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GUIDE FOR COUNSEL FOR ORAL ARGUMENTS BEFORE THE NORTH CAROLINA COURT OF APPEALS

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**GUIDE FOR COUNSEL FOR ORAL ARGUMENTS BEFORE
THE NORTH CAROLINA COURT OF APPEALS**

I. INTRODUCTION

This guide is intended to help attorneys who will be arguing before the North Carolina Court of Appeals. A separate guide is available [here](#) for attorneys arguing before the North Carolina Supreme Court. In addition to this guide, counsel also should thoroughly review the North Carolina Rules of Appellate Procedure, which govern in all arguments before the State's appellate courts. Additional assistance with preparing briefs and other filings can be found in the Appellate Style Manual, which is available [here](#). An abbreviated reference guide comparing and contrasting oral argument procedures and practices before the North Carolina Court of Appeals, the Supreme Court of North Carolina, and the U. S. Court of Appeals for the Fourth Circuit is available [here](#).

The Clerk and staff of the Court of Appeals also are available to answer questions and provide assistance:

North Carolina Court of Appeals
Office of the Clerk
1 West Morgan St.
Raleigh, NC 27601

P.O. Box 2779
Raleigh, NC 27602
(919) 831-3600

The Court of Appeals is open Monday through Friday (except for State holidays), 8:00 a.m. through 5:00 p.m.

II. ORAL ARGUMENT BEFORE THE NORTH CAROLINA COURT OF APPEALS

A. The scheduling of oral argument

The Court of Appeals generally holds oral arguments year-round except from early June to approximately mid-August. The Court of Appeals holds morning sessions that begin at 9:30 a.m. and afternoon sessions that begin at 1:00 p.m.

After the appellee's brief is filed, the Court will notify the parties of the session when the Court will consider the appeal. An appeal usually will be calendared for oral argument or for decision on the briefs approximately two to three months after the appellee's brief is filed. The notice also will identify the three-judge panel assigned to the appeal. Not all cases are decided with oral argument, and many are decided on the briefs alone. You should attend Court only if the notice that you receive states that there will be an oral argument for your appeal.

Whenever you have an appeal before the Court of Appeals, you should promptly notify the Court of any dates for which you request secure leave. Refer to North Carolina Rule of

Appellate Procedure 33.1 for instructions on requesting secure leave. Conflicts between a scheduled oral argument and a proceeding in another court should be resolved pursuant to North Carolina's Guidelines for Resolving Scheduling Conflicts.

Once an oral argument has been scheduled in the Court of Appeals, requests for rescheduling generally will be granted only if there is good cause, the opposing party consents, and another argument date is available before the assigned panel.

B. The day of argument

The Court of Appeals is located at One West Morgan Street in downtown Raleigh. Several parking lots and decks open to the public are nearby, including parking lots and decks at:

120 South Wilmington St.

1 South Wilmington St.

201 West Morgan St.

222 West Hargett St.

On the day of the argument, you should arrive at the Court in plenty of time to pass through security, find the courtroom, and settle into your seat before the session is scheduled to begin. The Court opens at 8:00 a.m., and the courtroom is located on the third floor. Please note: Arguments are not always held in Raleigh. Please read the oral argument notice carefully to be sure you go to the right place.

If you intend to argue, the Court requires that you personally sign the brief. If you did not personally sign the brief before it was filed, you should visit the Clerk's office before your argument to sign. Allow plenty of time before your argument session to do so. However, an electronically filed brief is considered personally signed by any counsel whose name is listed on the brief. *See* App. Rule 28(i).

You should be in the courtroom at the beginning of the session even if your appeal is not scheduled to be heard first. The argument schedule is subject to change, and your appeal may be heard earlier than expected. If counsel is not present, arguments will generally proceed in counsel's absence.

On arriving in the courtroom, counsel for the first argument may sit at the counsel tables. Appellant's counsel sits at the right-hand table (if you are facing the bench), and appellee's counsel sits at the left-hand table. Only counsel should sit at the tables. Clients and other observers should sit in the audience. Counsel whose appeal is not scheduled first also should sit in the audience until their appeal is called.

Cellular phones must be placed on mute or turned off while you are in the courtroom. Laptops may be used at the counsel tables as long as the sound is turned off.

Water is provided at the counsel tables. Food and drink should not be brought into the courtroom.

C. The argument

The session begins with the Marshal of the Court of Appeals instructing all to rise, after which the Judges will enter. Sessions are presided over by the most senior Judge on the panel. After any introductory comments, the presiding Judge will announce the first argument.

At that point, counsel for the appellant should step to the lectern. If the case involves cross-appellants, traditionally the party that filed its notice of appeal first will argue first. It is customary to open with the phrase, "May it please the Court" and to introduce yourself before beginning your argument.

The appellant and the appellee each has thirty minutes for its argument. If there are multiple appellants or appellees, they still receive only a total of thirty minutes for their side of the argument. Dividing the thirty minutes among multiple counsel is allowed. For good cause, the Court may extend the thirty-minute period, but requests for extensions are rarely granted. On motion, counsel for *amici curiae* may be allowed to participate. See Rule 28(i).

The appellant's counsel may reserve part of his or her thirty minutes for rebuttal. Appellant's counsel should notify the Court at the beginning of his or her argument if counsel wants to reserve rebuttal time. It is customary for the appellant to reserve five minutes, but the Court may allow more time to be reserved. The Court of Appeals rarely allows an appellant to reserve more than ten minutes for rebuttal. However, the appellant's counsel should expect no more time for rebuttal than counsel reserves, even if counsel finishes his or her opening argument before the time for that argument expires. During rebuttal, the appellant's counsel is generally prohibited from raising issues that were not raised during the parties' primary arguments.

After the appellant's counsel finishes his or her argument and leaves the lectern, the appellee's counsel should immediately step to the lectern. The appellee's counsel should open with the phrase "May it please the Court" and introduce himself or herself before starting the argument. After the appellee's counsel concludes his or her argument, appellant's counsel may return to the lectern to use any time reserved for rebuttal. No further argument will be allowed after the appellant's rebuttal.

During the argument, Judges on the Court of Appeals should be referred to as "Judge" or "Your Honor." If the panel includes the Chief Judge of the Court of Appeals, the Chief Judge should be referred to as "Chief Judge" or "Your Honor."

A timer on the lectern counts down from 30:00 and shows the total time remaining, including rebuttal time. Appellant's counsel must keep track of when counsel is into rebuttal time. The red light on the timer will indicate when time has expired. Counsel should end the argument at that point and sit down.

You are not required to use your full argument time. If you finish your argument before your time is over, notify the Court that your argument is finished. Ensure that the Court has no further questions before you sit down.

You may use exhibits during the argument if they are part of the record. There is an “elmo” display beside the lectern where you can place exhibits to be displayed on a television in the courtroom and on screens that are before each Judge. The courtroom can also accommodate PowerPoint presentations, although you should provide the Court with advance notice if you intend to use PowerPoint. Counsel unfamiliar with the courtroom’s electronic equipment are advised to contact the Clerk’s office to arrange a time to familiarize themselves with it before their argument.

Once oral argument for one appeal concludes, the presiding Judge will call the next appeal, if any. Counsel who have just finished arguing should promptly leave the counsel tables and take with them any materials that they brought. They may quietly leave the courtroom through the side door if they wish. Counsel for the next appeal should promptly take their seats at the counsel tables.

If three or more arguments are scheduled for a single session, the Court will generally take a short recess after the second argument.

Once all oral arguments have been completed for the session, the Court will adjourn. The Marshal will instruct all to rise while the Judges leave the courtroom.

D. Preparation and Delivery of Oral Argument

Joseph Story (Associate Justice, Supreme Court of the United States two centuries ago) stated in this excerpt from his poem entitled “Advice to an Advocate,” that the appellate advocate during oral argument should do the following:

Be brief, be pointed; let your matter stand
Lucid, in order, solid, and at hand;
Spend not your words on trifles, but condense;
Strike with mass of thoughts, not drops of sense;
Press to the close with vigor, once begun,
And leave (hard the task!) leave off when done;...

1. Preparation

a. Visit the Court

Most good appellate advocates devote substantial blocks of time to preparation for their oral argument—generally from one week to several weeks. The variation depends on the attorney’s level of experience and the complexity of the case. Well in advance of your oral argument, visit the Court on one or more days and observe several oral arguments. There is only one courtroom for the North Carolina Court of Appeals, which is restored to its original elegance, and is beautiful and dignified. To choose good days to observe, check the dockets on www.nccourts.org. If possible, choose oral arguments on topics closely related to the topic of your case. If you are able to find a case with a topic closely related to the topic of your case, review the parties’ briefs online.

Also, look to see what the issues are in the cases being argued on the same day as your case. Occasionally, the issues are related and the judges will ask about an argument from a prior case that day that implicates your argument.

Another way to plan your visit is to look on the docket for names of practitioners and/or firms that you respect or that your colleagues recommend. In the North Carolina Court of Appeals, look on the docket for judges' panels that include some or all of your panel members. Biographies of the judges on your panel in the North Carolina Court of Appeals are available on the website at www.nccourts.org.

Dress professionally, and if you bring anyone with you, be sure he or she dresses professionally as well. Be prompt and enter before Court convenes or during breaks in the arguments. Note the timing, pace, and style of attorneys' arguments, and what seems effective. Note the concerns of the judges, how they present their questions, and how counsel most effectively answers their questions.

Adjacent to the rear door to the courtroom is a table with chairs, which is part of the library. It is located where the attorneys' room or "cloaking room" was previously located. It is wise to consider carefully whether to wait for one's argument at the table. Many advocates prefer to avoid distractions by sitting in the courtroom and waiting for their cases to be called. Also, many advocates have found that it is best to go straight from home to Court; for example, do not go to the office and undertake new tasks. By the same token, it may be unwise to bring a client to Court during your oral argument. Your attention should be focused entirely on presentation of your argument. If for some reason you bring your client to Court, do not introduce your client to the Court.

The Court visit is also a trial run for you to determine how long it takes to get to the Court, where to park, where the facilities are, and where you are supposed to sit, stand and put your belongings while you argue.

The Clerk's Office has available CD recordings of attorneys' arguments, which can be purchased for a small fee. Contact the Clerk's office for further information about how to obtain copies.

b. Moot

It is highly recommended that you arrange for a panel of your colleagues to sit as mock judges to moot your oral argument, at least once, but preferably twice. This gives you an opportunity to re-think your argument in response to unanticipated questions by your moot panel. Give both parties' briefs to each of the moot judges to read prior to the moot sessions. Schedule the first session about a week before oral argument. Then, re-group and work on your oral argument and have a second moot session a couple of days before the oral argument. If possible, have at least one attorney serving as a moot judge who is familiar with the substantive area of law. Also have at least one attorney serving as a moot judge who is unfamiliar with the substantive area of law.

c. Practice before a mirror and/or on video

It is very helpful to break bad habits and cultivate good habits by practicing on your feet, at a podium before a mirror or on video. There is nothing like observing one's own facial tic or wry smile at the wrong moment to motivate one to drop that sort of mannerism before oral argument.

2. Purpose and tone of oral argument

Oral argument is a chance to respond to the judges' questions about your case before they vote and write their opinion. You should be prepared to answer any potential questions about your case. Oral argument builds on extensive preparation by counsel. Do not read or memorize a presentation to the Court. However, prepare to 1) make a presentation in the event you receive no questions from the panel; and, 2) know how to answer questions, but still be able to steer the discussion back to your main points if you get many questions from the Court. Use a normal tone of voice and talk to the judges about the case. Be respectful. Articulate clearly. Speak loudly enough to be heard and slowly enough to be understood. As in any setting, if you do not know the answer to a question, say so, but offer to do further research to answer the question for the judge in a supplemental memorandum to be filed after oral argument.

3. Master your case

a. Master the record and transcript

Read and re-read the record and tab important documents in the record. It is critical to know what is contained in the documents—usually many of the facts at the heart of your case. Read and re-read the transcript of the proceeding in the court below. It is also critical to know intimately what transpired in the proceeding that is the subject of your appeal.

b. Master the judicial opinions and statutes

Several times, read, re-read, and highlight copies of both briefs and of statutes, regulations, rules, and judicial opinions cited in both briefs. As you read and study, make a list of questions and follow-up work. Mark clean copies of important statutes, other authorities, and opinions and take them with you to Court. Beginning a few weeks before you argue, Shepardize the statutes and opinions once a week, and again the day before you argue. If there are changes, submit a memorandum of additional authority pursuant to Rule 28(g). When possible, file the memorandum at least a few days before argument so the judges have the opportunity to review the materials. At oral argument, counsel may not refer to any authorities not cited in the briefs or in a memorandum of additional authority. See App. Rule 28(g).

c. Master opposing counsel's arguments

Again, several times, read, re-read and highlight your opponent's brief. Note any arguments with potential merit and prepare your responses. Note any weaknesses in your argument and know how to address them; and note any weaknesses in your opponent's arguments and prepare your responses to them. Re-read the authorities in support of your

opponent's arguments and be prepared to distinguish them, if possible. It is best to do this hard work now so that you are well prepared when you are on your feet at oral argument.

d. Prepare a very short recitation of the facts

Choose key facts and prepare a short recitation of the facts.

e. Prepare an argument outline

Prepare an outline of the major issues and best legal and policy arguments. One method is to put the most important issues first, followed by issues of lesser importance in descending order. Keep condensing the outline until it is two to three pages long. Type the outline in all capital letters. One approach is to highlight key words first in yellow, then in other colors until the most important words are most highlighted. Finally, use your pen to make final comments, etc. When you begin practicing your oral argument, use your outline. After finishing your practice sessions, make needed revisions to the outline.

f. Develop a theme or theory of the case

Many advocates have found that the theme or theory of the case can best be developed in explanation of the case to non-attorney friends. The theory is based on the idea that ruling in favor of your client's position is the just thing to do. In one or two sentences, explain why the Court should rule in favor of your client. Keep this theory in mind as you prepare and argue your case.

4. At the Lectern

a. Opening

Greet the Court. Write down your opening lines, "May it please the Court," "Chief Judge (if he or she is on the panel) and Judges of the North Carolina Court of Appeals," "I am (and write your name), and I represent (name of client)." If you are appellant, you should reserve time for rebuttal. The advocate should have an outline of what he or she intends to say if the Court allows him or her to give a brief opening without interruptions to ask questions.

b. The argument

Relax, be yourself and keep eye contact with all the judges. Although your purpose is to engage in dialogue with the Court, your style should remain dignified. If necessary, adjust the microphone. Project your voice, speak into the microphone, and enunciate so that all the judges can hear you. It is important to speak with conviction.

If it seems you have won your point, do not continue to argue it. When referring to a judicial opinion, to keep the flow of your argument, do not routinely give the citation to the Court. Do not refer to facts or materials outside the record. You may use exhibits entered into evidence at the trial court. However, use exhibits only when they will make a critical point that cannot be otherwise made. Be extremely cautious about using any kind of humor or informality in addressing the Court. The Court expects advocates to exhibit a serious and respectful

demeanor. When the judges use humor, respond briefly in acknowledgment and appreciation of the humor and move on.

c. Answering questions

Listen very carefully to the Court's questions. Ask for repetition or clarification if you cannot hear or understand. Respond to each of the questions or comments in a respectful tone of voice. Never interrupt the Court. So long as you are fully prepared, you will naturally cover your major points in answering the Court's questions. The best approach is to remain flexible and open to answer questions in any order given. In response to a question, it is unwise to say, "I'll address that point later" since the question contains what the judge is most concerned about. The Court may ask questions hypothesizing that the facts are slightly different in some respect, and asking whether the proposed rule would still apply. Do not answer these hypothetical questions solely by stating, "That is not this case." In responding to these questions, emphasize your strong points and themes. Counsel should not try to avoid answering questions.

d. Conclusion

As in all good courtroom practice, request that the Court rule in your client's favor and tell the Court specifically how you would like the Court to rule. Reiterate for the Court the one or two strongest arguments. Thank the Court.

5. Checklists (Adapted from Supreme Court and Appellate Advocacy, David C. Frederick, Thomson West (2009))

a. Basic chronology of preparation

- Review Briefs
- Review Records
- Review Judicial Opinions, Statutes, Rules, Regulations Cited in Briefs
- Draft List of Potential Questions
- Draft Opening
- Prepare Argument by Issue or/Section of Brief
- Research and Prepare Answers to Potential Questions
- Conduct Moot Courts
- Revise Argument/Answers
- Tab Record Materials and Briefs for Quick Reference
- Make List of Key Affirmative Points
- Develop Segues
- Prepare Argument Notebook
- Memorize Opening
- Review Argument Notebook--Judicial opinions, rules, regulations
- Review Briefs

b. Items to Prepare

- Key Portions of Record on Appeal
- Key Precedents

- Affirmative Points
- Responsive Points to Opponent's Arguments
- Statutory Text
- Legislative History
- Applicable Rules of Procedure
- Policy Rationale for Rule Being Advocated
- Legal and Factual Analogies Raised by Issue Presented
- Opening
- Closing

c. Items in Argument Notebook

- Opening
- Affirmative Points
- Responsive Points to Opponent's Arguments
- Key Statutes, Rules, Regulations
- Brief Chronology of Facts and Proceedings
- Summaries of Judicial Opinions
- Questions and Answers
- Key Judicial Opinion or Opinions

d. Items to take to Court

- Time-keeping device
- Argument Notebook
- Briefs
- Binder of Judicial Opinions
- Record on Appeal
- Pertinent Statutes
- Pertinent Rules and Regulations
- Pens
- Pad of paper
- Post-its or Tabs
- Throat lozenges
- Glasses
- Contact lenses, case, and solution
- Tissues
- Highlighter
- Comb or hairbrush

Sources and Resources:

A Practitioner's Guide to Appellate Advocacy, Anne Marie Lofaso, Editor, American Bar Association, 2010, See Chapter 15, "Oral Argument," by Lawrence D. Rosenberg, partner, Jones Day, Washington, DC. (excellent essay)

Appellate Practice in the U.S., Second Ed., Robert L. Stern, Bureau of National Affairs, Bureau of National Affairs, 1989, See Chapters 13-15: 13-“Before the Argument”; 14- “Preparation for Argument”; 15- “The Contents of the Argument.”

Art of Advocacy: Appeals, Houts, Rogosheske, Matthew Bender, 2009, See Chapters 40-42: 40-“The Tragic Passing of Oral Argument”; 41-“A Few Tips on Public Speaking”; 42-“Do’s and Don’ts for Oral Argument—contains good chart of suggestions.” (notebook with updates)

How to Handle an Appeal, 4th Ed., Herbert Monte Levy, Practising Law Institute, New York, 2009, See Chapter 9: “Oral Argument,” (notebook with updates).

Making Your Case: The Art of Persuading Judges, Antonin Scalia and Bryan Garner, Thomson/West, 2008.

Mastering Appellate Practice in North Carolina, Continuing Legal Education, North Carolina Bar Foundation, 2007. See Chapter IV, “Keys to Succeeding at Oral Argument,” James G. Exum, Smith Moore, Greensboro, North Carolina.

North Carolina Appeals Deskbook, Gordon Widenhouse, Jr., Ed., Lexis Nexis, 2008.

Supreme Court and Appellate Advocacy, David C. Frederick, Thomson West, 2009.

Winning An Appeal, 4th Ed., Myron Moskowitz, Matthew Bender, 2007, See Chapter 5, “Oral Argument.” (excellent slim volume of practical advice)

Maps: Court and Parking

<http://www.godowntownraleigh.com/get-around/parking>

http://www.visitraleigh.com/pdf/Downtown_map_printable.pdf

<http://www.raleighconvention.com/raleigh-downtown-city-map.php>

<http://www.godowntownraleigh.com/go/state-court-of-appeals>

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