

CLIENT ALERT

Federal Circuit Adds New Guidelines to its Oral Argument Guide

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Appellate advocacy differs in many ways from earlier phases of a litigation. Perhaps the most significant differences can be observed during oral arguments. Time constraints combined with an extensive record and the high stakes at issue in an appeal can pose significant challenges for counsel and the panel of judges alike. To further streamline this process, the U.S. Court of Appeals for the Federal Circuit published an updated version of its Oral Argument Guide (located [here](#)). Although this new version modifies the Court's guidelines in several respects, the Court's summary signals the main focus to be on "a revised Courtroom Decorum Policy and new Guidelines for Counsel During Argument." See [Updated Argument Resources](#) (last visited Jan. 29, 2020).

The Guide adds Section VI, titled "Guidelines for Counsel During Argument." This new section is designed "to assist counsel in making the best use of the allotted time at argument." The full list of guidelines reads:

- Counsel should not interrupt a judge.
- Assume the court is familiar with the facts of the case.
- Minimize reading.
- Have a copy of the appendix and be familiar with the location of items.
- Assume the court is familiar with the briefs and appendix contents.
- When raising new authority at argument, provide a copy to opposing counsel ahead of time.
- Stop your argument when your time expires unless the court permits you to continue.
- Answer questions directly.
- Avoid pejoratives.
- When referring to specific portions of the appendix, provided accurate page citations.
- Do not respond to a question with an unqualified citation to your brief in response to a question.
- Counsel seated at counsel tables should neither make inappropriate facial gestures nor engage in exaggerated gesticulation.

Although many of the points listed here should be obvious to practitioners, they appear to correspond directly to conduct that the Court has observed over the years and that tend to slow down oral arguments. The focus at the appellate level often tends to revolve around the briefing. But oral argument is a powerful tool for directly addressing Court's most consequential concerns. They are therefore paramount and can often affect the outcome. Given the little time available during oral arguments, the Court's updated Guide is an attempt to streamline them. At the same time, the Guide raises the bar for all lawyers who appear before the Court to comport with its articulated standards. These are now the court's published guidelines, not just unspoken best practices.

The Guide aligns with best practices of seasoned appellate lawyers. As an example, while outlines and notes are certainly useful for an appellate argument, the focus should be on answering the Court’s questions in a direct manner rather than reading prepared answers aloud. The Guide thus advises lawyers to minimize reading and answer questions directly to the Court. Additionally, support is imperative at oral argument just as much as in written advocacy. A well-prepared appellate advocate has a mastery of the record before the Court and, as the Guide suggests, should be able to provide accurate citations for propositions being addressed.

The Court’s Guidelines with respect to decorum (Section V) are largely designed to minimize distractions. The guidelines define where lawyers may sit or stand and where to store large bags and coats. They also prohibit noise during argument, eating and drinking, reading irrelevant materials, and use of electronic devices. To avoid distracting from the substance of the arguments, it behooves all litigants to strictly adhere to the Court’s decorum guidelines.

In another notable change, the Court clarified Section III(H), titled “Use of Visual Aid at Argument.” The court discourages the use of visual aids, and “*particularly* the use of electronic presentations in a slideshow format.” (Emphasis added). Again, this is an area where appellate advocacy differs from oral argument at the district court level.

The guidelines are an aid designed to help arguments run smoothly, and thus failing to follow them can only detract from one’s success at the Court. Given that this is the Court’s third version of the document since October 2018, it seems likely that the court will continue to revise and update its guidelines in an effort to make oral argument as useful and streamlined of a decision-making tool as possible.

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