

FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
February 8, 2019

TOPIC:

EFFECTIVE ORAL ARGUMENT PREPARATION AND
PRESENTATION

PRESENTERS:

RICHARD BRAUCHER, FDAP Staff Attorney
STEPHANIE CLARKE, FDAP Staff Attorney
LOUISE COLLARI, FDAP Staff Attorney
MATTHEW SIROKA, FDAP Panel Attorney

MATERIALS:

- Effective Oral Argument Preparation and Presentation Checklist
- First District Justices' Biographies
- Excerpt from *The Little Book on Oral Argument*

EFFECTIVE ORAL ARGUMENT PREPARATION AND PRESENTATION CHECKLIST

FDAP February 2019

I. Decision to Request or Waive Oral Argument

- A. Begin thinking about decision whether to request oral argument at the reply brief stage.
 - 1. Reread all briefs, reviewing each issue.
 - 2. Check for new authority at time of receipt of oral argument notice letter from court.
- B. Things to consider in making the decision to request oral argument (not exhaustive or in any particular order of importance):
 - 1. Novel issue?
 - 2. Complex legal/factual argument?
 - 3. Need to assist court in understanding issues, facts, arguments, or to resolve any doubts court may have about your position?
 - 4. Opportunity to focus the court on the principal issue in the case?
 - 5. Strength and potential impact of the issue(s) presented?
 - 6. Relative strength or weakness of respondent's argument?
 - 7. Opportunity to strengthen your position in some way?
 - 8. Something new/important to say or something better communicated orally?

9. Need to humanize your client, remind court that there is a human being behind the briefs?
 10. Need to highlight justice/fairness points?
 11. Time-sensitive nature of the case and possibility that requesting oral argument will delay the Court's deciding the case?
- C. If unsure about decision to request oral argument, consider consulting project attorney or trusted colleague.
- D. Mechanics of Requesting Oral Argument:
1. Deadline to file request: Within 10 days of oral argument notice.
 2. Fill out oral argument request form found on court's web site and file electronically (1st App. Dist. MISC. Order 13-1, III).
 3. Decide whether to present argument in person or by phone; if by phone, comply with local rules governing argument by teleconference (1st App. Dist. Local Rule 13). (While telephonic or video argument may be necessary at times, it is not optimal due to reduced ability to interact with and read the Court.)
- E. Request transfer of exhibits (if they haven't already been transferred) (Cal. Rules of Ct., rule 8.224(c)).
- F. Court must provide 20 days notice of scheduled oral argument date (Cal. Rules of Ct., rule 8.256(b)).

- G. If you have waived oral argument (by not requesting it), but another party has requested argument, then you must still attend oral argument to represent the interests of your client. Consult the project attorney regarding the scope of your appearance, considering the circumstances of the case and the division.

II. Preparing for Oral Argument

- A. Getting started: review, reevaluate and reassess case:
 - 1. Reread all briefs in order.
 - 2. Refamiliarize yourself with the record, reviewing key portions (e.g., rulings).
 - 3. Refamiliarize yourself with appellate theory/theme of the case (what the case is really about) and “fine tune” your position.
 - 4. If you receive a “focus letter” from the court, prepare thorough answer(s) to issue(s) raised.
- B. Check for significant new authority.
 - 1. If so, file new authority letter (Cal. Rules of Ct., rule 8.254).
- C. Learn about your division and judicial panel:
 - 1. Discover if there are unique practices in the division (e.g., Div. Two requires all counsel appearing to stand when case is called, identify themselves and state, “present and ready”).
 - 2. Read justices’ bios, articles.
 - 3. Consult with colleagues about justices.
- D. Visit the courtroom and observe an oral argument if you have never appeared in the court before.

- E. Prepare outline/bullet points/some combination that:
 - 1. Focuses on disputed law/facts and contains citations to record and authority;
 - 2. Distills key points;
 - 3. Highlights theme of argument;
 - 4. Do not prepare a script, except maybe your first couple sentences to get you going.
- F. Prepare “greatest hits” of facts and law of your case.
- G. Write out likely “tough” questions and prepare pithy answers.
- H. Re-read key cases and write one line summaries of them (as authority, to distinguish or analogize) for quick reference.
- I. Be prepared to argue your weakest points.
- J. Be prepared for the unexpected (e.g., while you might think issue no. 1 is going to be the court’s focus, the court may have other ideas; or other side may make last-minute concession).
- K. Coordinate with counsel for co-appellant(s), co-respondent(s), or amicus. If there are no conflicts in the positions of the parties, a coordinated approach may be most effective and appreciated by the court.
- L. Discuss or moot court your case with the project staff attorney or colleagues.
- M. Practice aloud key parts of oral argument.
- N. Prepare a very short introduction that provides a focus for the argument and an oral argument roadmap of two to five points that will assist the court in understanding the direction of your argument, presenting your strongest argument first.

- O. Prepare a short conclusion.
- P. Assemble everything you need to bring with you to oral argument in a binder or expandable file folder (outline, talking points, briefs, key portions of record, copies of cases/statutes, etc).
- Q. Set up any necessary accommodations with court:
 - 1. Ex: Hearing-impairment accommodations – Contact division clerk in advance of oral argument to request hearing accommodation. Formal request only required if more than assisted listening device is needed (use Judicial Council form MC-410.) The Court can provide devices that fit in or over the ears. On a date prior to the actual oral argument, the clerk will arrange a trial run. On oral argument day the court will have the selected device ready and charged.
- R. Communication with client/client's family:
 - 1. Inform your client in advance of the date/time/location, scope, and their right to attend (unless incarcerated).
 - 2. If client and/or client's family wish to attend, provide more detailed information about oral argument (what it is, what to expect, where to sit, etc.).

III. Presenting Oral Argument

- A. Mechanics
 - 1. Dress professionally. You want your argument, not your outfit, to be noticed.
 - 2. Do not go to court on an empty stomach. Have some food and/or water beforehand as you may be there for hours.

3. The First District Court of Appeal courtroom is on the Fourth Floor of the Court of Appeal building at 350 McAllister Street, San Francisco. Directions by car and public transit [are available on the Court's website](#).
4. Plan to arrive **at least** 30 minutes before oral argument is to commence. Leave plenty of time for traffic jams and public transportation delays.
5. Pursuant to [Court policy](#), laptop computers and electronic tablets are allowed in the courtroom as an aid in presenting oral argument. No cellular telephones or other electronic devices are permitted in the courtroom; you will have to check those with the security right outside the courtroom.
6. Restrooms, a drinking fountain, and a large and comfortable lounge with chairs and tables are on the Third Floor, accessible by stairs or elevator from the courtroom.
7. When you arrive at the courtroom on the Fourth Floor, there will be a small table right in front of you as you exit the elevator. On the table will be a form to fill out with your name, the party you represent, and the case name. You will hand it to the Clerk when you enter the courtroom. On the small table you will also see a list of the cases on the calendar. The cases will be listed in the likely order in which they will be called, but the Court can vary from that order.
8. While you wait, engage in activity to get grounded, provide focus, and calm the nerves (e.g., deep breathing, silent affirmations, etc.).



9. When you enter the courtroom, hand the Clerk the form with your name on it. Then take a seat in the audience (unless your case is first and the Clerk instructs you to sit at counsel table). It is best to sit on the side of the audience closest to the seat at counsel table you will take. Appellant's counsel sits to the right of the podium; respondent's counsel to the left. If you sit in a seat on the aisle, it will be easier to get to the counsel table when your case is called.
10. The podium has a button you can use to lower or raise it. Make sure the flexible mic is positioned so that you are speaking into it.

B. The Argument

1. When your case is called (assuming you are the appellant), introduce yourself to the panel, and specify the amount of rebuttal time you are reserving.
2. Engage with your panel, animate your case, focusing as soon as possible on what is important about your case.
3. Make eye contact, speak slowly, clearly, directly and concisely.
4. Listen carefully to questions, asking for clarification when needed.
5. When a justice asks a question, you should answer the question directly with a "yes" or "no," before explaining your answer. If you don't know the answer, tell the court directly with any clarification that you can offer.

6. If the court discusses a matter that is important to your case but which you have not had an opportunity to address, request leave to brief the issue with a letter brief.
7. If the court's questioning implies that you are winning on a decisive issue, be prepared to reserve the rest of your time for rebuttal, and sit down.
8. Be attentive when opposing party is arguing, jotting down careful notes of points that must be addressed at rebuttal, paying attention to what the justices appear to be focusing on.
9. At rebuttal, briefly address significant opposing party's points (facts/law that must be corrected, distinguished). End oral argument with a brief, strong conclusion.

Justices of the California Court of Appeal, First Appellate District

Division One	
<p><u>Jim Humes, Administrative Presiding Justice</u></p> 	<p>Appointed in December 2012; became Presiding Justice of Division One in 2014; Governor Brown’s Executive Secretary for Legal Affairs, Administration, and Policy; Chief Deputy for then-Attorney General Brown; Chief Assistant for the Civil Division; Colorado Attorney General’s Office</p> <p>J.D., University of Denver; Master of Social Science from the University of Colorado; B.A., Illinois State University</p> <p>OBSERVATIONS/INFORMATION:</p> <hr/> <hr/> <hr/>
<p><u>Sandra L. Margulies, Associate Justice</u></p> 	<p>Appointed in January 2002; Judge, Alameda County Superior Court, 1988-2002; Judge, San Leandro-Hayward Judicial District, 1985-1988; Deputy District Attorney, Alameda County, 1977-1985</p> <p>J.D., Southwestern University School of Law; B.A., University of California at Los Angeles, Magna Cum Laude</p> <p>OBSERVATIONS/INFORMATION:</p> <hr/> <hr/> <hr/> <hr/> <hr/>

Kathleen M. Banke, Associate Justice



Appointed in June 2009; Judge, Alameda County Superior Court 2006-2009; Partner at Reed Smith LLP/Crosby, Heafey, Roach & May, specializing in appellate practice for more than 20 years; co-author of California Practice Guide: Civil Procedure Before Trial–Statutes of Limitations (The Rutter Group 2017); chief consulting editor of and a contributing author to California Civil Writ Practice (CEB 4th ed. 2008); contributing author to California Civil Appellate Practice (CEB 3d ed. 1996), Employment Litigation (TRG 2001), and Federal Civil Trials and Evidence (TRG 2000)

OBSERVATIONS/INFORMATION:


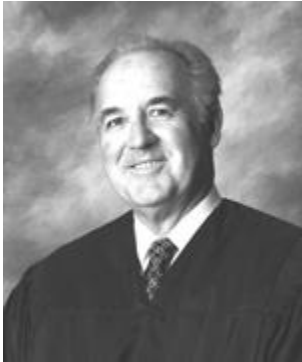
Gabriel P. Sanchez, Associate Justice







Appointed in 2018; Deputy Legal Affairs Secretary, Office of Governor (2012-2018); Deputy Attorney General (2011-2012); Munger, Tolles and Olson LLP (2006-2011); Law Clerk, Judge Paez, 9th Cir. (2005-2006)



J.D., Yale Law School.



OBSERVATIONS/INFORMATION:



Division Two	
<p><u>J. Anthony Kline, Presiding Justice</u></p> 	<p>Appointed Presiding Justice in December 1982; Judge, San Francisco Superior Court 1980-1982; 1975, Legal Affairs Secretary to Governor Edmund G. Brown, Jr.; Managing Attorney of Public Advocates; Legal Services Lawyer and was one of the founders of Public Advocates, Inc; associate at Davis Polk and Wardwell; law clerk to Justice Raymond E. Peters of the California Supreme Court</p> <p>LL.B., Yale Law School; M.A., Cornell University; B.A., Johns Hopkins University</p> <p>OBSERVATIONS/INFORMATION:</p> <hr/> <hr/> <hr/> <hr/>
<p><u>James A. Richman, Associate Justice</u></p> 	<p>Appointed in February 2006; Judge, Alameda Superior Court 1996-2006; associate/partner at Cooley Godward LLP 1967-1996; Adjunct professor at University of San Francisco School of Law; Assistant Professor at Gonzaga University School of Law; clerk for the Honorable Raymond L. Sullivan on the First District Court of Appeal.</p> <p>J.D., University of San Francisco School of Law; University of San Francisco</p> <p>OBSERVATIONS/INFORMATION:</p> <hr/> <hr/> <hr/> <hr/>



<p><u>Therese M. Stewart, Associate Justice</u></p> 	<p>Appointed in June 2014; Chief Deputy City Attorney for the City and County of San Francisco; associate/partner Howard, Rice, Nemerovski, Canady, Falk & Rabkin; law clerk for Judge Phyllis A. Kravitch on the Eleventh Circuit from 1981 to 1982.</p> <p>B.A. with distinction from Cornell University in 1978; Graduated Order of the Coif at Boalt, U.C. Berkeley School of Law in 1981.</p> <p>OBSERVATIONS/INFORMATION:</p> <hr/> <hr/> <hr/> <hr/>
<p><u>Marla J. Miller, Associate Justice</u></p> 	<p>Appointed in November 2014; Judge, San Francisco Superior Court; partner, Morrison & Forester; assistant United States Attorney in the criminal division of the U.S. Attorney's Office for the Northern District of California (1987-1992); Chief Assistant District Attorney in the San Francisco District Attorney's Office; director at the law firm of Howard, Rice, Nemerovski, Canady, Robertson & Falk; law clerk to Judge Charles M. Merrill on the U.S. Court of Appeals for the Ninth Circuit, in San Francisco.</p> <p>J.D. (cum laude), Harvard Law School; Harvard University</p> <p>OBSERVATIONS/INFORMATION:</p> <hr/> <hr/> <hr/>



Division Three	
<p><u>Peter J. Siggins, Presiding Justice</u></p> 	<p>Appointed Presiding Justice of Division Three in July 2018; appointed to COA as associate justice in 2006; Legal Affairs Secretary to Governor Arnold Schwarzenegger (2003-2005) and the Governor's Interim Chief of Staff (September to November 2005); Attorney General's Office of the California Department of Justice from 1988 until 2003; general civil litigation and maritime law Acret & Perrochet (1980-1983), as a sole practitioner (1983-1985), and in the two lawyer firm of German & Siggins (1985-1988).</p> <p>J.D., Hasting College of Law; B.A., Loyola Marymount University</p> <p>OBSERVATIONS/INFORMATION:</p> <hr/> <hr/>
<p>Martin J. Jenkins, Associate Justice</p> 	<p>Will be leaving bench in near future to go to the Governor's Office.</p> <p>Appointed on April 4, 2008; Judge of the United States District Court for the Northern District of California, 1997-2008; Judge Alameda County Superior Court, 1992 became the Presiding Judge of the Juvenile Division in 1995; Oakland Municipal Court, 1989; trial attorney Pacific Bell Legal Department, 1986; trial attorney U.S. Department of Justice, Civil Rights Division, 1983; prosecutor for the Alameda County District Attorney's Office, 1980-1983.</p> <p>J.D., University of San Francisco School of Law; Santa Clara University</p>

<p><u>Carin T. Fujisaki, Associate Justice</u></p> 	<p>Appointed in October 2018; Principal Attorney to Chief Justice CA Supreme Court (2015-2018); Judicial Staff Attorney (1991-2014); Staff Attorney (1990-1991); Howard, Rice, Nemerovski, Canady, Robertson and Falk (1986-1990); Research Attorney, S.F. Superior Court (1985 - 1986)</p> <p>U.C. Hastings College of the Law OBSERVATIONS/INFORMATION:</p> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><u>Ioana Petrou, Associate Justice</u></p> 	<p>Appointed in 2018; Judge, Alameda Superior Court. (2010-2018); Assistant U.S. Attorney, Northern District Cal. (2004-2010); O'Melveny and Myers LLP (2002-2004); Assistant U.S. Attorney, Eastern District N.Y. (2000-2002); Foley and Lardner LLP (1996 - 1999); Weissburg and Aronson (1995- 1996); Proskauer Rose LLP (1994-1995)</p> <p>U.C. Berkeley School of Law OBSERVATIONS/INFORMATION:</p> <hr/> <hr/> <hr/> <hr/> <hr/>

Division Four	
<p><u>Stuart A. Pollak, Presiding Justice</u></p> 	<p>Appointed in 2018 as Presiding Justice in Division 4; 2002-2018 associate justice in Division 3; 1982-2002 judge, San Francisco Superior Court; 1965-1982 Howard Rice Nemerovski Canady & Pollak; 1963-1965 United States Department of Justice, Criminal Division; Special Assistant to Assistant Attorney General 1964 President's Commission on the Assassination of President John F. Kennedy; 1962-1963 Law Clerk to Chief Justice Earl Warren, and to Justices (Ret.) Stanley Reed and Harold Burton</p> <p>Stanford University, A.B. (with Great Honors); Harvard Law School, LL.B (Magna Cum Laude)</p> <p>OBSERVATIONS/INFORMATION:</p> <hr/> <hr/> <hr/>
<p><u>Jon B. Streeter, Associate Justice</u></p> 	<p>Appointed in November 2014; associate, Keker & Van Nest; Orrick, Herrington & Sutcliffe; former President of the State Bar of California; former law clerk to Senior Judge Harry T. Edwards of the United States Court of Appeals for the District of Columbia Circuit (1982-83)</p> <p>A.B., Stanford University; J.D. from Boalt Hall School of Law at U.C. Berkeley</p> <p>OBSERVATIONS/INFORMATION:</p> <hr/> <hr/> <hr/>

<p><u>Alison M. Tucher, Associate Justice</u></p> 	<p>Appointed in 2018; Judge, Alameda Superior Court (2013-2018- family law and criminal court assignments); Morrison & Foerster LLP (1998- 2013); Deputy District Attorney Santa Clara (1995-1998); Law Clerk: Justice Souter, U.S. Supreme Court (1993-1994), Judge Norris, Ninth Circuit (1992-1993)</p> <p>J.D., Stanford Law School; Williams College</p> <p>OBSERVATIONS/INFORMATION:</p> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><u>Tracie L. Brown, Associate Justice</u></p> 	<p>Appointed 2018; Judge, San Francisco Superior Court. (2013-2018); Assistant U.S. Attorney, Northern District CA (2002-2013); Associate, Cooley (1997-2002); Law Clerk, Judge McKeown, Ninth Cir. (1998-1999); Morrison and Foerster LLP (1996-1997)</p> <p>U.C. Berkeley School of Law</p> <p>OBSERVATIONS/INFORMATION:</p> <hr/> <hr/> <hr/> <hr/> <hr/>

Division Five	
<p data-bbox="188 243 699 275"><u>Barbara J.R. Jones, Presiding Justice</u></p> 	<p data-bbox="812 243 1430 552">Appointed Presiding Justice of Division 5 in December 1998 (the first woman to serve as a presiding justice in the First District: 1996, Associate Justice of Division 5; Judge of the San Francisco Superior Court in January 1992, and reelected in November 1992; civil litigation; elementary school teacher; editor of social studies textbooks.</p> <p data-bbox="812 583 1414 657">J.D, University of San Francisco, School of Law; Duke University</p> <p data-bbox="812 688 1365 720">OBSERVATIONS/INFORMATION:</p> <hr data-bbox="812 772 1414 783"/> <hr data-bbox="812 835 1414 846"/> <hr data-bbox="812 898 1414 909"/> <hr data-bbox="812 961 1414 972"/>
<p data-bbox="188 1043 675 1075"><u>Mark B. Simons, Associate Justice</u></p> 	<p data-bbox="812 1043 1430 1474">Appointed as Associate Justice in 2000; Judge, Contra Costa County Superior Court 1995-2000; Mt. Diablo Municipal Court; Deputy Public Defender Contra Costa County; associate at Cooley Godward; law clerk to Federal District Court Judge Alvin B. Rubin in the Eastern District of Louisiana (New Orleans); Dean of the B.E.Witkin Judicial College in 1995 and 1996; adjunct professor of law at Hastings College of the Law from 2002-2004</p> <p data-bbox="812 1518 1414 1591">J.D., University of Chicago School of Law; University of Michigan</p> <p data-bbox="812 1602 1365 1633">OBSERVATIONS/INFORMATION:</p> <hr data-bbox="812 1707 1414 1717"/> <hr data-bbox="812 1780 1414 1791"/> <hr data-bbox="812 1854 1414 1864"/>

<p><u>Henry E. Needham, Jr., Associate Justice</u></p> 	<p>Associate Justice in January 2007; Superior Court Judge, Alameda County, 1996 – 2007; Attorney/Partner, Anderson, Galloway & Lucchese , 1988 – 1996; Private Practice, 1985 – 1988; Deputy District Attorney, Alameda County, 1980 - 1985</p> <p>J.D., San Francisco Law School; B.A., Fisk University</p> <p>OBSERVATIONS/INFORMATION:</p> <hr/> <hr/> <hr/> <hr/>
<p><u>Gordon B. Burns, Associate Justice</u></p> 	<p>Appointed to Court in 2018; Undersecretary, Cal. EPA (2011-2018); Attorney, Resources Law Group LLC (2010-2011); Cal. DOJ, Deputy Solicitor General (2006-2010), Deputy Attorney General (1997-2006); Downey, Brand, Seymour and Rohwer (1994-1997).</p> <p>J.D, UC Hastings College of the Law; UCLA</p> <p>OBSERVATIONS/INFORMATION:</p> <hr/> <hr/> <hr/> <hr/>

AN OUTLINE OF POINTS TO REMEMBER ABOUT ORAL ARGUMENT

from Alan Dworksy, *The Little Book on Oral Argument*
Publisher, Fred B. Rothman & Co. (October 1991)

NERVOUSNESS

Nervousness is normal and useful. Channel it into preparation and performance.

Nervousness disappears soon after you begin your argument, and generally always with the first question from the judges.

Most nervousness doesn't show.

Judges want you to do well. The better your performance, the easier their job.

Identify with your client's cause. Remember, the case isn't about you, it's about your client. Being an advocate for someone else is easier than arguing on your own behalf.

Watch as many oral arguments as you can.

Visualize success, think positively, prepare thoroughly.

PREPARATION

Know the record.

Know the law. You must be able to articulate the law off the top of your head. The only way to do so is to know it inside and out.

Know the rules (15 min. per person, request rebuttal, etc.)

Anticipate questions. The tough parts of your argument are fertile grounds for questions -- be prepared.

Make an outline. Manila folder works well, index cards for cases.

Plan what to bring to the podium.

Practice your argument...! In front of mirror, in the shower, in front of friends, in front of a classmate, wherever, whenever you can.

Arrive at the courtroom early. Don't forget or miscalculate the date or time.

STYLE

Speak in a conversational tone. No speeches, no reading. Make eye contact with each judge. Get them involved.

Use plain English: simple, clear, direct, precise, concise.

Avoid “I” statements. Just give the court the facts and the law. “Appellant is entitled to a reversal of her convictions because . . . ” is better than “I believe that appellant is entitled to a reversal . . . ”

Omit introductory phrases that weaken and detract from the argument. Again, “Appellant contends that ...”, “Respondent would argue that ...” detract from the argument. Just state what the law or facts show.

Show respect for the court. Address the judges as “Your Honor(s).”

Refer to the opposing party, not the opposing advocate. Rather than saying “My opponent argues ...”, say “Ms. Bray contends” or “Defendant contends”, or “Respondent’s position is ...” etc.

Convey that you believe in your client’s cause. If your argument is genuine and heartfelt, it won’t come across as an act and it will be easier to engage the judges in the case.

Don’t break character. Get serious. There is no stopping and starting over, no chance to “just ask a question before I get started”, etc. Don’t let the judges take you off task. If a judge asks, “Counsel, what do you really think?”, tell him or her why you should win. Don’t let the judge separate you from your argument, they are one and the same thing.

There is no backstage. You’re on from the minute you walk in the door. Act professionally at all times.

Deal calmly with distractions. Keep your cool. Stay focused.

Don’t sling mud with your opponent. Always attack the *arguments*, not your opponent.

QUESTIONS

Questions are gifts. They mean you have engaged the judge. Take it as an opportunity to persuade the court that your position is correct.

Stop talking when a judge asks a question and keep quiet until the judge finishes

....

Listen carefully to questions.

Ask for clarification if you don't understand a question.

Think before you answer, pause if necessary.

Never put off answering a question until later in the argument.

Give a direct answer first, then explain. "Yes" or "No" should be the first word of your answer.

Disagree with judges gracefully.

Don't let hypotheticals push you into defending an untenable position.

Never bluff. If you don't know the answer, say so.

Flow back into your argument after answering a question. Don't ask "Does that answer your question?" or "May I continue?", just do so. Take command, you are in charge!

REBUTTAL

Always reserve rebuttal time.

Make all your important points in your main argument. Don't hold anything back.

Listen carefully to your opponent's argument.

Don't waste time on an introduction. Just go for it.

Clearly connect each point you make to a point you're trying to refute.

Don't try to rebut everything your opponent says. You don't have time, just go for the most important points.

Close quickly.

Waive your rebuttal time if you don't need it.