



**GUIDE**

**FOR**

**COUNSEL**

**IN CASES TO BE ARGUED  
BEFORE THE**

**UNITED STATES  
COURT OF APPEALS  
FOR VETERANS CLAIMS**

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# UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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## GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THIS COURT

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### I. INTRODUCTION

This guide is designed to assist attorneys and non-attorney practitioners preparing cases for argument before this Court, especially those who have not previously argued here. It is not a substitute for the Court's Rules of Practice and Procedure. Counsel should familiarize themselves with the Rules of Practice and Procedure that are available on the Court's Website at [www.uscourts.cavc.gov](http://www.uscourts.cavc.gov).

The Clerk will notify counsel when the Court enters an order setting the date and time for oral argument. Please read the Rules of Practice and Procedure and this guide carefully, as they set forth guidance for counsel. Any questions counsel have should be directed to the Clerk's Office (ph. 202-501-5980). Counsel may also write the Clerk's Office at U.S. Court of Appeals for Veterans Claims, 625 Indiana Avenue, NW, Suite 900, Washington, DC 20004-2950. All records are kept by docket number; it is important that counsel have the docket number at hand when seeking information. **IMPORTANT:** The Clerk's Office must be notified immediately of any changes, including any change of counsel. The Clerk's Office relies upon those attorneys listed as counsel of record for all communications, as do parties interested in filing amicus briefs. Entering counsel must file a notice of appearance; withdrawal requires Court approval - see Rule 46.

### II. ORAL ARGUMENT

#### A. SCHEDULE & PREPARATION

Oral arguments are normally conducted during the second and fourth weeks of every month. The oral argument schedule is on the Court's website at [http://www.uscourts.cavc.gov/oral\\_arguments\\_schedule.php](http://www.uscourts.cavc.gov/oral_arguments_schedule.php). Arguments are scheduled on Tuesday through Thursday of each week when oral argument is held. Unless the Court directs otherwise, each side is allowed one-half hour for argument. If the Court hears more than one argument in a

single day, it generally hears one argument at 10:00 a.m. and one at 1:30 p.m. The Court may also hear argument in two cases on a single morning, beginning at 10:00 a.m. and may adjourn after the argument in the second case ends, usually around noon. Rule 34 of the Court's Rules of Practice and Procedure contains additional information concerning oral arguments.

When your case has been calendared for argument, the Clerk will send a notice to counsel. For directions to the Court, see the Court's Website, [www.uscourts.cavc.gov](http://www.uscourts.cavc.gov).

Occasionally, the Court holds oral arguments on law school campuses and other locations throughout the nation. If you are preparing for such arguments and need further information about the location of the argument, please call the Clerk's Office at the number provided in Section I, above.

To the extent possible, the Clerk will endeavor to schedule the oral argument to avoid conflicts. If counsel have any longstanding professional or religious commitments, or for some reason cannot appear for oral arguments on the date set for argument, counsel must file and serve a motion to opposing counsel to continue the argument. An affidavit providing the reasons for the request must accompany the motion.

Please advise the Clerk of any necessary accommodations (e.g., a wheelchair), to permit suitable arrangements at the counsel tables.

## B. DAY OF ARGUMENT

Arguing counsel and co-counsel who will be seated at the counsel tables for cases to be argued in the morning must report on the day of argument to the conference room in the second-floor library of the Court at 9:15 a.m. The Clerk will brief counsel at this time on Courtroom protocol and answer any last-minute questions they may have. Arguing counsel and co-counsel whose cases are scheduled for the afternoon session need not be present in the morning for the Clerk's briefing or the oral arguments, but must instead report to the library on the day of argument at 12:45 p.m. for a briefing by the Clerk. If desired by counsel, the Clerk will make arrangements for wi-fi access in the courtroom and, should counsel find themselves in need of anything unexpectedly, the Clerk will attempt to accommodate counsel's needs.

Appropriate attire for counsel is conservative business dress in traditional dark colors (e.g., navy blue or charcoal gray).

Electronic devices may be used by counsel in the Courtroom. If access to wi-fi is needed, please notify the Clerk during the briefing. Cell phones and any other electronic devices not in use must be turned off or in silent mode and stored. Coats, hats, and unneeded papers of arguing counsel and co-counsel may be left in the conference room in the library on the second floor. Coats and hats may also be hung on the coat racks outside of the Courtroom.

On argument days, no interviews may be conducted and news cameras are not permitted in the Court building; however, interviews may take place and cameras are allowed in the front of the building, where reporters may wait to talk to counsel after argument has concluded.

Audio transcripts of oral arguments will be posted on the Court's Website, [www.uscourts.cavc.gov](http://www.uscourts.cavc.gov), within one business day of the argument. To obtain a copy of the argument on CD, contact the Clerk's Office at 202-501-5980.

### C. SEATING FOR COUNSEL

After you have met with and been briefed by the Clerk, the Clerk is available to escort you to the Courtroom. You should advise the Courtroom officials if you are scheduled to move the admission of an attorney.

Two seats are available at each counsel table in the Courtroom, one for the arguing counsel and second to accommodate a co-counsel, if any. Generally, only one co-counsel per each arguing counsel will be seated at the table.

It is appropriate for co-counsel to occupy the arguing counsel's chair when the latter is presenting argument. Except in extraordinary circumstances, co-counsel do not pass notes to arguing counsel during argument.

### D. IN THE Courtroom—ORDER OF BUSINESS

Arguing counsel and their co-counsel should be settled in the Courtroom and seated in their assigned seats at the counsel tables about 5 minutes before Court is scheduled to open. The Clerk of the Court cries the Court in at 10:00 a.m. The Presiding Judge makes routine announcements. Any motions for admission to the bar will occur next. The Presiding Judge will then announce that the Court will hear the scheduled argument. Counsel will be asked to identify themselves to the Court, and counsel should stand when doing so. Appellant's counsel will then be asked if they are ready, if they wish to reserve time for rebuttal, and asked to proceed. You may acknowledge the usual: "Judge [Name of Presiding Judge], and may it please the Court." "Chief Judge" is used only in addressing the Chief Judge, who, you should note, may not always be part of the panel. Judges are referred to as "Judge Kasold" or "Judge Schoelen," for instance, or, "Your Honor." If you are in doubt about the name of a Judge who is addressing you, look to the Judge's nameplate. Remember, it is better to use "Your Honor" than to address one Judge by another's name.

### E. YOUR ARGUMENT

Demonstrating the principles recommended below, the attorneys in *Ramsey v. Nicholson*, 20 Vet.App. 16 (2006) (argued Sept. 22, 2005), provide an example of excellence in oral argument. The attorneys offer a commanding knowledge of the facts and law at issue; they articulate issues clearly and concisely; and they answer Judges' questions promptly, directly, and incisively. Oral argument

in *Ramsey* illustrates that counsels' preparedness and understanding of protocol enable the Judges to efficiently probe and comprehend the parties' arguments.

Counsel are encouraged to listen to the oral argument in *Ramsey*. An audio file of the argument is available on the Court's Website, [www.uscourts.cavc.gov](http://www.uscourts.cavc.gov), under "Oral Arguments", "Audio", "2005."

### 1. *Preparation*

Remember that briefs are different from oral argument. A complex issue might take up a large portion of your brief, but there might be no need to argue that issue. Merits briefs should contain a logical review of all issues in the case. Oral arguments are not designed to summarize briefs, but to present the opportunity to stress the main issues of the case that might persuade the Court in your favor.

Some counsel find it useful to have a section in their notes entitled "cut to the chase." They refer to that section in the event that most of their time has been consumed by answering questions posed by the Judges. Consulting a list of essential points allows counsel to efficiently use the few precious minutes remaining to stress main points.

If your argument focuses on case law, statute, regulation, or other enactment, be sure that the authority is printed in full in one of your pleadings so that you can refer the Judges to it and they can look at it during your argument.

Do not bring numerous volumes to the lectern. One notebook will suffice. Some brave counsel know their cases so well, they argue without any notes.

Be well acquainted with the entire body of law that relates to each issue, not just the cases you cite in your brief.

Know the record, especially the procedural history of the case. Be prepared to answer a question such as: "Why didn't you make a motion for expedited consideration?" You have the opportunity to inform the Judges about facts of which they are not aware. Judges frequently ask: "Is that in the record?" Be prepared to answer. It is impressive when you can respond with the page where the information is located. It is also quite effective to quote from the record of proceedings.

Do not make assertions about issues or facts not in the record. Know your client's claim. Know the circumstances of your client's medical examinations, names of physicians, dates of examinations, and whether there are conflicting opinions.

Many attorneys find it instructive to attend a courtroom session before their scheduled argument day. If you choose to do this, feel free to come by the Clerk's Office and introduce yourself to the Clerk.

In addition, the following are excellent sources of information for counsel to consult in preparing for argument: *Making Your Case: the Art of Persuading Judges*, by Justice Antonin Scalia and Bryan A. Garner; Chapter 14, "Oral Argument," *Supreme Court Practice* (9th ed.), by Eugene Gressman, Kenneth Geller, Stephen Shapiro, Timothy Bishop, and Edward Hartnett; and *Supreme Court Appellate Advocacy: Mastering Oral Argument*, by David Frederick.

## 2. Time

Argument time is normally limited to 30 minutes. You need not use all your time. In several U.S. Supreme Court cases, counsel for respondents used only a third or less of the time allotted and nonetheless prevailed in their cases. For example, counsel for the respondent in *Burgess v. United States*, 553 U.S. 124 (2008), argued for only 7 of the allotted 30 minutes and yet prevailed in a unanimous decision of the Court.

There is a digital clock on the podium that will show your allotted time for argument. If your time expires while you are answering a question from a Judge, unless asked to stop you may continue your answer and respond to any additional questions from that Judge or any other Judge. Do not, however, continue your argument without leave of the Court.

In a divided argument, it is effective for counsel to inform the Court of their argument plan. For example, appellant's counsel might say: "I will address the relevant statutes and regulations and counsel for the amicus will address the arguments of General Counsel."

Appellant's counsel who wants to reserve time for rebuttal should, prior to arguing, say: "I would like to reserve \_\_ minutes for my rebuttal." Appellant's counsel then argues, and the Courtroom Clerk will set the time for 30 minutes minus the requested rebuttal time. Appellee's counsel proceeds to the lectern, waits for acknowledgment by the Presiding Judge, and then opens with the following: "Judge [Name of Presiding Judge], and may it please the Court." When appellee's counsel has finished and gathered all items from the lectern, appellant's counsel should return to the lectern and wait for acknowledgment by the Presiding Judge, at which time the Presiding Judge will say, e.g.: "You have 5 minutes remaining." You may begin your rebuttal at this time without having to repeat: "Judge [Name of Presiding Judge], and may it please the Court."

Following argument, the Presiding Judge announces: "The case is submitted." At this point, the Presiding Judge may announce that the panel will greet counsel, at which time the Judges will pass by counsel tables and greet counsel by shaking their hands. Promptly and quietly vacate the front argument table after the Judges have departed and the Clerk has announced that "the Court is in recess."

## 3. Protocol

The Court is not a jury. A trial lawyer tries to persuade a jury with facts and emotion. At this Court, counsel should try to persuade the Court by arguing points of law.



Your argument should focus only on the question or questions presented in the briefs and record on appeal. Do not deviate from that question or those questions. It is unfair to both opposing counsel and to the Court to introduce arguments for which they have not prepared.

Ordinarily the Judges will know whether you are making your first argument before the Court. Be assured that some first-time arguments have been far superior to presentations from counsel who have argued several times.

As noted above, if your argument focuses on case law, statute, regulation, or other enactment, be sure that the authority is printed in full in one of your pleadings so that you can refer the Judges to it and they can be looking at it during your argument.

Counsel for the appellant need not recite the facts of the case before beginning argument. The facts are set out in the briefs, which the Judges have read.

Please speak clearly and distinctly, and try to avoid a monotone delivery. Speak into the microphone so that the Judges can hear you and you can be recorded clearly. Do not allow notes or books to touch the microphones. Avoid reading your argument from a prepared script.

You should not attempt to enhance your argument time by a rapid-fire, staccato delivery.

Exhibits can be useful in appropriate cases, but be very careful to ensure that any exhibit you use is appealing, accurate, and capable of being read from a distance of about 25 feet. Be sure to explain to the Court precisely what the exhibit is. Counsel must advise the Clerk of the intent to use an exhibit as promptly as possible and certainly before oral argument. (See Rule 34g of the Court's Rules of Practice and Procedure.) For a good example of an exhibit used at an oral argument, see the U.S. Supreme Court's decision in *Shaw v. Reno*, 509 U.S. 630, 658 (1993).

You should be knowledgeable about what is and is not in the record in your case. Judges frequently ask counsel if particular matters are in the record. If you are asked a question that will require you to refer to matters not in the record, your answer should so state; then proceed to respond to the question unless advised otherwise by the Judge.

Never interrupt a Judge who is addressing you. Give your full time and attention to that Judge—do not look down at your notes, and do not look at your watch. If you are speaking and a Judge interrupts you, cease talking immediately and listen.

When a Judge makes a point that is adverse to you, do not "stonewall." Either concede the point, as appropriate, or explain why the point is not dispositive of your case and proceed with your argument. Conceding when appropriate gives you greater credibility with the Court with regard to the rest of your argument.

Do not "correct" a Judge unless the matter is essential. In one case before the U.S. Supreme Court, a Justice asked a question and mentioned "waiver." Counsel responded by stating that a

"forfeiture" rather than "waiver" was involved. The distinction was irrelevant, but the comment generated more questions and wasted valuable time.

Be careful not to use the jargon of the military or Department of Veterans Affairs. Even if the jargon is widely understood within those entities, the Court may not be familiar with it. Similarly, during argument do not use the familiar name of your client. For instance, say: "Mr. Clark timely filed the Notice of Appeal," rather than "Bob timely filed the Notice of Appeal."

Do not refer to an opinion of the Court by saying: "In Judge Bartley's opinion." Rather, you should say: "In the Court's opinion, written by Judge Bartley."

If you quote a document (e.g., a statute or regulation) verbatim, tell the Court where to find the document (e.g., page 4 of the record of proceedings).

Attempts at humor usually fall flat. The same is true of attempts at familiarity. For example, do not say something such as, "This is similar to a case argued when I clerked here."

Do not denigrate opposing counsel. It is far more appropriate and effective to be courteous to your opponent. The Court has reprimanded counsel from the bench and in its opinion for counsel's use of derogatory terms to refer to the opposing party. See *Lamb v. Peake*, 22 Vet.App. 227, 236 (2008).

Avoid emotional oration and loud, impassioned pleas. A well-reasoned and logical presentation without resort to histrionics is easier for listeners to comprehend.

Do not argue facts (unless your point is that a Board finding of fact was clearly erroneous or constituted clear and unmistakable error). Argue to the question or questions of law presented.

Counsel for the appellee are often effective when they preface their argument by answering questions that appellant's counsel could not answer or answered incorrectly or ineffectively. This can often get you off to a positive start.

If your opponent is persuasive on a certain theme during argument, especially one that was not anticipated, you should address that issue at the outset of argument or rebuttal argument rather than adhere to a previously planned presentation. You take a great risk if you ignore a persuasive point made by your opponent.

Rebuttal can be very effective. But you can be even more effective if you thoughtfully waive it when your opponent has not been impressive. If you have any rebuttal, make it and stop. There is no requirement that you use all your allotted time.

#### 4. *Answering Questions*

You should assume that all of the Judges have read the briefs filed in your case, including amicus curiae briefs.

Anticipate the questions the Judges will ask and be prepared to answer those questions. If a case with issues similar to yours was previously argued in this Court, consider reviewing the oral argument in that case. Reviewing oral argument from a similar case might help you anticipate questions from those Judges who heard the previous case. If an audio file of the oral argument you seek is not available on the Court's Website, please call the Clerk's Office at 202-501-5980, to find out whether a recording of the oral argument is otherwise available.

Make every effort to answer the Judges' questions directly. If at all possible, say "yes" or "no," and then expand upon your answer if you wish. If you do not know the answer, you should say so. When a Judge asks you a question, do not respond by posing another question to the Judge.

If counsel stumbles on a question from the Court or does not fully answer it, it is a good tactic for an amicus curiae counsel or other counsel supporting that counsel's side to begin argument by repeating the question and answering it correctly and completely. Other supporting counsel will have had time to reflect on the question and perhaps develop a better answer.

A Judge will often ask a counsel seeking to establish a new precedent: "Do any cases from this Court support your position?" Be ready for the question, but be careful to cite only those cases that truly support your position. Do not distort the meaning of a precedent. The author of the opinion is likely to be a member of the Court and to have a remarkable memory of exactly what the opinion says. If you are relying on a case that had a dissent or multiple dissents in an en banc decision, be sure to mention that there was a dissent by Judge \_\_\_ in the case.

In appropriate cases, suggest to the Court that bright-line rules should be adopted and suggest what they should be.

If a question seems hostile to you, do not answer with a short and abrupt response. It is far more effective to be polite and accurate.

If a Judge poses a hypothetical question, you should respond to that question on the facts given in the question. In the past, several attorneys have responded: "But those aren't the facts in this case!" The Judge posing the question is aware that there are different facts in your case, but wants and expects your answer to the hypothetical question. Answer, and after that, if you feel it is necessary, say something such as: "However, the facts in this case are distinguishable."

Your answer should be carefully tailored to fit the question. A "yes" or "no" answer might be suitable for a narrow question. However, a simple "yes" or "no" in response to a broad question might unintentionally concede a point and prompt a follow-up question or statement that may ultimately damage your position.

In recent years, in response to a Judge's question at oral argument, one counsel responded, "I'll get to that." Never respond to a Judge's question with, "I'll get to that." If a Judge is asking the question it means that he or she would like the answer immediately. Evading Judges' questions contravenes the purpose of oral argument, frustrating the Judges' efforts to find answers to the questions they bring to oral argument.

If you are finishing one Judge's question when second Judge asks you another, ask the second Judge's indulgence to finish answering the first Judge's question. Although there is no definite rule of protocol, if two Judges start to speak at once, the junior Judge will generally withdraw in deference to the senior. Perhaps you could respond to the senior Judge's question first, and then address questions from junior Judges. These are the active Judges of the Court in order of seniority: Chief Judge Hagel, Judge Kasold, Judge Lance, Judge Davis, Judge Schoelen, Judge Pietsch, Judge Bartley, and Judge Greenberg.

### **III. COURTROOM SEATING**

Courtroom seating is limited. Spectators are seated first come, first seated. Groups can request reserved seating of up to 15 persons by writing the Clerk of the Court as far in advance as possible.

If arguing counsel desires to reserve space in the public section, counsel must contact the Clerk's Office after receiving notice of the argument. A letter concerning reservations, including the names of guests, should be sent to: Clerk of the Court, United States Court of Appeals for Veterans Claims, 625 Indiana Avenue, NW, Suite 900, Washington, DC 20004-2950. The Clerk, depending on available space, will endeavor to accommodate as many of your guests as possible.

When your guests arrive at the Court on the day of argument, they may deposit coats, hats, briefcases, cameras, electronic equipment, and similar items in the library conference room on the second floor or on the coat racks outside of the Courtroom. They should then proceed to the ninth floor. From there, a Marshal will escort them to the Courtroom, which is on the eleventh floor. Electronic devices must be turned off or on silent mode and be stored away during argument.

If you or a guest needs a device for the hearing impaired, please request assistance from the Clerk's Office.

### **IV. DECISIONAL PROCESS**

After a case has been argued, the panel will hold a conference and develop a decision. The case will be assigned to a Judge to write the majority opinion. Decisions may be issued at any time after the argument. The only information the Clerk or his staff can give you in this regard is that cases that have been argued will be decided as expeditiously as possible.

Opinions are issued by the Court on any business day the Court is open. Copies of opinions are electronically transmitted to arguing counsel and counsel of record on the day of issuance. Soon after they are issued, opinions are available on the Court's Website, [www.uscourts.cavc.gov](http://www.uscourts.cavc.gov), and on LEXIS and Westlaw.

Entry of judgment, pursuant to Rule 36 of the Court's Rules of Practice and Procedure, "[u]nless the Court orders otherwise," will be entered by the Clerk after the later of "the date on which the time allowed in Rule 35(d) (Time for Motion) has expired, or the date on which the Court renders a decision on any motion(s) filed pursuant to Rule 35 (Motions for Reconsideration, Panel Decision, or Full Court Review) when no further motion under Rule 35 is permitted to be filed."

As for issuance of mandate, Rule 41 of the Court's Rules of Practice and Procedure provides:

Mandate is when the Court's judgment becomes final and is effective as a matter of law pursuant to 38 U.S.C. § 7291(a). Mandate generally is 60 days after judgment entered unless—a timely notice of appeal to the U.S. Court of Appeals for the Federal Circuit is filed with the Clerk. Mandate was issued as part of an order on consent (I) dismissing, terminating, or remanding a case, or (ii) granting or dismissing an uncontested application for attorney fees and expenses or the Court directs otherwise.

If the appellant prevails, an application for attorney fees and expenses may be submitted after mandate is issued.

## **V. TRANSCRIPTS**

Audio recordings of oral arguments will be posted on the Court's Website, [www.uscourts.cavc.gov](http://www.uscourts.cavc.gov), within one business day of the argument. To obtain a copy of the argument on CD, contact the Clerk's Office, at 202-501-5980.

## **VI. RECORDS**

The Court's Rules of Practice and Procedure address the record before the agency. The Rules also permit the parties to inspect the materials that were before the Board and to file motions to supplement the record.

Rule 10, "Record Before the Agency," not later than 60 days following the notice of docketing, the Secretary shall: copy all materials that were contained in the claims file on the date the Board issued the decision from which the appeal was taken; copy any other material from the

record before the Secretary and the Board relevant to the Board decision on appeal. The Secretary will list any record matter that cannot be duplicated.

## **VII. GETTING TO THE COURT AND MISCELLANEOUS INFORMATION**

The Clerk and staff wish to be helpful to counsel and will endeavor to answer all requests to assist them in their visit to the U.S. Court of Appeals for Veterans Claims.

### *1. The Court's Website*

The Court's Website, [www.uscourts.cavc.gov](http://www.uscourts.cavc.gov), provides access to the automated docket, opinions, Court calendar, argument calendar, audio files of oral arguments, bar and admission forms and instructions, Rules of the Court, guides to filing appeals, this guide, and other information about the Court.

### *2. Storing Coats, Umbrellas, Cameras, Etc.*

Topcoats, raincoats, umbrellas, hats, cameras, may be left in the Court's library on the second floor or hung in the coat rack outside the Courtroom. Recording devices may not be used in the Courtroom. All cell phones and electronic devices must be put on silent.

### *3. The Court Building: Location and Hours*

The U.S. Court of Appeals for Veterans Claims is located in the city's "Penn Quarter," at 625 Indiana Avenue, NW, Suite 900, Washington, DC 20004-2950. The Court is open from 9:00 a.m. to 4:30 p.m., Monday through Friday. The Court is easily reached by taxi or Metro (subway) from Ronald Reagan (National) Airport. The building is closed Saturdays, Sundays, and holidays. It is accessible to persons with disabilities.

### *4. Getting to the Court by Metro (Subway)*

The Archives-Navy Memorial-Penn Quarter Station (Green and Yellow Lines) lies within one block (.1 miles) of the Court. The following stations are also near the Court: Judiciary Square (Red Line) (.26 miles from the Court) and Gallery Place-Chinatown (Red Line) (.28 miles from the Court).

### *5. Parking*

There is limited commercial parking in the lower floors of the building the Court occupies, and additional commercial parking is available in the vicinity. The Court does not validate parking.

6. *Lodging in Washington, DC.*

There are many hotels in the Washington metropolitan area, several of which are in the vicinity of the Court. Travel websites provide information about hotels for all budgets in the Washington metropolitan area. To search for hotels located near the Court, search for hotels in "Penn Quarter" or in the vicinity of the Verizon Center.

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