CHAPTER 10
Oral Argument

§ 10.1 Introduction

Oral argument invigorates some and intimidates 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 should take to ensure your effectiveness.

This chapter suggests methods of preparing for your argument, provides information as to the hearing procedures followed by both 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 under Rule 6.09(b). Your letter should include the relevant citations, the page or pages of the brief intended to be supplemented, and a short, minimally argumentative statement concerning application of the citations. A day or two before argument, check again and be prepared to address any additional authority at argument. Fax file this letter under Rule 6.09(b) and serve by fax as well to assure your opponent has advance notice of any fresh authority to be raised at argument. Do not ever cite authority at oral argument which has not been presented to the court and opposing counsel in a brief or letter of additional authority.

> **PRACTICE NOTE:** Pay particular attention to time frames and the word limitation in Rule 6.09(b). Until fourteen days before oral argument, there is wide discretion to cite persuasive or controlling authority discovered after the party's last brief was filed. Within the fourteen days before oral argument, only persuasive or controlling authority published or filed in that time frame may be cited. In all instances, the body of the 6.09(b) letter is limited to 350 words.

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 and least excusable 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. Perhaps the most crucial point on appeal is to identify and apply the appropriate standard of review. Failure to do so is the best downpayment on a failed appeal. The briefing rules, 6.02(a)(5) and 6.03(a)(4), require a statement of those standards of review, and as former Chief Judge McKay of the Tenth Circuit once noted, it's not because the court needs to know, it's to direct counsel to the straight and narrow.

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. Some attorneys prefer to work from a laptop or iPad. In preparing the outline, determine the issues you want to focus on 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. If you type these outlines, use a large font, because at the podium your eyes will be much farther from the text than your normal reading distance.

In developing your outline, consider developing a theme or story line that will engage the court, hold the judges' attention, and hopefully provoke 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 every issue and argument covered in your brief (initial restraint in the number of issues raised in the brief is also recommended). Consider which crucial issues would benefit from clarification and exploration, and develop your argument around those issues. Anticipate your weakest arguments and plan how you might respond to questions from the court.

Avoid taking shots at the district court judge. There are more former trial judges on the appeals court than appellate lawyers. If it is truly necessary, this can be done subtly but effectively in the briefs. Often, a simple transcript excerpt is vastly more effective than a page of misguided invective.

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. Their questions may be indicative of those by your panel.

Last, if there is a complexity of parties and cross-appeals, determine ahead of time how you want the argument structured and seek agreement of other counsel.

§ 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). The clerk of the appellate courts normally provides very helpful guidance at that time, to which you should pay close attention.

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 § 12.36, *infra*. The court may also designate larger amounts of time for unusually complex appeals or those involving issues of great public significance. 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). *Amici curiae* are not permitted to argue absent a special order.

In the Supreme Court, a digital timer is displayed on the podium, so counsel knows at all times how many minutes remain in that portion of the argument. Appellant's counsel must advise the court at the start of the argument how many minutes, if any, are requested for rebuttal. The court may occasionally allow a short additional time when questioning has been extensive, but it is never safe to count on this. Arguments taking less than the full allocated time are seldom criticized on that basis.

§ 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. The number of *en banc* hearings in the court's nearly 40-year history can be counted on one hand.

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(f)(2). See § 12.36, *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. Both parties are granted the same amount of time. Rule 7.02(f)(1).

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(f)(5).

The Court of Appeals places many cases on the summary calendar. Appeals placed on the summary calendar are deemed submitted without oral argument. Rule 7.01(c)(4). Any party seeking argument on a summary calendar case must file a motion within 14 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). The court tends to be liberal with such requests if good cause is shown.

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 court's schedule. Absence of counsel tends to send a counter-productive message.

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 clearly and assertively. Tell the court 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. Keep in mind that your case is competing with several others on that docket for the panel's attention and recollection.

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 on the issues.

As 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 appellant fails to establish any material flaws in the trial court's action.

§ 10.6 Body of Argument

Whether you are the appellant or appellee, keep in mind that your goal is to educate the court about what it doesn't already know or understand. You want the court to think about the result you wish to achieve, as well as the consequences of your adversary's proposed result. You must convince the court that your proposed result is fair, just, and correct – not merely a technical requirement. Point out the practical consequences of each side's suggested result, but avoid the common fault of hyperbole here.

Limit your presentation of the facts, as the court is generally familiar with the case from the bench memo prepared by its research attorneys. 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. The latter approach holds a real danger of diminished attention and tangential questions. Account for unfavorable facts, as you will most certainly be asked about them. It is important that you don't rely on 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 indicate 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. Prioritize your outline for the most crucial points in case questions consume much of your time.

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. That excuse is usually about as welcome as telling the court that you don't practice in the area of substantive law at issue. Neither have the judges probably, and they are often resentful about sharing their time with lawyers who use it as an excuse. 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 following argument. The court may then allow opposing counsel to respond.

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. This is often not a helpful occurrence in client relations, so try to anticipate what you can and cannot concede ahead of time. 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. A good limiting technique is often to begin any reply with "In the context of this case...."

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 all or part of its caption, not the legal citation. Keep in mind that oral argument is an opportunity to develop your position conceptually; you must rely on 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. Predictable nervousness often manifests in rapid speech, and this must be recognized and resisted. 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. Don't challenge the court to ask "counsel, could you mumble a little louder please."

Make eye contact with each of the judges throughout your argument, even if only one judge is asking most of the questions. It is a mistake to focus on a single judge who you feel is sympathetic.

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, and subtle wit is often missed as badly as strong humor is unappreciated.

Similarly, if you receive questions from members of the court that you perceive as hostile or personal in 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.

Humor works less often than many lawyers expect and should seldom be attempted before judges who are not personally familiar with counsel. It can be misinterpreted as impertinence or undue familiarity and will be unsettling if there is no favorable response. Above all, keep the need for personal credibility foremost in your mind.

§ 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. Some panels will advise in advance that failure to use all allocated time is not prejudicial.

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, how they fit the standard of review, and remind the court of the action you want the court to take. It is shocking how many counsel fail to do so, and occasional eccentric remand orders can result.

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. The mere prospect of it may caution the appellee against trying to overreach. Also realize, in making your request for rebuttal time, that it is common for counsel to use more time than planned in the opening portion of argument. Rebuttal offers a chance to regroup and make any crucial points previously overlooked (although, strictly speaking, rebuttal

should respond only to appellee's argument). Do not feel compelled to use the reserved time, however, because unless you have a forceful point to make, you could 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. 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/kansas-courts/supreme-court/arguments.asp. 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. There is also great value for younger or inexperienced counsel in hearing many recorded arguments to gain a feel for the tone and temperament of the court and individual justices. Pay particular attention to the subject of standards of review in their questions. The justices don't ask these questions because they need to learn the answers. They want you to learn the answers.

§ 10.11 Suggestions for Further Reading

Aldisert, *Winning on Appeal: Better Briefs and Oral Argument*, Ch. 22-25 (2nd ed. 2003).

Garner, *The Winning Oral Argument: Enduring Principles with Supporting Comments from the Literature* (2007).

ABA, Council of Appellate Lawyers, *Appellate Practice Compendium* (D. Livingston Ed.), Ch. 32 (ABA Press, 2012).