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Reserving Time for Rebuttal Oral Argument on Appeal

The Legal Intelligencer
By Howard J. Bashman
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Upon Further Review

Within the past few weeks, I presented an oral argument to a three-judge panel of the 3rd U.S. Circuit Court of Appeals. Because I was representing the party taking the appeal, my oral argument would occur first, followed by the oral argument of counsel for the appellee. Under the 3rd Circuit's practice, I was entitled to devote a portion of my 15 minutes of oral argument time to rebuttal argument that would follow the appellee's argument. But, first, I had to reserve some portion of my 15 minutes for rebuttal with the court's crier and request the panel's permission at the outset of my initial presentation.



Howard J. Bashman

Arguing an appeal before the 3rd Circuit is quite a pleasure, because in addition to the system of lights indicating generally how much time remains, the court has installed a digital time clock that allows the advocate to see precisely how much argument time remains. Because of the complexity of the case that I recently argued before the 3rd Circuit, I decided to reserve four minutes for rebuttal.

In general, when given 15 minutes of oral argument time, I tend to reserve anywhere from three to five minutes for rebuttal depending on the complexity of the case and the likelihood that I will need to address issues that will not arise until the appellee's oral argument. For appellate attorneys, time never goes by as quickly as when you are arguing an appeal, and time never goes by as slowly as when you are waiting for the appellate court to call your case for argument.

The Superior Court of Pennsylvania, one of Pennsylvania's two intermediate state appellate courts, allows the appellant to decide whether an appeal will be orally argued and whether the case will receive either five or 15 minutes of oral argument time per side. Unlike at the 3rd Circuit, the presiding judge at the Superior Court keeps track of the oral argument time using a digital clock that emits a beeping sound when the oral argument time has expired, but that clock is not visible to the arguing attorneys. Of course, if a case is being argued at only five minutes per side, counsel for appellant can usually reserve no more than two minutes for rebuttal argument.

On rare occasion, I have heard attorneys who will be arguing for the appellant at 15 minutes per side express the wish that they could reserve a full 10 minutes of their argument time for rebuttal, while limiting their initial presentation to just five minutes. Such a proposal, which would place the bulk of the appellant's oral argument into rebuttal, tends to be frowned upon by appellate judges, because it deprives counsel for the appellee of the opportunity to respond to what the appellant is actually arguing.

The opposite of wanting to reserve too much time for rebuttal at oral argument is wanting to reserve too little time. On rare occasion, I have seen the attorney for the appellant entirely forget to reserve any time for rebuttal, and thus consume the entire time for oral argument in his or her initial presentation. Sometimes when that happens, the appellate court will allow an extra minute or two for rebuttal, although often I have seen the court simply say to the attorney that he or she gets no rebuttal because the time for oral argument previously expired.

In the case that was called for oral argument immediately after the case that I argued a few weeks ago in the 3rd Circuit, the attorney for appellant at the outset of his presentation told the panel that he wanted to reserve just one minute of his 15 minutes for rebuttal. That drew a skeptical response from the presiding judge, who was doubtful that much if anything could be rebutted in only 60 seconds. Later, in listening to the online oral argument audio of that case posted at the 3rd Circuit's Web site, I learned that the presiding judge had been rightly skeptical, as the attorney for the appellant actually took more than just 60 seconds to present his rebuttal argument after the argument of counsel for appellee had completed.

Before the Commonwealth Court of Pennsylvania, which is Pennsylvania's other intermediate state appellate court, cases selected for oral argument ordinarily receive somewhere between eight to 10 minutes of oral argument time per side before a three-judge panel. In a complex case or a case involving more than just one or two issues, it can be very difficult to address several key points at oral argument when you have only eight to 10 minutes. It is also difficult to reserve more than two or three minutes for rebuttal as counsel for the appellant when you have only a total of eight to 10 minutes for your entire presentation.

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Reserving time for rebuttal is not something that counsel for the appellant needs to be concerned about when arguing a case before the Supreme Court of Pennsylvania. A policy of long-standing duration prohibits counsel for the appellant from reserving time for rebuttal or giving rebuttal oral argument before Pennsylvania's highest court. The usual explanation is that rebuttal oral argument is ordinarily not particularly helpful, and the justices serving on that court can simply anticipate what response counsel for the appellant will give to the points argued by counsel for the appellee.

Unlike in many other appellate courts, the state Supreme Court does not assign a fixed amount of oral argument time to its cases. Thus, oral argument before Pennsylvania's highest court can go on for as much or as little time as the court's Chief Justice deems appropriate under the circumstances. The fact that a case has no allotted amount of oral argument time may make it technically impossible to "reserve" time for rebuttal, but it need not eliminate the right to rebuttal altogether. My own view, based on many years of arguing appeals, is that rebuttal oral argument can be very important and helpful to both the court and to counsel for the appellant, and thus the state Supreme Court should eliminate its prohibition on rebuttal oral argument.

Last but certainly not least, attorneys representing the petitioner or appellant can reserve time for rebuttal when arguing a case before the U.S. Supreme Court, but oral argument time cannot be reserved in advance of, or at the outset of, the argument. Rather, the attorney for the petitioner or appellant must ask the chief justice for permission to reserve the balance of his or her oral argument time for rebuttal as the 30 minutes of total argument time approaches completion.

On rare occasion, one of the justices will have a question for the lawyer as the lawyer is trying to reserve the balance of the oral argument time for rebuttal, making it necessary to directly answer the question and, as a consequence, have even less time remaining for rebuttal. But experienced advocates before the U.S. Supreme Court can rapidly ask to reserve the balance of time for rebuttal so that an adequate opportunity will exist to reply to opposing counsel's oral presentation.

As in the story of Goldilocks, it may be difficult to know in advance how much oral argument time for rebuttal will be too much, too little, or just right. But it is important, when serving as counsel for the appellant, to consider in advance of the oral argument whether rebuttal time can be reserved, how it must be reserved, and in what amount should it be reserved. Giving a strong rebuttal oral argument can make the difference between winning and losing an appeal, because by that point the concerns of the judges and the response to those concerns of opposing counsel are readily apparent.

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