

How do you prepare for oral argument?

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I start preparing for oral argument with the realization that I will over-learn the case and spend more time getting ready than I can reasonably bill the client. And that's perfectly fine with me. Advocates put their reputations on the line when they step up to the podium. Extra preparation—an insurance policy of sorts—is well worth the price. And I start early, at least two weeks out, to make sure the material sinks in. My usual process consists of four main steps.

First, I create a binder with the key evidence, district court opinion, the appellate briefs, and all the cases except those supporting uncontested propositions. I read and re-read these materials, marking them up with a highlighter and pen and taking notes. I'm curious about dissenting and concurring opinions and occasionally find nuggets in them I didn't notice earlier. I do follow-up research along the way.

Second, I create a short outline. It cannot be more than two pages. The outline has a concise introduction and a few sentences about the main points and cases I expect to come up at argument. I fill the outline with direct quotes from cases or statutes, so I'll have them at hand as needed. I relentlessly edit, simplify, and highlight the outline in the days before the argument. I might go through a dozen drafts. And though I won't read from the outline at the argument, I find that creating and revising it helps me learn the material better than any other way I've tried.

Third, if I represent the appellant, I'll create a separate sheet of likely rebuttal points—things like distinguishing the appellee's key cases. Of course, this is just a resource. I write my rebuttal points as I listen to the appellee's argument and the panel's questions.

And fourth, I enlist co-counsel and colleagues to listen to my argument and, most importantly, ask me tough questions about any weakness my side has. In the early rounds, I'll make notes about issues I need to work on. And I find it enormously helpful to get questions in an order I don't expect (or even welcome). In my experience in the Fifth Circuit, a "hot bench" is the norm. Advocates won't get to make a speech, and if that's what they are prepared for, they risk getting tripped up.