal.<sup>59</sup> The student arguing the rebuttal should be someone especially comfortable with extemporaneous speech and should have a strong sense of the drama associated with a polished rebuttal. Most moot court judges appreciate a short, to-the-point rebuttal that homes in on the key problems with the other side's argument.<sup>60</sup> That means the students on the first team need to take careful notes during the second team's argument.<sup>61</sup> The best rebuttal is one that directly addresses the weaknesses in the appellee's

55. *Id.* § 13.5.3, at 301; § 14.5.3, at 325.

56. *Id.* § 14.5.3, at 325.

57. *Id.* § 13.5.3, at 301; § 14.5.3, at 325.

58. *Id.* § 14.5.3, at 325.

59. See *id.* § 13.7, at 305–07.

60. *Id.* § 13.7, at 306.

61. See *id.*

or respondent's argument, and students offering rebuttal should practice this type of extemporaneous response. However, students should also anticipate the weaknesses in the other side's argument and practice speaking about those issues.

## 2. Fielding questions

Students should prepare for questions from the bench. Ideally, the team members will have already studied the usual types of appellate oral argument questions in a law school class. If they haven't, they should review books such as *A Practical Guide to Appellate Advocacy*<sup>62</sup> and *The Art of Oral Advocacy*,<sup>63</sup> which cover the different forms of questions in detail. Briefly, students can expect questions about a number of concepts:

- The record;<sup>64</sup>
- The current state of the law—including circuit splits;<sup>65</sup>
- What the law should be and why;<sup>66</sup>
- Why the other side's argument is wrong and why theirs is correct;<sup>67</sup>
- Public policy;<sup>68</sup> and
- Hypothetical factual or legal scenarios.<sup>69</sup>

Students need to be prepared for interruptions and resistance from the judges,<sup>70</sup> as well as how to deal with questions that are confusing or for which the student does not know the answer.<sup>71</sup> Students should be prepared to speak about topics that may arise, but they will be awarded more points if they can accurately pick out the other side's unique weaknesses in oral argument and respond to those areas of concern.

In addition to preparing to answer accurately and succinctly, students need to practice eloquence and poise and how to develop a rapport with the judges.

62. *Id.* §13.6, at 302–05.

63. FREDERICK, *supra* note 48, chs. 3–4, at 37–79 (on answering questions).

64. *Id.* §3.1d, at 43–44.

65. BEAZLEY, *supra* note 19, §13.3.2, at 292; FREDERICK, *supra* note 48, §3.2a-d, at 46–52 (questions about precedent, case law distinctions, statutes, and legislative history).

66. BEAZLEY, *supra* note 19, §13.3.2, at 292; FREDERICK, *supra* note 48, §§4.1-4.2, at 56–75.

67. FREDERICK, *supra* note 48, §§4.1-4.2, at 56–75.

68. *Id.* §3.2e, at 52–55.

69. *Id.* §4.2a, at 65–70.

70. BEAZLEY, *supra* note 19, §13.6, at 302.

71. *Id.* §13.6, at 303.

Developing a rapport with the judges means listening actively and answering the questions the judges have asked.<sup>72</sup> Students should aim to engage the judges in a conversation and to build momentum as their argument progresses.<sup>73</sup> The team should videotape at least one practice and watch with their coach or advisor. Doing so helps the team to see and hear what they are doing successfully, and to catch mistakes in their body language, volume, and other potentially annoying habits. A team should also watch old competition videos when available. Watching past videos early in the practice process will show the team early on what they can generally anticipate at the competition and what winning teams do.

Learn as much about the culture of the competition as possible so that you can mimic the types of questions and competition environment in your practices. For instance, some competitions are known for judges who ask abstract, theoretical questions, while others tend to ask fact-oriented questions and hypotheticals. While the team should be prepared for all types of questions, they should especially practice answers to the questions that are most similar to what they can expect at competition. Ask this year's competitors to write down their observations about the competition for next year's competitors, and ask the old and new teams to meet to discuss, among other things, the competition culture.

## 3. Proper etiquette at counsel's table

The custom of the side where the appellant or petitioner's team sits varies from jurisdiction to jurisdiction and even by competition. While a student is arguing, the other students, regardless of which team is arguing, should remain still with a neutral expression. The advocates should not stare at the judges or at the student who is arguing. Similarly, the advocates should not fidget in their seats. The seated advocates should take notes, either to prepare comments on response or rebuttal, or simply to record some of the questions being asked, especially if they are good questions. When the advocates stand up to walk to the podium, they should push in their chairs. They generally may drink water while seated and may bring water up to the podium when arguing. However, some competitions do not allow food or water in the courtroom, especially when the competition is held at an actual courthouse.

72. *Id.*

73. *Id.* §13.6, at 302–04.