

Seminar in Constitutional Law: Appellate Advocacy

Week 8

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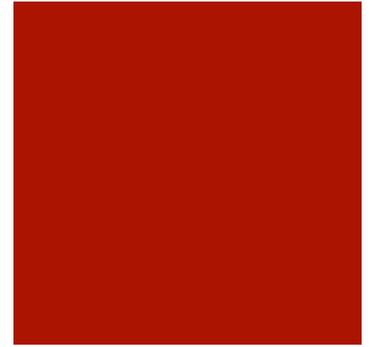
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Wednesday, May 18th, 2016

Agenda

- Hour 1: Lecture on Chapters 9+10
 - Basic structure of the oral argument
 - How to present/prepare the oral argument
 - Outline of the next 2 weeks.



BY NOW....



- (1) You have met with your groups
- (2) You have written a rough draft of your Argument section
- (3) Your groups have physically met with either Matt (Respondent) or Nazita (Petitioners)
- (4) You have received feedback from Matt and/or Nazita on your Argument sections

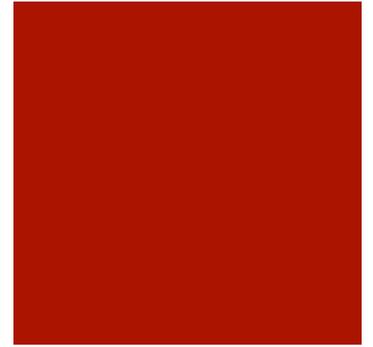
NEXT

- We Prep for Oral Arguments
 - Lecture and groupwork today will focus on this
- Final oral arguments: take place **WEEK 10** (June 1)
 - In front of a panel of judges
 - **THIS IS IN 2 WEEKS!!**
- You will spend Week 8(today), Week 9 (May 24), and Friday, May 27th practicing your arguments that you will make in front of the court.



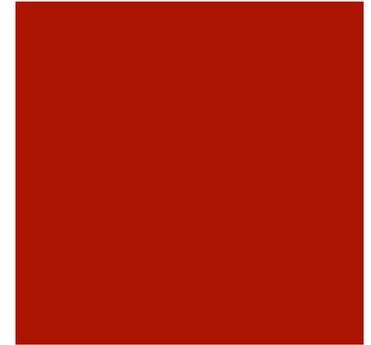
So lets get started

What is an oral argument?



- After you have submitted your appellate argument to the court, you have a chance to further explain to the appellate court **in person** the **same** arguments you made in your brief.
- During oral arguments, you:
 - (1) Clarify the points you made in your brief
 - (2) Tell the appellate court what you think is most important about your arguments
 - (3) Answer questions from the appellate court judges.

What you **do not** do during oral arguments:



- Do NOT give a long restatement of the facts of the case or
 - The judges know what you said in your brief.
- Do NOT present new issues that the court did not undertake.
- Do NOT **under**-prepare.
- Do NOT **read** your argument. NEVER READ YOUR ARGUMENT.
 - The purpose is to have a dialogue. If you read, the judges are bored.

Why are oral arguments awesome?



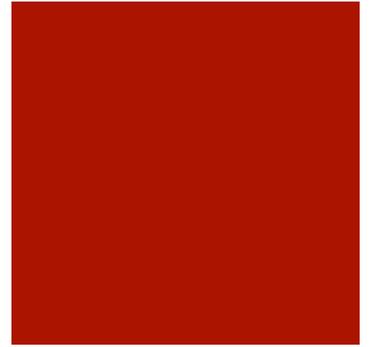
- “Oral argument — the chance to make a difference in result — is extremely valuable to litigants. If oral argument is to be more than an empty ritual, it must provide the litigants with an opportunity to persuade those who will actually decide an appeal.”
 - *Moles v Regents of Univ. of Cal.*, 32 C3d 867, 872, 187 CR 557 (1982).

Why Oral Arguments Are Hard



- Anxiety provoking
 - Oral arguments are fraught with anxiety
 - But anxiety leads to clumsiness.
 - And clumsiness leads to lack of credibility.
- SOLUTION: ***over prepare.***
 - Preparation is KEY to confidence and a good argument

Specific ways we will prepare today



During Hours 2-3, WE WILL WRITE OUT what we will say and practice saying this out loud, over and over until committed to memory.

- 1. Choose a theme your group will pursue during oral arguments
- 2. Opening the Argument
- 3. Statement of Facts
- 3. Arguments
- 4. Conclusion
- 5. Tips for How to Deal with Judges' Questions
- 6. What to Take to Podium

General Preparation for Oral Arguments



- 1. The advocate must be totally familiar with the record, the briefs, the facts, and the law.
- 2. The advocate must figure out how to cover the most important points in a limited amount of time.
- 3. The advocate must decide the types of notes to take up to the podium and decide how she/he wants to take notes when asked questions.

Structure of Week 10



- Each side has a total of 8 minutes to argue.
- Petitioner begins for 8 minutes
 - May reserve 1 minute for rebuttal at beginning of argument.
- Respondent responds for 8 minutes.
 - Is not permitted sub-rebuttal.
 - If conclude argument early but time remains, may yield the time back to the court.
- Petitioner Rebutts for 1 minute.
- Judges ask questions of both sides for 5 minutes

Specifically: Structure of Week 10 (MATT)



- We will have five 30 minute sessions: (Students are P1, P2, P3, R1, R2, R3)
- (1 min) P1: Introduction to team, overall theme
- (5 min) P2: Issue 1 / Argument 1 (no question/discussion for >1 minute)
- (5 min) P3: Issue 2 / Argument 2 (no question/discussion for >1 minute)
- (1 min): R1: Introduction to team, overall theme
- (5 min) R2: Issue 1 / Argument 1 (no question/discussion for >1 minute)
- (5 min) R3: Issue 2 / Argument 2 (no question/discussion for >1 minute)
- (1 min) P: Rebuttal
- (5 min) Judges' Questions/Comments

Structure of the oral argument

- **PERSON 1** (Opening the Argument)

- Introduction
- Roadmap

- **PERSON 2**

- Question Presented 1
 - Main Argument 1
 - Sub- argument 1
 - Sub-argument 2
 - Sub- argument 3

- **PERSON 3**

- Question Presented 2
 - Main Argument 2
 - Sub- argument 1
 - Sub-argument 2
- Conclusion

- **PERSON X**– up to your group

- Rebuttal – (Petitioner Only)



-The judges do not want to hear simply the issues and the holding of the case.

-They want an analysis of why the prior case should apply and fits into the existing framework of THIS case.

Theme – Everyone



- The first step for the organization of an oral argument is to pick a theme.
- The theme is the common thread that runs through the argument and describes the “rightness” of the case.
- Think: what is this case really about?
 - I.e. Respondents: This case is about individual rights and a parent's right to know their kid won't be questioned and interrogated without proper procedural protocol.
 - I.e. Petitioners: This case is about protecting the well-being of our kids and is about ensuring that their safety and physical wellbeing.

Opening Argument– Person 1

- The opening sentences of the argument are essential.
- (1) Begin with:
 - **“May it please the court, my name is _____X_____. Along with co-counsel _____(names of your teammates)_____, we represent the Petitioner/Respondent, ___(name of Petitioner/Respondent)___ in this matter.”**
- (2) Next, tell us where the case comes from:
 - **“This case comes here on appeal from the Twelfth Circuit Court of Appeals, which reversed the District Court’s ruling in granting the Defendant’s motion for summary judgment.”**

Opening Argument– Person 1



- (3) Next, tell us what the case is about in 2 sentences:
 - Petitioner I.E.
 - **“This case is about the inherent need of social workers to ensure that children who may be suffering from semi-urgent harm are evaluated so that such harm can be prevented in the future.”**
 - Respondent I.E.
 - **“This case is about the inherent need for parents to rely on social workers to follow the law and not intimidate their children by seizing them and conducting intrusive and inappropriate physical examinations in a school setting.”**

Opening Argument– Person 1



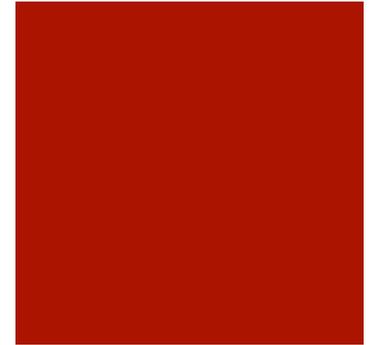
- (4) Next, tell us what the two questions presented in the case are – and what your co-counsel will argue mixed with some facts:
 - **“The case before the court presents two questions.**
 - **The first question is _____ (add in your detailed QP1 ____). The second question before the court is _____ (add in your detailed QP 2 _____).**
 - **In the minutes that follow, my co-counsel, ___X___, will present an argument advocating that the court find that a special needs exception does/does not apply for three reasons. Next, my co-counsel ___Y___ will present an argument as to the second question contending that the court find that even if a special needs exception did apply, (neither the interview nor the physical examination that followed constituted a seizure nor a search in violation of the Fourth Amendment/ both the interview and the physical examination that followed constituted a seizure and a search in violation of the Fourth Amendment).**
- (5) Reserve time for Rebuttal (PETITIONERS ONLY)
 - **“Finally, with the court’s permission, we would like to reserve 1 minute for rebuttal.”**

Opening Argument– Person 1: Statement of Facts



- (6) Ask the court if they would like to hear a statement of the facts
 - **“Would the court care for a brief recitation of the facts?”**
 - Most Judges will say no.
 - Limit yourself to no longer than 30 seconds
 - I.e. Give the 3-5 most important facts.

The Argument: Persons 2 & 3



- The aim here is to give persuasive, strong arguments.
- BE AN ADVOCATE
- Present Your Argument
 - Tell the Court which cases you are relying on
 - Tell the Court why your client's side of the case is most similar to the cases you are relying on.
 - Weave in the facts.
 - Make an impassioned plea

The Argument: Persons 2 & 3

■ Argument 1:

- **Good afternoon your honors, and may it please the Court, my name is __X__ and I will be presenting the Petitioner/Respondent's argument to the first question before the court today. To answer the first question, which is whether a special needs exception to the Fourth Amendment exists in the context of child abuse investigations, we argue that a special needs exception applies/does not apply for three reasons."**

- [Substance of your argument]

■ Argument 2: You can begin,

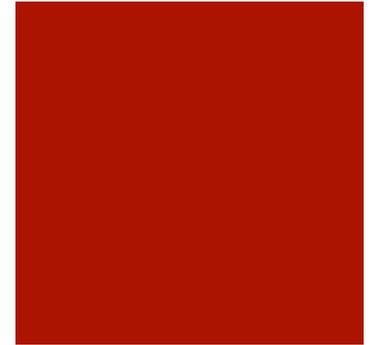
- **Good afternoon your honors, and may it please the Court, my name is __Y__ and I will be presenting the Petitioner/Respondent's argument to the second question before the court today. To answer the second question, which is whether the interview and the search constituted a seizure and search in violation of the Fourth Amendment in violation of the Fourth Amendment, we contend that both were unlawful/lawful.**

- [Substance of your argument]

Conclusion – Person 3

- If your time elapses, say:
 - **“I see that my time has expired. May I briefly conclude?”**
- The last person to Argue should say:
- **“In Closing, we ask the Court (reverse/affirm) the lower Court’s ruling and hold that a special needs exception to the Fourth Amendment does/does not apply in the context of child abuse investigations and that even if the special needs exception does apply, the interview and the physical examinations did/did not violate the Fourth Amendment.”**

Rebuttal – Petitioners ONLY



- The Achilles Heel of many oralists.
 - 1 Minute ONLY.
- Keep it simple; focus on the main issues. Begin with
 - **“May it please the court, the Respondent argued _____X_____.**
But we would like to remind the court of several major flaws/
implications of their position. _____(insert rebuttal)_____. Thank you
for your time.”
- Respond to major legal flaws or implications of Respondent’s position.
 - PREPARE your points ahead of time. YOU KNOW what Respondent will argue.
 - Do not make a LONG list which you feel pressured to get through.
- BE RESPONSIVE !

Tips for How to Deal with Judges' Questions – Everyone

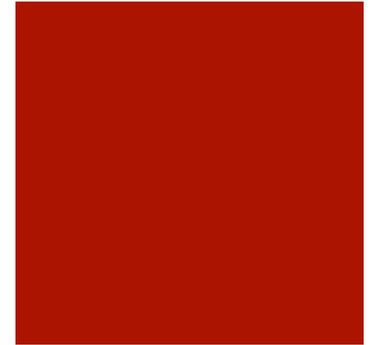
- ALWAYS answer questions beginning with “Yes/No **Your Honor**”
- At its heart, Appellate Argument is a conversation with the court. Go where the judge takes you with a question.
 - **DO NOT** say, “I’ll answer that later in my argument.”
 - One trick is to say, “**As I understand your question,**” and then restate the question. This buys you time to think of an answer.
 - Part of the skill set is the ability to answer a question directly and then circle back to your outlined argument.
- Don’t be evasive. Know what you can concede and don’t be afraid to do so. Judges are testing the limits of your argument.
- You are under time constraints so be concise.
- Ask for clarification if you don’t understand the judge’s question.

Tips for How to Deal with Judges' Questions – Everyone

- Judges may interrupt you. NEVER INTERRUPT THEM
 - LISTEN
 - THINK
 - ANSWER
- Judges may ask you about the cases cited in your argument
 - As a result, you need to have a 2 pager of a list of all the cases for your argument and a quick line of the rule from that case so that you can look down at your notes and refresh your recollection
- Judges may ask you hypothetical questions.
 - Try your best to answer, but do it quickly and return back to your main point.
- Judges may ask you questions you don't know the answer to
 - That is okay. DO NOT WING IT.
 - Say “**At this time your honor, I apologize, I am unable to provide that information.**”



What to Take to Podium – Everyone



- EVERYONE:

- SHORTENED Citation of Authority 2 pager
 - I emailed to everyone last week.

- EVERYONE:

- Your WRITTEN oral argument – which you will produce today, practice a million times, and commit to memory.

- PETITIONERS:

- Prepared points to make on Rebuttal

- EVERYONE OPTIONAL:

- Bullet points of MAIN facts in case you forget and WHERE in the record they came from

Things to do at the Podium – Everyone



- Maintain eye contact
- Speak slowly and clearly
- Breathe
- Have a conversation with the judges
- Advocate for your client
- Do not read.
 - But have your full written oral argument with you when you deliver your argument in case you need to return to it and get stuck.

Formalities – Everyone



■ Appearance of the Advocate

■ **Attire.**

- Your attire MATTERS. Wear a business suit.
- NEXT WEEK → Week 9. Dress Rehearsal. Come to class in a suit.

■ Attitude

■ **Respect.**

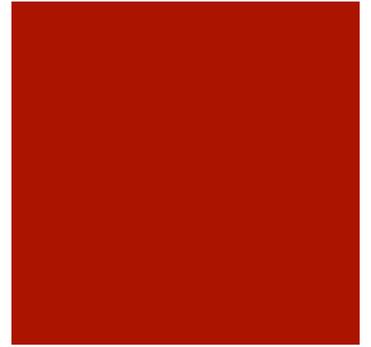
- Respect the Judges. Call them “Your Honor”
- Respect your Opponents. Refer to them as “Petitioner/ Respondent characterizes this case as...”.

■ Stance

■ **Steadiness and Confidence.**

- Stand up straight.
- Be steady. Place your hands on the sides of the lectern but do not lean on them.
- Do not gesture, its distracting.
- ENUNCIATE. Speak Loudly. Confidently. Slowly. Clearly.

Practice – Everyone



- Hours 2-3 today, each group will type out their oral arguments and begin practicing saying them out loud.
- Next week, (Week 9), come to class in a business suit.
 - ***** Your arguments should be memorized
 - ***** Your 2 pager of citation/authority should be ready to go
 - ***** We will begin asking you questions and doing mock orals.
- Next week, Friday May 27th, we have reserved SSB 333 to videotape you.
 - Fill out a doodle poll with your group for timeslots to come and be taped.

Day of Oral Argument



- Rehearse your oral argument with your group a FEW times before class begins.
- Dress Professionally—this means a BUSINESS SUIT
- Be early!
- Have all your materials neatly prepared.
- Sit down until judges are ready