

Asking for Oral Argument in the U.S. Courts of Appeals

October 10, 2023

In many federal courts of appeals, the statement on oral argument occupies a prime position in a brief. It is often the first substantive statement a judge reads. Yet so few advocates use this valuable “real estate” to introduce the court to their case. By writing a boilerplate oral argument statement, lawyers often miss an opportunity to make an early imprint of their case on the court. Oral argument invites lawyers into the court’s first discussion of the case, opens a window into the judge’s thinking, and allows lawyers to confront the judge’s concerns and the weak points in their cases. However, oral argument is rare. [“More than 80 percent of federal appeals are decided solely on the basis of written briefs”](#) and [“\[l\]ess than a quarter of all appeals are decided following oral argument.”](#) In light of this reality, lawyers may find it necessary to draft a persuasive statement for oral argument that packs a lot in little space. A statement for oral argument must be short — no more than a single page — and balance advocacy about oral argument against advocacy about the underlying merits of the appeal. Courts do not want the oral argument statement to turn into arguments on the merits. Yet a skillful writer can weave advocacy about the case into advocacy limited to oral argument. By doing so, the lawyer can both entice a judge to think about the merits of the case and convince the court to elevate the appeal into the small category of cases assigned to oral argument. Lawyers can accomplish these two goals by concentrating their statements on these issues:

- Focus on the complexity or novelty of the legal issues in the case. But don’t just say that the issues are complex or novel. Explain precisely what those issues are, how they are novel or complex, and support your assertions. Most importantly, frame the issues as complex or novel in a light that helps the judge think of the case in a way that favors your client.
- If the law is unsettled, lay out the divided authority in a way that gets the judge interested in breaking new ground. Judges can get tired of routine cases, and they can yearn for the case that lets them shape the law. Frame your case as a vehicle for the court to do so.

- If your case is objectively important, show why. Be careful, though, because every case is important to the litigant. Focus on objectively important issues, separating your investment in the case from how a busy jurist would see it. Some cases are important because they affect life and liberty. Others involve decisions that reverberate throughout an industry. Some cases raise important constitutional or legal questions that will influence categories of other cases. Others involve important government or societal actors, or institutions that affect society broadly.
- If the record is lengthy, lay out specifically how oral argument will help the court cut through the record. But be careful not to make your case seem like a slough. Otherwise, the judges might opt to decide the case on the papers, rather than prep for oral argument, where judges are expected to display mastery of the record.

Of course, lawyers should consider the specific court's rules and customs, the posture of their case, and the particular needs of their client when deciding whether, and how, to craft the oral argument request. In some cases, lawyers may not want to request oral argument at all, particularly if they believe they can win cleanly on the briefs applying clear, existing precedent. If lawyers do request oral argument, they should keep in mind that some courts, particularly state courts, set out explicit rules limiting what can be contained in an oral argument request. Those courts may not indulge statements that do not strictly follow those rules. Lawyers should also consider the unwritten customs of the courts, and consult local counsel.

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