ORAL ARGUMENT

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1.0 Hours MCLE Credits

MATERIALS
## Contents

<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preparing and Delivering Oral Argument by Andrew L. Frey</td>
<td>1</td>
</tr>
<tr>
<td>Effective Use of the Spoken Word on Appeal: Oral Argument</td>
<td>11</td>
</tr>
</tbody>
</table>
PREPARING AND DELIVERING ORAL ARGUMENT

By Andrew L. Frey

I. PURPOSES OF ORAL ARGUMENT.
To represent your client properly, you must understand the goals of oral argument from both sides of the bench. You can then tailor your arguments to meet these goals.

A. Judges' purposes.
Judges use oral argument to:

1. Clarify issues. Judges rely on oral argument to help them pin down the issues they must decide, and to resolve any ancillary questions such as jurisdiction, standing, mootness, etc., that may not have been the subject of briefing but that could arise in resolving the appeal.

2. Clarify factual and legal points. Judges may ask you to substantiate factual claims by reference to the record or to explain confusing holdings and party positions below.

3. Clarify the scope of claims. Judges pose hypothetical questions to test the limits of the principles underlying your argument.

4. Examine the logic of claims. Judges will ask you to address seeming inconsistencies in your arguments.

5. Examine the practical impact of claims. Judges will question whether acceptance of your arguments could produce impractical, unduly burdensome, or nonsensical results.

6. Lobby for or against particular positions. Some judges use argument to explain their views and press them on their fellow judges.

B. Lawyer's purposes.
You should use oral argument to:

1. Ensure that the judges understand and focus upon your claims. Only during oral argument can you meet the judges eye to eye, without any intervening screening from law clerk and without any distractions from the dozens of other cases on their dockets. Use
this opportunity to persuade the judges to rule in your client's favor.

2. **Correct misimpressions of fact or law that the judges may have about the case.** Be alert to any indications that the judges are proceeding on erroneous assumptions of fact or law and take the opportunity to correct such errors.

3. **Demonstrate the soundness of your position.** Show the judges that your position hangs together under fire and can withstand the hypotheticals they pose.

4. **Assuage the judges' concerns.** Find out what troubles the judges and address those problems.

5. **Impress the judges positively and memorably.** Be candid, prepared, and helpful, and advocate reasonable positions. This will enhance your credibility with the judges and make them more receptive to your position.

**C. Helpful reading materials.**

**II. DELIVERING THE ARGUMENT.**

**A. Substance**

1. **Introduction.** Tell the judges in a couple of sentences how the case reached them, the type of case (e.g., bankruptcy, tax), your position, and what points you plan to cover.

2. **Statement of facts.** Spend little time in stating the facts unless there is an affirmative tactical goal in doing so (i.e., your case is particularly strong on the facts). The judges are usually familiar with the statement portion of your brief, and there is a real risk of becoming bogged down in factual minutiae and wasting valuable argument time.

3. **Focus your argument.** Limit yourself to at most three or four crucial points.

4. **Keep your main points simple and hard hitting.** Judges may miss subtle or rhetorical comments. Keep your points straightforward.

5. **Using cases.**
(a) Limit your case discussion. Many excellent arguments never refer to specific cases. Disquisitions on the holding of cases that the judges haven’t read or aren’t familiar with can be a real turn-off. Unless the interpretation of potentially controlling precedents is crucial in your case, it is usually more effective to leave analysis of cases to the briefs and devote the argument to conveying the logic and common sense of your position.

(b) Don’t rely on noncontrolling case authorities. You may refer to the reasoning of inferior courts or courts in other jurisdictions, but don’t expect the judges in your case to reach a certain result just because other courts have done so.

6. Using the record.

(a) Know the record. Be prepared to answer questions about relevant parts of the record.

(b) Stick to the record. Ordinarily, refrain from referring to matters outside of the record such as newspaper articles. However, if a judge asks you to go outside the record, you may do so.

B. Technique.

1. Maintain eye contact. Walk to the lectern and look at the judges. Then talk to the judges, not at them.

2. Have something in writing at the lectern. Have an outline or some list of important points to be made during the course of the argument. Without written help, you may ramble and overlook pivotal points.

3. Don’t let unnecessary preparations delay your argument. Don’t gulp water, shuffle papers, remove your watch, etc. Walk to the lectern, set down your watch and papers, wait for the presiding judge to recognize you, and then begin.

4. Stand upright and still, but don’t be rigid. Stand, don’t slouch. Stay close to the microphone. Don’t wander around the courtroom.

5. Control your nonverbal communication. Be earnest, alert, and confident. Avoid distracting movements such as picking at your sleeve while a judge questions you. Don’t adopt combative positions such as crossing your arms.

6. Be courteous and respectful. The proper
relationship to the judges is that of respectful equality. Don't be scornful or belligerent. At the same time, don't be timorous or overawed. In particular, don't buckle or concede a point just because an individual judge seems displeased with your position.

7. **Enunciate clearly.** Judges abhor mumbling and muttering. It may be useful to listen to your argument on a tape recorder in order to ensure that you can speak confidently and clearly.

8. **Control your volume.** Don't speak softly, but don't bellow. Vary your volume so you don't speak in a monotone.

9. **Keep your cadence.** Oral argument should move with a carefully regulated cadence. It is important to maintain a conversational tone. Avoid long pauses while you grope for your next point or look for a record cite. Equally important, do not race through an argument.

10. **Address the judges correctly.** Don't try to address a judge by name, unless you can do so correctly. If you address Judge Smith as Judge Jones, neither judge will be pleased.

11. **Don't read to the judges.** Reading from statutes, cases, or legislative history will bore the judges, even if it does not bore you. However, you may briefly quote pivotal language critical to your argument.

12. **Avoid long sentences, numbers, and citations.** Remember that oral and written communication are different. Keep your sentences simple and vivid.

13. **Limit reliance on help from others at the counsel table.** Conferring with co-counsel makes you look ill-prepared and should be done only in limited circumstances. Offer to submit a supplemental brief on a significant point that you cannot address adequately. But if you can't answer an important question and your co-counsel knows the answer, quickly consult him or her. Limit note passing with co-counsel. Passing notes distracts the judges. Pass notes only to obtain information, not to toss around ideas.

14. **Remember the forum.** If you are a trial lawyer, remember that appellate judges are not jurors and greatly resent being addressed as though they were. Avoid emotional rhetoric; instead, view oral argument as an intellectual exchange or debate.

15. **Be prepared to modify your argument.** Think of your argument as an accordion that expands or contracts based on the time available. The more the judges question you, the less time you have to present what you planned. Be ready to discard less important matters if time is running short.
16. **Use the written format that works best for you.** Experiment with different techniques during moot court sessions until you find the one you are most comfortable with. You might use an outline with key words and sentences. You may prefer to list key arguments on notecards. You may have a script with you, *but do not read your argument.* If you have a script, don't do more than glance at it to refresh your memory on key points. Remember that written and spoken communication use entirely different diction. A written argument will sound stilted unless great care is taken to use words and phrases appropriate to oral communication.

17. **Be well armed with the material you may need.**

   (a) All briefs and appendices.

   (b) Pertinent record materials, legislative history, and important cases. If you plan to quote any authority, have copies available for the judges if they request.

18. **Tab important parts of the transcript and the appendix.** You don't want to lose time searching for a reference.

19. **Don't use distracting exhibits or physical evidence.** You may lose several minutes of your precious time while the judges pass your exhibits around. Know that some judges see them as a stunt. If certain exhibits really will assist you, get the clerk's permission to copy and to distribute them to the judges before oral argument.

20. **Managing your time.** Keep track of your remaining time, so that you can cover your most important points. If you are the appellant, be sure to save time for rebuttal. End your argument when the red light signals that your time is up. Thank the judges and sit down. However, you may answer questions posed by the judges after your time is up.

C. **Answering questions.** By far the most important part of an oral argument is responding to the judges' questions. The purposes of the argument are communication and persuasion. Responding to what the judges have on their minds is much more valuable than repeating the points you have already made in your brief.

1. **Preparing for questions.** Read the record, briefs, and cited cases thoroughly. Read relevant law review articles and economic or similar studies. After doing this, review every submission in your brief and proposed oral argument from the point of view of a hostile or skeptical judge. Read your opponent's brief carefully and with an open mind to appreciate the points it makes that are potentially most troublesome for your position. Try to think of every difficult question that a judge might ask. Jot the questions down and know the best answers to them. To prepare for questions you may have missed,
discuss your case with laypersons and other lawyers to see what questions they have. Ask fellow lawyers to act as judges in a moot court. They will raise questions you otherwise might miss.

2. Know how to respond to different types of questions. Bear in mind that judges ask different kinds of questions demanding different responses.

(a) Questions that go to the heart of the case. Spend most of your time on these.

(b) Background questions. Answer quickly and accurately and then move on.

(c) Fencing or debating questions. Try to avoid being bogged down too long on peripheral points that a judge wants to bat back and forth. Give your best answer, then find a tactful way to return to your main point.

(d) Humorous questions or observations. Enjoy the remarks and then get back to business.

(e) Irrelevant questions. Even if you think the question is irrelevant, don't say so. Respond briefly, and then explain why your case presents a somewhat different issue.

(f) Hostile questions. Don't be unnerved or disappointed. Hostility may signal that the questioner is in the minority. Answer politely and firmly and then return to your argument.

3. Listen carefully to the questions. Make sure you understand them. You will frustrate and perhaps confuse the judges if you answer questions not posed.

4. Answer the questions directly. Whenever possible, begin your response with a yes or no, then provide an explanation, if one is needed. Don't beat around the bush. You don't have time. But if a question leads naturally to an important point you were going to make later in the argument, consider rearranging the argument to cover the point while you have the judges' attention.

5. Do answer the questions. Don't be so anxious to get back to your argument that you give back-of-the-hand answers to questions troubling the judges. The case will be decided on the basis of what is important to them, and their questions frequently signal the topics that require thorough consideration.

6. Don't evade the questions. Don't try to escape a question by explaining its unimportance, or arguing that
your case differs from the hypothetical. Obviously, the judge believes the question matters, otherwise he or she would not ask it.

7. What to do when you can’t answer a question.

(a) Factual questions. If someone at your counsel table knows the answer, ask that person. If not, tell the judges you can’t answer. Occasionally, you may be forced to say “I regret that I cannot supply that information. However, I believe that X’s testimony addresses that point. Ideally, no critical record fact will escape your recall.

(b) Legal questions. You cannot answer a legal or hypothetical question with I don’t know. You should answer the question on the spot. You may say that you haven’t considered that variant of your situation, but then state the relevant factors and answer as well as you can. If you don’t follow the question, say so, and the judge will rephrase it.

8. Don’t bluff about cases you haven’t read. If you get a point-blank question about an unfamiliar case, admit it, and ask the judge to refresh your memory. This should never happen with respect to a significant case if you prepare properly.

9. Don’t postpone answers. Always answer immediately. Delaying your answer may irritate the judges. If you must postpone, answer briefly and promise to elaborate after you have laid a foundation for your answer. Then be sure that you do return to the point as promised.

10. Answering friendly questions that lead to incorrect conclusions. Accept the help, but politely correct the mistake: I would agree with your Honor’s approach, but I think the main support in this situation comes from **.

11. Don’t expect law school questions. The judges won’t ask you to give the facts in the Drybones case. But you should know enough about the relevant cases to answer general factual questions.

12. Be flexible. During some arguments, you may need to hop from question to question quickly. During others, you may never stray from your planned presentation. In any case, be prepared to set aside your notes entirely and answer the questions, weaving in your affirmative points as you go.

13. What to do in a really hot argument in which you get nothing but questions. In general, you should
welcome active questioning. But try not to let the argument break down into a series of unrelated responses or a cross examination in which the judges force you to concede point after point until your time is up. Focus on the main points that you want to convey no matter how intense the questioning. Weave those points into your argument.

14. What to do in a cold argument with few or no questions. Occasionally, judges ask few or no questions. Prepare an argument that you can present without supporting dialogue between you and the judges, leaving sufficient time for questions and answers. You don't have to use your entire time. Make your points and then signal the judges that you are about to finish: that will conclude my presentation, unless the court has further questions. If they have none, thank the judges and sit down. Judges will greatly appreciate your brevity.

15. Be careful with concessions. Be cautious in making concessions; the judges may use them against you in deciding the case. Of course, answer the questions honestly and candidly and don't extend your position beyond its reasonable limits so that it produces absurd results.

   (a) Recognize the difference between factual and legal concessions. You must concede unfavorable facts, although you can then explain why your concessions don't destroy your case. Be extremely careful about legal concessions. Think through the implications before conceding any legal point. For example, a judge may ask you wouldn't you admit that your position should be rejected if * * *? Don't agree too readily. Where appropriate, say, that presents a different case, but I wouldn't concede that would produce a different result. The facts that would have to be weighed include * * *.

   (b) Don't concede a point merely because a judge thinks you should. If a judge believes you should concede a point, but you do not, say I do acknowledge your Honor's point, but it does not dispose of the issues here * * *.

16. Answer carefully questions that test principles underlying your argument. The judges will question you on the scope of these underlying principles. Know the limits of your principles in advance. Every principle has its breaking point; every principle clashes with a contrary principle at some point. Avoid radical arguments that extend your principal too far. Instead, offer some neutral basis for distinguishing cases that you would not include within your principle. For example, if a judge asks would the Speech or Debate Clause immunize a
physical assault during an emotional debate on the floor of the Senate? Don't say, Yes. Instead, you could say the Speech or Debate Clause is directed to speech and debate, not assaultive physical conduct. Remember, you can't merely say that the hypothetical differs from your case because *. * *. The judges know that. They want to know what principle separates your case from their troubling hypotheticals.

17. Beware the relentless judge. Sometimes a judge will not let go of a point. However, you must move on. Give your best answer and then politely but firmly steer the argument back on course.

18. What to do when the judges seem to be ignoring you. Don't be unnerved if they get up, turn chairs around, read, talk, etc., during your argument. In most instances, the judges are talking about your case. You may pause briefly to catch their attention. But usually you should plunge ahead and try to make your argument lively and interesting.

III. THE APPELLEE'S ARGUMENT.

A. Same general rules apply. Prepare notes and have your main points in mind. Make your affirmative case. Give the judges the emotional and intellectual basis for ruling in your client's favor.

B. Don't argue in a vacuum; be flexible. Annotate your outline as your opponent speaks. Note the main points that you want to add to your argument in light of your opponent's argument and the judges' comments. If an important exchange between the judges and your opponent goes to the heart of your case, you may wish to start with that.

C. Don't spend your time nattering about your opponent's every mistake. Rectify only your opponent's critical misstatements. If your opponent waffled or incorrectly answered a question on a significant point, pose and answer the question correctly: Judge Roberts asked *. * *. My opponent said * * *. In fact, * * *.

IV. REBUTTAL.

A. Save time for rebuttal. Whether or not you end up using it, it is essential for opposing counsel to know that you have the opportunity to correct any misstatements of fact or law that may be made. This has a salutary restraining influence.

B. Never prepare in advance. You can't rebut what you haven't heard.

C. Limit your points. During your opponent's argument, select the two or three major points that you wish to rebut. Address those and
D. **Employ dispositive authority.** City the authority that most effectively rebuts your opponent's position.

E. **Do it well or not at all.** Judges often are visibly impatient with rebuttal, so make it snappy and make it good.

F. **Waiving rebuttal.** If your opponent's argument did not impress the judges, simply stand up and confidently tell the judges that Unless the Court has questions, we will waive rebuttal.
- Chapter Six -

Effective Use of the Spoken Word on Appeal: Oral Argument
CHAPTER SIX

EFFECTIVE USE OF THE SPOKEN WORD ON APPEAL:
ORAL ARGUMENT

I. INTRODUCTION [§6.0]

This chapter is intended to help counsel use oral argument more effectively. It is not a comprehensive treatment, but rather a basic guide to oral argument practice in the California courts.

A. Views of Oral Argument [§6.1]

Oral argument is, to many attorneys and judges, the highlight of an appeal. It is the time to step out of cloistered offices and libraries and into the spotlight, to engage one another in dialogue and debate, and to work toward the correct resolution of the case. At its best it is interactive, challenging, lively, and enlightening.

To some attorneys and judges, on the other hand, it is the most dreaded part of appellate work. Many attorneys far prefer the bookishness of brief writing and feel inadequate working “on their feet.” They fear they will be tongue-tied, unable to answer questions properly, backed into corners from which there is no escape, and, ultimately, humiliated. Many judges think oral argument is a necessary evil—a waste of time, a boring exercise in futility, a time to think about anything but the case at hand. (A few—fulfilling the more timid attorneys’ nightmares—amuse themselves by putting attorneys on the spot for the sheer fun of it.)

Whatever one’s personal predilections, oral argument plays an important role in the appellate process. While secondary to briefing in most courts, especially intermediate appellate courts, it can and occasionally does make a difference in the result. Appellate judges have often offered anecdotal evidence of how oral argument has changed some decisions. The potential for influencing the outcome is empirically observable in Division Two of the Fourth Appellate District, which provides tentative opinions before oral argument (see §6.10 et seq., post); on occasion the final opinion has held the exact reverse of the tentative opinion because of oral argument.
B. Functions of Oral Argument [§6.2]

Oral argument is counsel’s last opportunity to persuade the court before it makes a final decision. It is, ideally, a conversation with the court. It is not a speech or a rehash of the briefs. It is an opportunity to answer the court’s questions, the one chance in an appeal when counsel can look the court in the eye, assess its reactions to the issues, make midstream adjustments, dispel doubts, and “nail” crucial points.

Oral argument is valuable in establishing a human connection between the bench and bar. It is the only opportunity for a dialogue between counsel and the justices and may provide understanding in a manner that cannot be matched by written communication . . . . [It] provides a fluid and expeditious method of getting at the essential issues.

(San Diego County Bar Association, Appellate Court Committee, California Appellate Practice Handbook (7th ed. 2001) § 7.12, p. 274.) Unless the appellate court takes the comparatively rare action of telegraphing its concerns via a pre-argument letter or a request for further briefing, or unless the case is in Division Two of the Fourth Appellate District with its tentative opinion practice, oral argument is “the advocate’s only window into the court’s decision-making process.” (Ibid. at § 7.13, p. 275.) It also provides a forum for discussing new appellate decisions filed after the completion of briefing, presenting a fresh slant to the case, or highlighting a “theme” for the appeal.

II. LAW GOVERNING ORAL ARGUMENT [§6.3]

Oral argument in California is governed by the state Constitution, statutes, and the California Rules of Court, as well as case law interpreting this authority. Local practices vary widely within the basic legal framework and can significantly affect the role of oral argument in the decision-making process.¹ (See §6.8 et seq., post.)

A. Right to Oral Argument [§6.4]

The California Constitution gives parties on appeal the right to oral argument on the merits in both the California Supreme Court and the Court of Appeal. (Cal. Const., art. VI, §§ 2, 3; Moles v. Regents of University of California (1982) 32 Cal.3d 867, 872;

¹Each court’s processes are described in the Internal Operating Practices and Procedures (IOPP’s), published by the various courts and revised periodically.

An appeal may be decided only by the concurrence of a majority of the justices who heard the oral argument, although the parties may stipulate to the participation of an absent justice. (Cal. Const., art. VI, §§ 2, 3; Moles v. Regents of University of California (1982) 32 Cal.3d 867, 874.) Oral arguments are taped, and the practice is for absent justices to listen later to the recording.

Original proceedings for extraordinary relief (writs) do not require oral argument unless an alternative writ or order to show cause is issued. If the petition is summarily denied or the court issues a peremptory writ in the first instance, there is no right to oral argument. (Lewis v. Superior Court (1999) 19 Cal.4th 1232, 1237.) Similarly, interlocutory motions during the pendency of an appeal and petitions for rehearing or review do not require oral argument. However, a court may place a motion on calendar at the request of a party or on its own motion. (Cal. Rules of Court, rule 8.54(b.).)

B. Rules Governing Oral Argument [§6.5]

The procedures for oral argument are prescribed by rule 8.256 of the California Rules of Court for the Court of Appeal and rule 8.524 for non-capital cases in the Supreme Court. These rules apply to criminal and juvenile appeals. (Rules 8.366, 8.368, 8.470, 8.472.)

Practice tip: If an oral argument is boring live, then it will probably be even more boring recorded. An attorney arguing orally when a justice is absent should take this into account in developing an approach to the presentation.

A grant is in the “first instance” when the court orders a peremptory writ — one giving ultimate relief — without prior issuance of an alternative writ or order to show cause. It is available in mandate or prohibition proceedings, as long as the respondent has an opportunity to file informal opposition. (See Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal.3d 171; Cal. Rules of Court, rule 8.490(g)(4).) In contrast, a writ of habeas corpus granting ultimate relief may not be issued without giving the respondent an opportunity to file a formal return. (People v. Romero (1994) 8 Cal.4th 728, 740-745.) This topic is covered in §§8.42 and 8.80, chapter 8, “Putting on the Writs: California Extraordinary Remedies.”

This chapter does not cover the special rules and practices that apply to death penalty cases.
1. **Argument in the Court of Appeal** [§6.6]

Rule 8.256 of the California Rules of Court governs oral argument in the Court of Appeal. (See also rules 8.366, 8.470.) The Court of Appeal clerk must notify the parties of the setting of oral argument at least 20 days before the date, unless there is good cause for shortening the time.\(^5\) (Rule 8.256(b).) Under rule 8.256(c), the appellant has the right to open the argument. Each side has 30 minutes, unless local rules or orders provide otherwise (see discussion below on Fourth District practices). (See §6.22, *post.*) Only one counsel may argue for each separately represented party. Argument by multiple parties and/or amicus curiae is governed by rule 8.256(c)(2).

2. **Argument in the California Supreme Court** [§6.7]

California Rules of Court, rule 8.524 governs non-capital cases in the California Supreme Court. (See also rules 8.368, 8.472.) The Supreme Court clerk must notify the parties at least 20 days before the date of oral argument unless the Chief Justice orders otherwise. (Rule 8.524(c).) The petitioner opens and closes, and each side has 30 minutes. Unlike the Court of Appeal, only one counsel per side – regardless of the number of parties on the side – may argue, unless the court orders otherwise upon a request to divide argument among multiple parties and/or amicus curiae. (Rule 8.524(d)-(g).)

### III. **COURT PROCEDURES AS PART OF THE DYNAMICS OF ORAL ARGUMENT** [§6.8]

Particular court operating procedures (as well as individual personalities and predilections) may significantly affect the value and uses of oral argument.\(^6\) In a

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\(^5\) Counsel of course must keep track of the deadline for requesting argument and the date of oral argument itself. In criminal cases counsel can check those dates (and also confirm filings such as briefs, the opinion, and post-opinion petitions) on the court website at [http://appellatecases.courtinfo.ca.gov](http://appellatecases.courtinfo.ca.gov). Counsel should also register for automatic e-mail notification of major developments and visit the site periodically for notifications not automatically sent by e-mail.

\(^6\) Each California appellate court's processes are described in its Internal Operating Practices and Procedures (IOPP's). The IOPP's are published in conjunction with the California Rules of Court. Many also are on the court website:
jurisdiction where only a small percentage of cases are argued, oral argument may be extremely influential. Where it is a matter of right and calendars are crowded, arguments may often have minimal value.

Because of differences in internal procedure and "culture," the role of oral argument varies considerably among the districts and divisions of the Court of Appeal. The differences among the divisions of the Fourth District will be discussed here.

A. Traditional Procedures [§6.9]

The typical process for most divisions of the California Court of Appeal is that after the reply brief has been filed or the time to file it has passed, the clerk of the appellate court sends a notice to the parties asking whether any party requests oral argument. (See Cal. Rules of Court, rule 8.256(b).)

The assigned justice prepares a memorandum opinion, which is distributed with the case file to the other two members of the panel in preparation for oral argument. After argument, the three panel members confer. If none has any reservations about the memorandum opinion and nothing in oral argument has changed their view, the


7For example, Federal Rules of Appellate Procedure, rule 34(a)(2) (28 U.S.C.) states, "Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary . . . ." Oral argument may not be necessary if, for example, "the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." (Rule 34(a)(2)(C).) "Any party may file . . . a statement explaining why oral argument should, or need not, be permitted." (Rule 34(a)(1).)

8Court processes are described in the courts' Internal Operating Practices and Procedures (IOPP's), which are published in conjunction with the California Rules of Court. In the Fourth Appellate District, for example:
Division One oral argument is covered in section VII of its IOPP's: http://www.courthome.ca.gov/courts/courtsofappeal/4thDistrictDiv1/iopp.htm.
memorandum opinion will become the final opinion. If any differences emerge, further conferencing and drafts may be necessary.

B. Tentative Opinion  [§6.10]

Division Two of the Fourth Appellate District has a unique pre-oral argument procedure. The court provides counsel with a tentative opinion that usually has the preliminary vote of at least two justices of the assigned panel. When it sends counsel a notice about requesting oral argument, the court includes the tentative opinion. The tentative opinion may indicate whether the panel is considering full or partial publication.

1. Notice of oral argument opportunity  [§6.11]

Division Two sends two types of oral argument notices – one saying oral argument is unlikely to be useful and one notifying counsel the court intends to calendar the case for argument.

a. “Argument is available but unlikely to be useful” notice  [§6.12]

The more common notice in Division Two states oral argument is unlikely to aid in the decision-making process, although counsel may nevertheless request it. (Cf. People v. Pena (2004) 32 Cal.4th 389, 400-404 [stating the importance of oral argument and criticizing the former version of this letter, more actively discouraging it].) The letter sets a deadline for requesting argument, which is enforced strictly.

On receiving such a notice accompanied by an tentative opinion unfavorable to the client, counsel should weigh whether there is a reasonable possibility oral argument will persuade the court to change its mind. Merely repeating the briefs will not help if the tentative opinion shows the court has understood the points made in the briefs and has analyzed them under the correct law. On the other hand, argument that spotlights the heart of the client’s case and places it in the most persuasive light, clears up confusion evidenced in the tentative opinion, or rebuts the analysis of the tentative opinion might change the result.

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Division Two processes are described in section VII of its Internal Operating Practices and Procedures (IOPP’s). Division Two IOPP’s are published with the California Rules of Court but are not on the court’s website.
b. "Argument will be set" notice [§6.13]

The other type of Division Two notice affirmatively "invites" counsel to argue and says counsel will be notified of the date. No request is necessary.

Counsel should treat the invitation as an order to appear. The court has suggested the outcome may be hanging in the balance. The tentative opinion may not have the concurrence of a majority of the justices, or the votes supporting it may not be "solid." With this type of notice, counsel can anticipate active questioning by the court.

2. Uses of tentative opinion [§6.14]

The tentative opinion can be useful to all sides. First, it gives counsel clues as to the value of orally arguing at all. If the court's analysis is a reasonable application of settled law and suggests the issues are not troublesome or close in any way, counsel may conclude there is no significant chance of changing the court's mind and make a reasoned decision to waive argument. If the opposite is true, counsel is alerted to the importance of further argument.

Second, the tentative is an invaluable guide to preparing for argument. It offers a way around the usual guessing game of where to concentrate the most effort. It helps counsel to avoid areas that do not concern the court and instead hone in on those most open to change. The tentative losing party knows the court's exact reasoning and can target the most vulnerable points at oral argument. If the opinion rests on a particular case, for example, counsel may argue it can be distinguished or is inconsistent with other cases. Faulty logic, unforeseen repercussions, and inaccurate factual or legal premises can be pointed out. The tentative winning party, on the other hand, knows the crucial underpinnings of the decision and can seek to reinforce them.

IV. REQUESTING AND WAIVING ORAL ARGUMENT. [§6.15]

After receiving the notice of an opportunity to request oral argument, counsel must consider how to respond.

A. "To Argue or Not To Argue" – That Is the First Question [§6.16]

The first decision counsel faces, when given an opportunity to request argument, is whether to ask for it at all. Counsel must be prepared to use oral argument responsibly. If the case is unlikely to benefit from argument, counsel should not seek it just to have a
moment in the spotlight or to get some “practice.” On the other hand, if the case can potentially benefit, the attorney has the responsibility to argue orally, no matter how uncomfortable it seems (and it does get easier with practice).

The decision whether to request argument depends mainly on the importance, difficulty, and novelty of the issues in the case. Signals from the court, such as requested supplemental briefing or the tentative opinion offered in Division Two of the Fourth Appellate District, also enter into the equation. Secondary factors may be the length of the sentence and the client’s wishes. The decision may be influenced by the court’s procedures – whether only orally argued cases are discussed in conference or whether argument will delay the case. The court’s or individual justices’ reputation for receptivity to oral argument is an intangible but significant consideration. Counsel may find it helpful to discuss such matters with the assigned staff attorney or other experienced appellate counsel.

1. Factors suggesting the need for argument  [§6.17]

Argument is most effective when the case is complex, or difficult, or novel – whenever the correct resolution is less than obvious and requires exploration. In such a case, the briefs may provide inadequate assistance to the court, because they do not offer the give-and-take of conversation. Counsel should not pass up the opportunity to protect the client’s interests when they have such a case; doing so could be an abdication of counsel’s basic responsibilities.

2. Responsible waiver of oral argument  [§6.18]

Oral argument should not be requested in all cases. Counsel should make a professional, reasoned decision. When the briefing essentially covers what can be said and an interpersonal exchange with the justices seems unlikely to develop their understanding of the issues further, oral argument is probably not going to be of material benefit.

Strategically, if counsel’s own briefing is complete and effective and the opponent’s is not, oral argument may help the other side more. It may also delay the case – an important consideration in time-sensitive situations.

Oral argument is not a vehicle for counsel merely to ask whether the court has any questions; this approach does not benefit one’s client, consumes public resources in the form of the court’s time and both attorneys’ time and travel, and greatly irritates the court.
3. When in doubt [§6.19]

A rule of thumb is that, if in doubt, counsel should request oral argument. While
some justices may wince at this advice, there are reasons for it. First, once requested, oral
argument may be waived later, whereas the converse is not true. Second, as discussed
above, placing a matter on an oral argument track may result in a different treatment of
the case.

Above all, oral argument is a vital tool of appellate practice, and failure to use it
when counsel reasonably concludes it will help the client is a failure to fulfill the duty of
zealous advocacy. Indeed, waiver of oral argument, combined with defective briefing
leaving factual or legal issues unresolved, may constitute ineffective assistance of
appellate counsel. (People v. Lang (1974) 11 Cal.3d 134, 138-139.) For all of these
reasons, if there is reasonable doubt as to the value of oral argument, the doubt should
probably be resolved — for the client’s benefit — in favor of the argument.

B. Requesting Argument [§6.20]

The notice from the court of an opportunity to request argument usually requires
an affirmative response by a specified date. In such a situation, the failure to file a timely
request is deemed a waiver of oral argument. In Division Two of the Fourth Appellate
District, the court may sometimes indicate in its notice letter that the case will be set for
argument; it is unnecessary to submit a request in such a situation.

1. General thrust of argument [§6.21]

Some courts’ notices not only ask whether oral argument is requested but also ask
counsel to state “the general thrust” of the argument if requested. Whether the “general
thrust” description affects the argument probably varies with the membership of the three-

10 Counsel should notify the court and other counsel of a decision to waive well in
advance of the argument date. A last-minute cancellation is frowned upon — it is
discourteous and may cause unnecessary preparation and/or travel.

11 If counsel for some reason does not receive the notice or fails to meet the deadline,
counsel can file a late request seeking oral argument. But a caveat: some courts strictly
apply the stated deadlines for requesting argument, and so counsel should not count on
having any latitude. Promptness in seeking relief from default is essential; a request made
a few days beyond the deadline is more likely to be granted than one submitted just before
the opinion is to be filed.
justice panel; since it may have some effect, counsel should prepare the summary thoughtfully.

2. **Time estimate**  

   [§6.22]

   The court’s notice may also ask counsel to provide a time estimate for oral argument. (See also §6.35, post.) Rule 8.256 allows 30 minutes per side, “unless the court provides otherwise by local rule or order.”12 Some presiding justices will hold counsel to the written time estimate provided in the request, whereas others will go by the one given at the time of oral argument. Because the time allotted may be consumed in varying degrees by questions from the bench, and because counsel will always be allowed to revise their estimates downward but perhaps not necessarily upward, reasonable estimates on the higher side may be advisable. However, to maintain credibility counsel should not give an inordinately long estimate merely for the sake of having some leeway. Conversely, counsel should not state an unreasonably short time in order to have the case called early on the calendar.

3. **Remote argument**  

   [§6.23]

   To reduce the time and expenses of travel to oral argument, some courts permit argument from a remote location. In some districts, this is done by telephone. Division Three of the Fourth Appellate District in Santa Ana provides for optional televised oral arguments, where counsel argue from a videoconferencing room at Division One in San Diego. If an argument is short with relatively simple issues, then a remote presentation may be quite adequate. However, neither telephone nor videoconferencing offers the same perception of the court as a live appearance, and it does affect the quality of the personal interaction. Care should therefore be exercised in choosing the method of argument.

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12A court’s notice of oral argument may state the court’s local time limit. Division One of the Fourth Appellate District normally limits oral argument to 15 minutes per side. (Ct.App., Fourth Dist., Div. One, Internal Operating Practices and Proc., VII, Oral argument: http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv1/iopp.htm.) Division Two of that district issues an annual miscellaneous order limiting time to 15 minutes per party except for good cause.

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V. PREPARATION FOR ORAL ARGUMENT [§6.24]

A month or so before oral argument, counsel will receive a copy of the oral argument calendar. (If counsel registers for e-mail notification of the progress of the appeal, as is highly recommended, counsel will receive an e-mail notification of the calendar.) In most cases, preparation for argument will probably begin in earnest somewhere between that time and the date of argument.

A. Approaches to Preparation [§6.25]

1. Reviewing materials and selecting main focus [§6.26]

In preparing for argument counsel should review the briefs filed in the case and crucial parts of the record. Because the reply brief is often the most tightly focused brief and takes account of the respondent's points, in many cases it will be the best vehicle on which to construct oral argument.

Counsel should plan to focus on the most important issues at oral argument. Addressing all of many issues will likely cause the justices' eyes to glaze over, and they may lose interest in the argument altogether. Counsel should nevertheless be prepared to discuss any issue, in case the court takes off in unexpected directions.

"Important" is a variable notion. One issue may be important because it is of considerable general legal interest; another issue, because it may mean years off the client's sentence; another, because it is the most likely to succeed. Of course, what the court will probably think is important must always be factored in, too. In Division Two of the Fourth Appellate District the tentative opinion will offer considerable insight into this question.

It is often very effective to plan a "theme" that runs through the important issues, ties them together, and gives a focal point to the presentation. This technique enables counsel to construct a cumulative and persuasive case for a decision in the client's favor. If the brief itself has such a theme, the oral presentation can reinforce it and enhance its impact.

2. Updating authorities [§6.27]

It is a good idea to do last-minute research on the most important issues, both to refresh the memory and to determine whether there are relevant new legal developments, such as a recent decision, a grant of review on a case involving a related issue, or a
change in the legal force of any case cited in the briefs. If there has been such a development, counsel should alert the court and the opponent as soon as counsel finds out about it (by letter, if time permits); the court frowns on “hiding the ball” until the day of the court appearance. In the rare situation where advance notice is not possible, counsel should bring the citation and a copies of the opinion to oral argument and provide both the opposing counsel and the court with them before argument begins.

If any of counsel’s own cases can no longer be cited, it is far better for counsel, rather than the opponent, to bring the court’s attention to the fact. If the opponent’s authority has been undermined, the opponent should be given the courtesy of an opportunity to notify the court, but if that is not practical or the opponent fails to do so promptly, counsel has the responsibility to bring up the matter himself or herself.

If an opponent cites authority for the first time at oral argument and counsel is not prepared to address it, counsel should request leave to submit a supplemental letter brief.

3. Outlining argument [§6.28]

Counsel should never write an oral argument as a “speech” to be memorized. However, most counsel find it valuable to outline the salient points. Most importantly, whether writing an outline or just mentally preparing, counsel should assume the position of a skeptical cross-examiner and ask what the hardest questions are likely to be and how those questions might be followed up. Then counsel must develop appropriate responses. If counsel has prepared only to summarize the case or deliver an oration and not to engage in a conversation with the court about the strengths and weaknesses of the issues, oral argument is probably going to be at best ineffectual and at worst disastrous.

4. Rehearsing [§6.29]

Counsel should rehearse the oral argument and the various ways it may play out. If possible, other attorneys or even lay persons should help. While the number of oral arguments precludes ADI staff attorneys from providing a moot court in every case, if counsel has not previously argued or if the case is especially important, counsel can request that staff attorneys help prepare for the argument. If counsel has never argued

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13Depublication or a grant of rehearing or review eliminates the precedential value of the previously published case. (Cal. Rules of Court, rule 8.1115; see §7.8 et seq. of chapter 7, “The End Game: Decisions by Reviewing Courts and Processes After Decision.”)
before the particular court, counsel might make an effort to attend an oral argument there beforehand, to get a feel for the process.

B. Coordination with Other Counsel  [$6.30]

Oral argument may be complicated if the case involves a co-appellant or amicus. When the issues present no true conflict, the attorneys should devise a coordinated strategy, so as to present a complete argument without undue redundancy or fragmentation. If possible, one attorney should do the argument—a series of short presentations is confusing and often ineffective.

When a co-appellant has an actual conflict, the attorney must argue personally. The co-appellant’s argument could undermine the client’s position, and therefore counsel should prepare to answer multiple opponents—not only the respondent, but the co-appellant, as well.

C. Members of Panel Deciding the Case  [$6.31]

Knowing who is on the three-justice panel assigned to decide the case may help counsel develop an approach to the argument. In the Fourth Appellate District, Division One and Three’s calendars expressly name the panel.\textsuperscript{14} Also, the identities of the justices on the various panels of Divisions One and Three are available on the calendar page of the court website.\textsuperscript{15} Division Two publicly discloses the panel on the day of oral argument. The composition of the panel is subject to change before argument.

D. Late Waiver of Argument  [$6.32]

If during the preparation period counsel concludes argument will not be advantageous, counsel should advise both the court and opposing counsel as soon as a decision to waive has been made, not in the courtroom on the day of argument. (This is especially true as to opposing counsel. The court takes a dim view of causing the opponent to prepare for and travel to oral argument unnecessarily.)

\textsuperscript{14} The identity of the justice assigned to author the opinion, however, is confidential.

\textsuperscript{15} http://www.courtinfo.ca.gov/cgi-bin/calendars.cgi.
VI. DELIVERY OF ORAL ARGUMENT [§6.33]

To put first things first, counsel should plan to arrive early enough to find the courtroom, check in, and become oriented to the surroundings. Cutting the time close invites serious problems, if not outright disaster.

A. Preliminary Mechanics [§6.34]

In most courts, counsel will first check in with a deputy clerk, confirming or revising a time estimate.16 Rule 8.256(c) of the California Rules of Court provides 30 minutes per side for oral argument, unless the court provides otherwise by order or local rule; counsel should consult the assigned staff attorney for local practices.17 In any court, questioning from the bench can prolong argument considerably beyond putative limits.

1. Calendar formalities [§6.35]

The presiding justice usually will order the oral argument calendar according to estimated time, with the shortest first. A lengthy estimate is almost guaranteed to be near the end of the calendar, unless counsel has a legitimate reason to seek preference. If the calendar is very long, counsel may ask to be excused until a time certain, so as not to have to sit in the courtroom.

In Division Two of the Fourth Appellate District, the calendar order is determined before the day of argument and is posted for counsel. Repeat of time estimates is therefore obviated. Counsel should nevertheless check in to announce their presence.

The presiding justice will typically give the audience a brief statement indicating that the panel has read the briefs and is familiar with the cases and therefore counsel should not repeat what is in the briefs. (Counsel should heed this admonition, but not

16The court will almost always accept a downward revision. Some presiding justices will permit an upward revision, but some will not.

17A court’s notice of oral argument may state the court’s local time limit. Division One normally limits oral argument to 15 minutes per side. (Ct.App., Fourth Dist., Div. One, Internal Operating Practices and Proc., VII, Oral argument; see http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv1/iopp.htm.) Division Two issues an annual miscellaneous order limiting time to 15 minutes per party except for good cause.
treat it as an absolute injunction against repeating core concepts necessary to help the court understand the case.) He or she will then call the first case on the calendar.

2. **Formalities at the podium**  [§6.36]

When case is called, counsel should proceed to the podium. Counsel should first state his or her name and the party represented. It is a good practice for the appellant’s counsel at this point expressly to reserve time for rebuttal; while brief rebuttal might be permitted regardless of whether time has been specifically reserved, some presiding justices may not permit rebuttal if the time estimate has been exceeded.

B. **Tone**  [§6.37]

Every attorney, like every person, has a different style and at argument should remain faithful to the attorney’s own personality. However, it is important to do so adaptively, taking account of the forum, its purpose and internal dynamics, and the expectations of decorum.

1. **Respect**  [§6.38]

A court and its members carry the authority and dignity of government and must be treated with invariable respect. Counsel should maintain an attentive posture (avoiding slouching or leaning all over the podium) and a respectful tone of voice. At the same time, counsel is an advocate and must be assertive; the message should be that the client is entitled as a matter of law to prevail, not that counsel is beseeching the court to grant a favor.

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18Former United States Supreme Court Justice Robert H. Jackson offered this advice on what not to say in opening remarks: “On your first appearance before the Court, do not waste your time or ours telling us so. We are likely to discover for ourselves that you are a novice but will think none the less of you for it. Every famous lawyer had his first day at our bar, and perhaps a sad one. It is not ingratiating to tell us you think it is an overwhelming honor to appear, for we think of the case as the important thing before us, not the counsel. Some attorneys use time to thank us for granting the review, or for listening to their argument. Those are not intended as favors and it is good taste to accept them as routine performance of duty. Be respectful, of course, but also be self-respectful, and neither disparage yourself nor flatter the Justices. We think well enough of ourselves already.” *(Advocacy before the Supreme Court: Suggestions for Effective Case Presentations* (1957) 37 Amer. Bar Assn. J. 801, 802.)
Opposing counsel should likewise be shown respect, even in the face of provocation. Taking the high road – resisting the impulse to answer in kind when opposing counsel has breached decorum or made a personal attack – is always right. The court will notice the contrast and appreciate the restraint, and both the client’s cause and counsel’s reputation will be enhanced.

2. **Conversation**  [§6.39]

Oral argument is not a forum for making speeches. The point is to engage in dialogue, to understand where the court is and persuade it to go in the right direction. Justices are legally astute and do not want to be manipulated. A blatantly oratorical style, an overly emotional or strident delivery, or an argument that sounds like one for a jury is going to fall flat. Counsel should strive for a conversational tone, while still showing respect for the dignity of the proceedings.

3. **Humor**  [§6.40]

Generally counsel do well to heed the advice, “Humor should be used sparingly if at all.” (San Diego County Bar Association, Appellate Court Committee, California Appellate Practice Handbook (7th ed. 2001) § 7:47, p. 284.) There are few absolute rules, however, and some levity might help dispel an emotionally tense situation or revitalize the court and counsel toward the end of a lengthy calendar. It is often more effective when spontaneous, rather than built into the presentation as “entertainment.” Sarcasm, put-downs of the opponent, and impertinence are never appropriate.

4. **Candor**  [§6.41]

As to absolute rules of conduct, there is no exception to the rule of honesty and forthrightness. If counsel has made an error or does not know the answer to a question, a candid admission will do far more for the client and the attorney alike than an effort to cover up. Counsel need not be embarrassed about not knowing an answer; the justice apparently didn’t, either, or else he or she would not have asked the question.

C. **Dialogue with the Court**  [§6.42]

Since the whole purpose of oral argument is to engage in conversation with the court, eliciting a response from the bench is a key objective. Counsel in turn must be prepared to deal with that response.
1. **Process of give and take**  [§6.43]

The court's response takes the form of questions to counsel. When a question is asked, counsel must be certain he or she has understood the question. If unsure, counsel should request clarification. Once the question is understood, counsel should answer it directly and immediately. Attempting to evade or delay it implies that a direct answer would be harmful. In the end, answering the court's questions is more important to the success of oral argument than plowing through a prepared presentation.

Counsel must continuously observe and listen, as well as speak. Both the questions themselves and the justices' body language may offer clues as to whether counsel should abbreviate or prolong a particular discussion or change the direction of the argument.

2. **"Softballs"**  [§6.44]

Although of course counsel must be prepared for the hard questions, it is a mistake to assume that all questions are hostile or skeptical. Sometimes counsel may be used as a foil among the members of the panel. Although the questions are outwardly voiced to counsel, some may be aimed at another justice on the panel. Counsel should be alert to the possibility of "softball" questions — ones that back counsel's position — and answer them supportively.

3. **Loaded questions**  [§6.45]

Some questions, like leading questions in eliciting testimony, will include a foundational premise that counsel does not accept. The best way to approach such a question is: (1) state very briefly that the question contains a premise not conceded, (2) assume arguendo the existence of the premise and answer the question forthrightly, and (3) after answering the direct question, explain why the premise is wrong.

4. **"Off the wall" questions**  [§6.46]

Among the hardest questions to answer (and virtually impossible to prepare for) are those that are "off the wall," go in a completely tangential direction, contain logical fallacy, or betray the individual justice's ignorance of the real issue or of basic applicable law. It may be hard to maintain a respectful attitude in dealing with it, but there is no alternative. A patient, tactful answer that shoulders the blame for any confusion ("I'm sorry my brief did not adequately explain this point") may be the most effective response.
The other justices will probably be aware of the questioner's errors and be sympathetic to counsel's predicament, unless counsel responds in a way that embarrasses their colleague.

5. **Concessions and other damaging answers** [§6.47]

Sometimes counsel will be put into a position where it is difficult to avoid making a concession or giving an otherwise damaging answer. There is no cardinal rule as to how to respond. If the response relates to a comparatively minor point, counsel may gain credibility simply by agreeing to it. Some answers could spell doom to the appeal and should be resisted strenuously. If counsel's hand is forced into offering a potentially hurtful answer, counsel should control the damage by providing the best supporting explanation available.

This is the very kind of situation in which thorough preparation pays off. Getting blind-sided by a devastating point counsel failed to consider can fluster even the best oral advocate.

6. **Supplemental briefing** [§6.48]

If the court seems concerned about any point not fully briefed or any point counsel was unable to answer during oral argument, counsel can seek leave to submit supplemental briefing before the case is taken under submission. (Cal. Rules of Court, rules 8.200(a)(4) and (b), 8.256(d).)

D. **Concluding Oral Argument** [§6.49]

Counsel wants the court to incorporate the oral argument into the deliberating and decision-making process. To make a firm impression on the court, counsel should use the concluding part of it effectively and persuasively.

1. **Watching the clock** [§6.50]

Counsel must be conscious of the elapsed time and be prepared to end argument smoothly. Toward the end of the estimated time the presiding justice may ask whether counsel wants to stop and reserve the balance of the time. Some courts use color-coded lights to inform counsel when the time is nearing its end.
2. **Cues that it is time to conclude**  [§6.51]

Counsel must be perceptive to the court's reaction to argument. If the court appears to be leaning in a favorable direction, it is wise to heed the old adage "quit while you're ahead" and wind up promptly. Unnecessarily prolonging argument increases the chances the court will change its mind; it is indeed possible to snatch defeat from the jaws of victory. If the court says it would like to hear from opposing counsel, that usually means trouble for the other side and is a definitive signal to sit down.

3. **Strong ending**  [§6.52]

The argument should be concluded on a strong point. This is not to advise reserving the clinching "zinger" for the last word. Time may expire without an opportunity to make the point at all. However, the conclusion of the argument should relate to an important aspect of the case and not to a trivial or insignificant point.

E. **Rebuttal**  [§6.53]

If rebuttal argument is offered, as generally it is, counsel should use the opportunity to rebut the opponent's points and not rehash the opening argument. Unless there is to be supplemental briefing, rebuttal is the last opportunity to address the court and, most importantly, the only opportunity to correct any misstatements, factual or legal, by the opponent or the court. It can also be used to address concerns raised by the court during the opponent's argument. Rebuttal should be concise and to the point, but not rushed or fragmentary.