

## Petitions for Review and Petitions for Writ of Certiorari

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## Nuts & Bolts

- What must be in a petition for review (PFR)?
- Where do I file a petition for review?
- When do I file a petition for review?
- How do I file a petition for review?

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## What Must Be In a PFR?

- Name petitioner (your client) & respondent, usually the Attorney General. FRAP 15(a)(2)(A)-(B); 8 U.S.C. § 1252(b)(3)(A).
- State nature of proceedings to be reviewed (order of removal). 28 U.S.C. § 2344(1).
- Specify order to be reviewed (date entered, by whom entered), and attach copy of order (unless this is not possible). FRAP 15(a)(2)(C); 8 U.S.C. § 1252(c)(1).

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## What Must Be In a PFR? (cont.)

- State if any court has previously upheld validity of order. 8 U.S.C. § 1252(c)(2).
- State provision of law under which jurisdiction asserted: 8 U.S.C. § 1252(a)(1) and sometimes 8 U.S.C. § 1252(a)(2)(D). Not technically required, but best practice.
- State facts establishing venue. 28 U.S.C. § 2344(2). Which brings us to...

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## Where Do I File a PFR?

- PFR must be filed in the Court of Appeals for the Circuit in which the Immigration Judge completed proceedings. 8 U.S.C. § 1252(b)(2)
  - Videoconferencing complicates this, but venue is usually still based on where the IJ was. See *Thiam v. Holder*, 677 F.3d 299 (6th Cir. 2012); *Sorcía v. Holder*, 643 F.3d 117 (4th Cir. 2011); *Ramos v. Ashcroft*, 371 F.3d 948 (7th Cir. 2004)
- If order was issued by DHS and no IJ was involved, this will be interpreted as the Circuit in which the DHS officer issued the order

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## When Do I File a PFR?

- **Must be filed within 30 days of the order of removal sought to be reviewed.** 8 U.S.C. § 1252(b)(1).
- One possible exception: when you can't file within 30 days of the order being issued because it wasn't served on your client until well after government claims it was issued. *Villegas de la Paz v. Holder*, 640 F.3d 650, 653-654 (6th Cir. 2010).

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## How Do I File a PFR?

- Must be admitted to practice in the Court of Appeals where you file, or file application for admission concurrently.
- For admission: show good character, admission before state high court or other federal court, have member of court's bar move your admission. FRAP 46(a)(1), (3).
- File through CM/ECF, or sometimes directly to Clerk's office. **But file on time!**

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## When Is An Order Of Removal Final and Subject to PFR?

- When "alien has exhausted all administrative remedies available . . . as of right." 8 U.S.C. § 1252(d)(1)
- Usually: when BIA appeal dismissed.
- Denial of MTR is also a final order, but that PFR will only address the MTR. MTR doesn't affect deadline for PFR of initial order. *Stone v. INS*, 514 U.S. 386 (1995)

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## Finality: CA1-CA6

- If decision re-issued after MTR granted, still final. *Ordonez-Tevalan v. Att'y Gen.*, 837 F.3d 331, 338-340 (3d Cir. 2016).
- If BIA remands to IJ to consider VD, still final. *Giraldo v. Holder*, 654 F.3d 609 (6th Cir. 2011); *Alibasic v. Mukasey*, 547 F.3d 78, 82-84 (2d Cir. 2008); *Saldarriaga v. Gonzales*, 402 F.3d 461, 465 n.2 (4th Cir. 2005).
  - CA1 will prudentially decline jurisdiction. *Hakim v. Holder*, 611 F.3d 73 (1st Cir. 2010).

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## Finality: CA1-CA6 (cont.)

- If BIA remands to IJ for consideration of other relief besides VD, such as upholding denial of asylum but remanding for further consideration of WOR: not final. *Chupina v. Holder*, 570 F.3d 99, 105 (2d Cir. 2009).
- But, after proceedings on IJ remand, don't need to appeal to BIA again to file PFR re: BIA's prior decision— can PFR from IJ's decision if appeal waived. *Id.* at 105.

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## Finality: CA1-CA6 (cont.)

- Remand for background checks?
  - Normally, order only final after background checks completed. *Vakker v. Att'y Gen.*, 519 F.3d 143, 146-148 (3d Cir. 2008).
  - If only CAT deferral, final b/c nothing in checks could affect it. *Yusupov v. Att'y Gen.*, 518 F.3d 185, 196 & n.19 (3d Cir. 2008).

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## Finality: CA1-CA6 (cont.)

- Can prematurely filed PFR “ripen” once order is final? Division of authority.
  - CA2, CA3: yes. *Khan v. Att'y Gen.*, 691 F.3d 488 (3d Cir. 2012); *Herrera-Molina v. Holder*, 597 F.3d 128, 132 (2d Cir. 2010).
  - CA5, CA6: no. *Moreira v. Mukasey*, 509 F.3d 709, 713 (5th Cir. 2007); *Jaber v. Gonzales*, 486 F.3d 223, 228-230 (6th Cir. 2007).
  - But: even in CA2 and CA3, safer to re-file.

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## Finality: CA1-CA6 (cont.)

- Asylum-only proceedings are like removal for finality purposes. *Kanacevic v. INS*, 448 F.3d 129, 134-135 (2d Cir. 2006).
- Termination of CAT deferral is reviewable final order. *Khouzam v. Att’y Gen.*, 549 F.3d 235, 247-249 (3d Cir. 2008).
- Reinstatement under INA 241(a)(5) is final order. But...

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## Finality: CA1-CA6 (cont.)

- Reinstatement = reviewable final order. *Villegas de la Paz v. Holder*, 640 F.3d 650, 653 (6th Cir. 2010); *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 295 (5th Cir. 2002).
- But: reinstatement doesn’t restart the 30-day limit for attacks on the underlying reinstated order. *Mejia v. Sessions*, 866 F.3d 573, 589-590 (4th Cir. 2017); *Verde-Rodriguez v. Att’y Gen.*, 734 F.3d 198 (3d Cir. 2013).

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## Finality: CA1-CA6 (cont.)

- Final Administrative Order of Removal under INA 238: usually final upon issuance by DHS officer, but if reasonable fear / withholding-only proceedings held, final when those are complete.
  - *Guerra v. Shanahan*, 831 F.3d 59, 63 (2d Cir. 2016)
  - EOIR cover page acknowledges IJ decision in Reasonable Fear Review is also final order subject to PFR under § 1252.
  - DHS purporting to “cancel” already-executed removal order under INA § 238 does not affect finality. *Castendet-Lewis v. Sessions*, 855 F.3d 253, 258-260 (4th Cir. 2017).

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## When is an Order Final

- BIA affirms IJ's removal order (8 U.S.C. § 1101(a)(47)(B))
- BIA affirms IJ's denial of a motion to reopen/reconsider a removal order
- DHS issues an order of expedited removal, reinstatement of removal, FARO, or an order against a Visa Waiver overstay under 8 C.F.R. 217.4(a), if no credible fear or reasonable fear process leads to a hearing before an IJ
- IJ affirms an asylum officer's adverse reasonable fear determination (*but see Martinez v. Sessions*, 873 F.3d 655, 658 (9th Cir. 2017) (BIA's dismissal of appeal of negative reasonable fear determination for lack of jurisdiction was final administrative order due to misleading instructions by the immigration court))
- *Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2014) (en banc) (BIA order denying some claims but remanding others for relief to the IJ for further proceedings is not a final order of removal with regard to any claims) (\*\*VD, BCR exceptions\*\*)

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## When is a Final Order Not Final

*Galindo-Romero v. Holder*, 640 F.3d 873 (9th Cir. 2011)  
(BIA affirms order terminating proceedings)

- *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 957 (9th Cir. 2012)  
(withholding proceedings still pending)
- *Noriega-Lopez v. Ashcroft*, 335 F.3d 874 (9th Cir. 2003)  
and *Mejia Galindo v. Sessions*, --- F.3d ---, WL 3629062  
(7th Cir. 2018) (ultra vires BIA decision)

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## Illustrative Examples of Non-Final Orders:

- Decisions denying a stay of removal. *Shaboyan v. Holder*, 652 F.3d 988 (9th Cir. 2011) (BIA decision denying stay of removal is not reviewable until the BIA adjudicates the underlying motion).
- Termination of asylum or rescission of LPR status, unless accompanied by a final order of removal. See *Qureshi v. Holder*, 663 F.3d 778 (5th Cir. 2011).

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## From Finality to Jurisdictional Bars – Expedited Removal

- Expedited Removal under INA 235(b), 8 U.S.C. § 1225(b), is not reviewable by PFR. 8 U.S.C. § 1252(a)(2)(A). Instead:
  - Limited habeas under 8 U.S.C. § 1252(e).
  - Constitutionally guaranteed habeas (protected by Suspension Clause) if sufficient ties to USA. *Osorio-Martinez v. Att’y Gen.*, 893 F.3d 153 (3d Cir. 2018).
  - Challenge to written policy brought in DDC within 60 days of implementation. 8 U.S.C. § 1252(e)(3).

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## Jurisdictional Bars – Discretionary Relief

- INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B): denials of discretionary relief (besides asylum) are not reviewable.
  - (B)(i) lists specific sections subject to the bar: INA §§ 212(h), 212(i), 240A, 240B, 245
  - (B)(ii): other decisions or actions specified to be in discretion of AG/SHS, besides asylum. But must be specified in this subchapter of INA. *Kucana v. Holder*, 558 U.S. 233 (2010)

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## Jurisdictional Bars – Criminal Grounds, Reinstatement

- INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C): bar to review of order of removal issued against alien removable under various criminal grounds.
- INA § 241(a)(5): reinstated order of removal is “not subject to being reopened or reviewed”

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## Jurisdictional Bars – Asylum

- INA § 208(a)(3), 8 U.S.C. § 1158(a)(3): no review of bars to asylum in § 208(a)(2)
  - Safe third country bar, § 208(a)(2)(A)
  - One-year filing deadline, § 208(a)(2)(B)
  - Previous denied application, § 208(a)(2)(C)
  - Changed and extraordinary circumstances exceptions to the one-year deadline and previous-applications bars, § 208(a)(2)(D)
- INA § 208(b)(2)(D): asylum terrorism bar

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## Exception to Jurisdictional Bars: Questions of Law

- INA 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D): exception to jurisdictional bars for “constitutional claims or questions of law raised upon a petition for review filed with [a] . . . court of appeals”. INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D).
- Exception to all jurisdictional bars except 8 U.S.C. § 1252(a)(2)(A) (regarding expedited removal orders under INA § 235(b) / 8 U.S.C. § 1225(b).

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## Exception to Jurisdictional Bars: Questions of Law (cont.)

- Some examples of use of § 1252(a)(2)(D):
  - *Pareja v. Att’y Gen.*, 615 F.3d 180, 186 (3d Cir. 2010); *Gomez-Perez v. Holder*, 569 F.3d 370, 372-373 (8th Cir. 2009); *Figueroa v. Mukasey*, 543 F.3d 487, 496 (9th Cir. 2008): hardship for non-LPR cancellation of removal
  - *Zambrano v. Sessions*, 878 F.3d 84 (4th Cir. 2017); *Wenlong Lin v. Holder*, 763 F.3d 244 (2d Cir. 2014); *Mandebvu v. Holder*, 755 F.3d 417 (6th Cir. 2014); *Shi Jie Ge v. Holder*, 588 F.3d 90 (2d Cir. 2009); *Lumataw v. Holder*, 582 F.3d 78 (1st Cir. 2009); *Nakimbugwe v. Gonzales*, 475 F.3d 281 (5th Cir. 2007): asylum one-year filing deadline & exceptions
  - *Alaka v. Att’y Gen. of the U.S.*, 465 F.3d 88 (3d Cir. 2006): criminal removability jurisdictional bar

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## Exception to Jurisdictional Bars: Questions of Law (cont.)

- What is a question of law?
  - How to interpret statute or regulation
  - Application of erroneous legal standard
  - Factfinding can be flawed by an error of law, such as where important facts are overlooked or mischaracterized. *Mendez v. Holder*, 566 F.3d 316, 322 (2d Cir. 2009); *Xiao Ji Chen v. USDOJ*, 471 F.3d 315, 329 (2d Cir. 2006).

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## Motions – Practice Tips for Second and Third Circuits

- CA2 requires Form T-1080 Motion Information Statement cover sheet, specifying relief sought, contact information of attorneys, whether you have notified opposing counsel, opposing counsel's position, if oral argument is requested, etc.
- CA3 does not have a similar form, but Local Rule 27.3 requires that an uncontested motion be certified as such.

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## Motions – Practice Tips for Second and Third Circuits (cont.)

- Motion to Stay Removal
  - CA2: forbearance policy. Agreement between Court and government attorneys that after motion for stay of removal is filed, no removal will occur until the motion is ruled on.
  - CA3: standing order that clerk will enter administrative stay when motion for stay is filed on timely-filed PFR with proper venue, arguably final order. (Stems from incident of removal while motion for stay was pending, after which Court ordered return of the petitioner to the US.)

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## Motions – Practice Tips for Second and Third Circuits (cont.)

- Motion to Stay Removal (cont.)
  - Even with an administrative stay or forbearance in effect, be careful to show how you meet the criteria for a stay under *Nken v. Holder*, 556 U.S. 418 (2009). Government can still oppose stay (in CA2) or seek lifting of temporary administrative stay (in CA3).
- Motion to Dismiss
  - DHS may argue Court lacks jurisdiction. Be prepared for cross-motion in re: motion to stay

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## Motions – Practice Tips for Second and Third Circuits (cont.)

- Motion to Extend Briefing Schedule
  - CA2 disfavors. Instead, request briefing schedule w/ brief filed up to 91 days after admin record (or more so if voluminous record), then only extend if dire emergency.
- Motion to Consolidate
  - When PFR is filed re: denial of Motion to Reopen/Reconsider, & PFR of original order still pending, 8 U.S.C. § 1252(b)(6). In CA2, consolidated case won't get 90-day tolling.

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## Motion for Stay of Removal

- Non-oppositions
- Oppositions
- File a reply
- Consider delayed filing (briefing schedule suspended/reset upon filing a motion to stay)

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## Government's Motions to Remand

### Reasons to Oppose:

- Government's inability to defend BIA decision but remand does not concede error (attempt to get a better-reasoned denial)
- Remand issues are collateral or not dispositive
- Partial opposition: request to give up EAJA fees

### Reasons to Join

- When OIL concedes error and/or client can clearly benefit from case returning to BIA

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## Motions to Amend Decision

- To modify a decision to avoid confusion, e.g.:
  - *Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1050-1051 (9th Cir. 2011) ("We therefore grant the petition for review" replaced with "We therefore grant the petition for review and vacate the order of removal.")
  - *U.S. v. Ramos-Medina*, 706 F.3d 932 (9th Cir. 2013) (amending decision in response to amicus brief)

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## Motions for Attorneys' Fees

- Equal Access to Justice Act. 28 U.S.C. § 2412(d) (when Government's Position was not substantially justified before the agency or in the litigation)
- File within 30 days of FINAL decision (usually 120 days of decision after cert petition deadline)
- Request even if OIL won a motion to remand.  
*Li v. Keisler*, 505 F.3d 913, 915 (9th Cir. 2007)

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## Other Motions

- Motion to Hold Briefing in Abeyance
- Motion for Briefing Extension
- Motion for Appointment of Pro Bono Counsel
- Motion to Transfer (usually on claims for US citizenship)
- Motion to Reconsider
- Motion to Stay the Mandate
- Motion to Recall the Mandate

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## Effective Briefing Tips

Make sure the Certified Administrative Record is complete and cite it throughout the briefs

- Check to see if IJ/BIA used correct legal standard
- Failure to consider all relevant evidence?
- Improper waiver of rights?
- Log your time for EAJA Attorney's Fees

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## Panel Rehearing

- Federal Rule of Appellate Procedure 40
- Due 45 days from the decision (a motion to extend this time limit is due 7 days prior)
- Limited to 15 pages (Fed. R. App. P. 35(b)(2)) or 4,200 words, 14 point type (Ninth Cir. R. 40-1)

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## Panel Rehearing (cont.)

- Best chance where intervening law or where panel completely overlooked or misunderstood a point of fact or law which resulted in the adverse decision (Fed. R. App. P. 40(a)(2))

- Second best chance where there was a dissent and you have good arguments buttressing the dissent

- Third best chance where oral argument suggested panel seemed inclined to rule the other way

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## Panel Rehearing (cont.)

- If panel rehearing is granted, there generally will not be further argument or briefing. Instead, the panel usually issues an order and amended opinion or memorandum disposition in which it grants rehearing and revises the prior disposition in response to the request for rehearing -- all at the same time.

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## En Banc Rehearing (FRAP 35)

- (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
- (2) the proceeding involves a question of exceptional importance.

- Appropriate for a precedent decision in conflict with decisions of the Supreme Court or other panel decisions of the Ninth Circuit, creates a circuit split, or is otherwise of "exceptional importance."

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## En Banc Rehearing

- If en banc rehearing is granted, the court will issue an order granting the petition for rehearing en banc and vacating the panel decision. The case generally will be calendared for oral argument before the full court (or, in the Ninth Circuit, before an 11 judge limited en banc panel during one of the court's quarterly en banc sittings in March, June, September, and December). The court may order additional briefing.

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## Art of Oral Advocacy

- One never “wins” or “loses” argument.
- Rather the goal is to highlight 2 to 3 factual or legal points and be available to respond to concerns of the panel.
- It is a conversation.

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## Judges: What Are They Asking?

- Every question by a judge is simply a way of saying “help me.”
- The judges know the law, but you know this case better than they do
- They want to do the right thing
- Make it easy for them.
  - Have the record citations
  - Have the legal authority
  - Have an answer to every single question
  - Listen and respond to every question asked.

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## How to Think About Judges

- A judge is either a
  - **Foe** (against you),
  - **Friend** (with you), or
  - **Fence** (not sure).
- Same judge can switch roles on different issues
- Oral argument is to provide reassurances to the Friend, recruit the Fence, and avoid arguing with a Fore

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## Answer Judges' Questions

- No question is ever wasted or superfluous
- Forms of questions:
  - Judges are either expressing true ambivalence and want response to tip them to your side
  - Judges may be giving you softballs to persuade colleagues
  - Answer extreme hypotheticals
    - And then pivot to your point
- ALWAYS ANSWER QUESTION ASKED BY JUDGE
- Sit down/stop on point when asked

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## Common Mistakes

- Never summarize facts
- Never ask for direction from Court
- Never reserve time (unless asked by Court in advance)
- Never BS or bluff—
  - the Court knows the law it writes
  - at least 6 people have scoured the record
- Judges never asked filler questions. **Every question is important.**

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## Tone—Do's

- Have respect towards judges
- Confidence in arguments
- Listen to questions
- Stop to hear judge speaking
- Answer questions
- "Conversational tone"—win if you are a trusted advisor
- Speak slowly and loudly
- Enunciate

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## Tone—Don'ts

- Don't be arrogant
- Don't interrupt or talk over a judge
- Don't be familiar with a judge
  - (never refer to Judge by name unless 110% certain)
- Don't fake it—
  - do not overstate facts or law
  - Don't guess
  - If do not know, ask if you can file supplemental briefing
- Avoid grandstanding, raised voice, stubborn insistence
- Don't speak too quickly
- Don't speak too softly

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## Presentation—Tips

- Remember we communicate more clearly when we speak than when we write
- Prepare points as you would say them, not write them
- Use pauses

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## Presentation—Do's

- Have one to three winning points prepared
  - Eight minutes
  - Jump to main point immediately
- Have alternative arguments
- Pivot when losing
  - “Even if you disagree with me, I still win on point x”

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## Presentation—Don'ts

- Don't waste time
- Don't engage in losing battle

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## Facts—Do's

- Know record entirely
- Write out summary of key facts with cites to the Administrative record
- Copy relevant portions of record with cites

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## Law—Do's

- Write out summary of key cases
- Print out copies of all key cases
- Refer to cases by short name "In Johnson,..."
- Have pin cites and quotes ready if needed

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## Law—Don'ts

- Don't overstate case
- Don't refer to author of case if on panel
- Don't refer to cases by citations unless asked

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## Key Argument—Do's

- Know and admit limitation of cases/facts
- Know and admit weakness
- Concede limitations
- Less is more. Know when to stop talking  
Hopefully, you do not need to win on all issues

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## Direct: Purpose is to control the Message

- Present the **strongest points** you find most persuasive
- And address the **weakest points** in our case using our framework
  - Direct is not a book report on the briefs.
  - Rather, the best argument boils down the briefs into simple, persuasive points.
  - Oral argument is **10,000 feet** up or "Tweets" (opening brief is ground level, reply brief 5,000)

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## Direct: Purpose

- Keep in mind that one rarely gets all three judges to agree on all points you have
- Your job is to communicate all material points in the hopes that at least two judges agree
  - You will not be met with praise or approval
  - Rather, expect silence or skepticism
  - Remember, the second worst case wins

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## Rebuttal: Purpose is Triage

- There is less time on rebuttal, but when done right, it can win the case.
- Tips
  - Read the panel to identify Foe, Friend, Fence
  - Listen to direct to clean up any missed opportunities or mistake
  - Listen to government to seize opportunities
  - Triage the "most likely winning points" to Friend and Fence
    - No need to direct points to the Foe or raise losing issues.

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## Rebuttal: Triage

- Focus on what is most relevant
  - Sometimes just having one point is the most effective way to end argument
  - Sometimes, you may need multiple points, try not to exceed three points
- Have discipline to stop when you are ahead
  - Do not raise extra issues because it can quickly backfire
- Rebuttal sets the tone before the judges decide the case

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## How to Prepare For Argument

- Work is the opposite of anxiety
- Watch videos of positive experiences and strong oral advocates
- Moots help you identify potential issues and pitfalls
- Write out and speak aloud key points
- Prepare binder of key facts, cases
- Have fun.
  - This is an incredible experience and should be rewarding and enjoyable.

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## Questions & Answers



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