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ORAL ARGUMENT IN THE SUPREME COURT OF THE UNITED STATES

*Stephen M. Shapiro**

The art of oral argument in the Supreme Court of the United States has been discussed with great competence by a number of distinguished writers.¹ Before approaching the lectern of the Supreme Court, any advocate would do well to consult these eminent authorities. There is one aspect of the argument process, however, which has not, in my judgment, received the emphasis which it deserves. And to this extent, the neophyte may go astray. While Justice Jackson has likened oral argument to the stately process of "building a Cathedral,"² counsel is apt to conclude, after completing a first argument, that the experience is more akin to an intense athletic contest, hedged by rigid time restrictions and potentially fatal fumbles and missteps. Unlike the builder of a cathedral, the Supreme Court advocate does not have the luxury of time, and the preconceived architecture of the argument must, in nearly every instance, be set aside in its entirety. The intensity of the debate, and the shortness of available time, are all important aspects of Supreme Court argument which require the advocate's closest attention.

I. PURPOSES OF ORAL ARGUMENT

Before turning to the specifics of oral argument technique, it is useful for the attorney, facing his or her first argument in the Supreme Court, to try

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1. Among the most valuable of these discussions are: R. STERN, *APPELLATE PRACTICE IN THE UNITED STATES* ch. 7 (1981); R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* ch. 14 (1978); F. WIENER, *BRIEFING & ARGUING FEDERAL APPEALS* ch. 7 (1967); Prettyman, *Supreme Court Advocacy: Random Thoughts in a Day of Time Restrictions*, 4 *LITIGATION* 16 (1978); Griswold, *Appellate Advocacy, With Particular Reference to the United States Supreme Court*, 26 *RECORD OF THE BAR OF THE CITY OF NEW YORK* 342 (1971); Jackson, *Advocacy Before the United States Supreme Court*, 37 *A.B.A. J.* 801 (1951); Davis, *The Argument of an Appeal*, 26 *A.B.A. J.* (1940).

2. Jackson, *supra* note 1, at 864.

to envision what it is that the Justices expect to accomplish through oral argument, and likewise to bear in mind what experienced advocates seek to accomplish. By viewing the oral argument process from both sides of the bench, the advocate is better equipped to give an effective presentation and to anticipate and grapple with questions from the Court.

Most regular observers of the argument sessions of the Supreme Court would agree, I think, that the Justices utilize the oral argument process to achieve the following objectives:

a) *Clarification of the record.* In nearly every argument, the Justices attempt to bring into better focus important record facts, including details of relevant pleadings, findings at the trial or administrative level, holdings of the lower courts, steps taken to preserve points in the trial court and on appeal, and the adequacy of the specification of questions presented in the petition for certiorari or jurisdictional statement.

b) *Clarification of the substance of claims.* Despite the best efforts of the brief writer, it is common for the Justices to insist upon a further explanation concerning the precise nature of the claims presented to the Court. What exactly is counsel contending in the Supreme Court?

c) *Clarification of the scope of claims.* More so than most lower courts, the Supreme Court is interested in the scope of arguments and principles relied on by the parties. How far does the principle go that counsel invokes? This, of course, is the domain of the hypothetical question, which the Justices propound with frequency during oral argument.

d) *Examination of the logic of claims.* The Justices commonly require attorneys to explain apparent inconsistencies between oral statements and positions articulated in the briefs, or discrepancies between findings made by the lower courts and positions taken in the Supreme Court. Still more frequently, the Justices require counsel to explain how his or her position can be reconciled with past relevant decisions of the Supreme Court, or the plain language, structure, or history of controlling statutes.

e) *Examination of the practical impact of claims.* Since the Justices are responsible for rendering decisions that embody wise policy consistent with the intent of Congress and the framers of the Constitution, they persistently inquire into the practical impact of the positions advocated by counsel. Will a particular position impose excessive burdens on law enforcement officers, interfere unreasonably with the freedoms of private citizens, or hamper the legitimate activities of honest businessmen?

f) *Lobbying for or against particular positions.* Several of the Justices use oral argument as an early opportunity to make known their tentative views to the other Justices, and to express, at least indirectly, their agree-

ment or disagreement with the submissions of counsel. Thus, to some extent, the argument serves as an early conference, where the views of both lawyers and judges can be expressed and debated. The use of the argument for this purpose—in addition to the clarification of factual and legal uncertainties—raises difficult tactical problems which are discussed in greater detail below.

It also is useful to consider the objectives of oral argument from the point of view of experienced Supreme Court advocates. The following summary of objectives is based on observations of senior attorneys in the Office of the Solicitor General.³

a) *Motivating the Justices to view the case sympathetically.* Every advocate is, in an important sense, a salesperson, and the object of advocacy is persuasion of other human beings. Oral argument is the lawyer's only opportunity to meet the decisionmakers eye to eye, without "screening" from law clerks, and without distractions from the five thousand other cases that the Court confronts each year. Oral argument gives the advocate the opportunity to personally motivate the Justices to rule in his or her favor by conveying the impression that fairness, common sense, and the general public interest strongly support his position.

b) *Simplifying information needed to decide the case in counsel's favor.* Oral argument offers the opportunity to separate out the truly important, pivotal considerations in a case, and to give the Justices the few specific "implements of decision" which are needed to resolve the case in a correct manner. Counsel must bear in mind that the Justices cast their votes in conference only a few days after hearing oral argument in twelve cases, nearly all of which have extensive records and lengthy briefs. It is essential, therefore, to give the Justices the few specific points that are needed to resolve the case correctly, and which remand stick in the Justices' minds until conference.

c) *Laying to rest concerns or difficulties that the Justices express.* In nearly every oral argument, the Justices express their misgivings, concerns, and doubts about counsel's submission. Some of them may tell counsel precisely what their pivotal uncertainty is and invite him to dispel that uncertainty. This, of course, is an opportunity to lay to rest not only their concerns, but also those of other Justices who share the same point of view. Although the observation is hardly original, it is important to reiterate that oral argument is counsel's only opportunity to effectively "participate in

3. For a description of the Solicitor General's Office, see McCree, *The Solicitor General and His Client*, 59 WASH. U.L.Q. 337 (1981).

the conference" and come to grips with the real questions that trouble the Court.

d) *Making a positive and memorable personal impression*. Cases in the Supreme Court frequently are close, and the Justices look to counsel for guidance and leadership. If the Court has confidence in counsel, this will smooth the way to acceptance of counsel's arguments. By contrast, an attorney who makes a poor personal impression necessarily raises obstacles to acceptance of his or her contentions. The personal impression that one must convey is that of respectfulness, utmost candor, reliability, complete knowledge of the record, and sincere conviction. These impressions derive not only from the substance and style of the argument, but also from subtle forms of nonverbal communication—including counsel's tone of voice, "body language," and attire. In arguing policy positions, counsel must endeavor to convey the impression that such positions are carefully considered and reasonably formulated in light of the interests of all affected persons.

e) *Demonstrating that the argument hangs together under fire*. Oral argument is the anvil on which a solid position is hammered out and confirmed—or shattered entirely by repeated blows. Effective advocates use oral argument to dramatically demonstrate that his position is sound. Thus, despite difficult questions and criticisms, there always is a logical response and the argument hangs together in a coherent way. There are, in short, no hidden defects, gaps in reasoning, or unanticipated consequences. Some arguments fall apart entirely under the pressure of argument. Other arguments, which have been carefully honed in advance, are strengthened and confirmed by the process of debate.

II. ARGUMENT PREPARATION

Argument preparation is an essential means to meet the goals described above.⁴ It is a truism that counsel should "know the record from cover to cover." But the point is of crucial importance. Not only is familiarity with the record essential to provide specific information to the Justices, but it is also essential to convey the impression of reliability and leadership that is fundamental to any effective presentation. The attorney who cannot turn, in a moment, to an essential part of the record, or who cannot answer questions about the state of the record, will not command the confidence of the Justices.

In this connection, however, it is essential to undertake a rough cost/

4. This subject is comprehensively treated in the authorities noted previously in this article. *See supra* note 1.

benefit analysis early in the process of preparing for oral argument. If the record is truly voluminous—as, for example, the record of a six month antitrust trial—counsel may simply not have time to personally read each page of testimony and each exhibit. Any attempt to do so would undermine preparation on other central matters. The solution, in this instance, is to obtain the help of trial counsel and junior assistants, who can identify essential portions of the record for review and provide concise summaries of the remainder. In addition, a close reading of the Supreme Court's past relevant decisions will acquaint one with the record facts that have been deemed important by the Justices in similar situations. The attorney who argues the case must master such facts through personal study, despite the length of the record. Of course, any portions of the record cited in the briefs or the opinions below imperatively call for counsel's personal examination.

While counsel is preparing for oral argument, it is advisable to spend a day or two listening to arguments at the Supreme Court in Washington, D.C. Even counsel who have argued frequently before the Court get a better "feel" for courtroom dialectics through these regular visits, and are more comfortable with the argument when their case is called for presentation. If the Court is not in session, counsel may wish to listen to tape recordings of oral arguments at the National Archives in Washington, D.C. It is also possible to examine transcripts of past Supreme Court arguments, which are available in microfiche form in law libraries throughout the nation.

All significant case authorities must be read and reread before argument, while peripheral cases may be reviewed through summaries from assistants. Counsel also should try to "read around" in the area, including any relevant law review articles and policy-oriented materials such as economics studies. Familiarity with issues of policy will better equip counsel to deal with the questions likely to be heard from the bench.

Argument preparation also requires the advocate to think through the theory of his or her case and consider its relationship to other areas of law. It is not enough to have an internally logical theory of law. Questions from the bench almost certainly will require counsel to explain the connection between his or her argument and other related legal subjects. For example, in a case involving forum shopping challenged under the due process clause, the Court is likely to inquire: what is the relevance of the doctrine of *forum non conveniens*, statutory transfer under 28 U.S.C. § 1404, and venue restrictions? The issues, in short, should not be consid-

ered in isolation. Counsel should use a "macroscope" as well as a "microscope" in examining the legal issues and anticipating questions.

Each brief submitted by counsel to the Supreme Court, and each proposition to be covered during oral argument, must be reviewed from the point of view of a skeptical or hostile Justice who is intent upon exposing all latent fallacies and errors. Jot down such questions and think through the best response. The very process of anticipating questions and devising effective replies will strengthen one's understanding of the legal issues, and help to build an intellectual framework that lends substantial assistance in dealing with even unanticipated questions from the bench. An assistant with an objective viewpoint also should be recruited for the purpose of identifying questions.

In trying to anticipate questions from the bench, it should be kept in mind that many questions will pertain to the familiar, common-sense themes discussed previously. What is the case about? (What are the record facts and procedural history?) What do you want? (What holding do you want in this case? What rule do you want the Court to adopt to justify that holding? Is there any other rule that would satisfy you?) How would your rule work? (What are the practical consequences of the rule? How would it change current practices? Can it be administered?) Can the Court do that? (Is there a legally respectable argument for the rule? Does it have support in relevant authorities? Is it consistent with what the Court has said before?) Why should we do that? (What values and interests would be advanced by adoption of the proposed rule? Would opposing values and interests be fairly accommodated? Why is the rule sought by counsel preferable to the alternative?) After anticipating questions in these categories, counsel should develop simple and common-sense replies. They should be convincing on an intuitive level, even to the layman.

The attorney preparing for argument should discuss the issues in the case with anyone who will listen. Intelligent laymen may raise questions that are highly pertinent, as may attorneys who specialize in other fields of law. Specialists in the field, of course, can provide sophisticated insights into potential difficulties. If the case arises in a field of interest to nonlawyer specialists—such as economists, sociologists, or businessmen—the issues should be discussed with such persons as well. Brainstorming sessions with such persons frequently result in the identification of questions and issues that later arise during the course of oral argument.

Perhaps a week in advance of the scheduled oral argument, it is advisable to conduct one or more moot court sessions. Enough time should be allowed to assimilate the questions and revise the argument outline after

the moot court. It also is essential to tape record the oral argument presentation to assure that it can be covered in the allotted time, and to assure that all of the expressions to be used in court are easily comprehended through the spoken word. Many expressions that make perfect sense in written form are highly awkward—if not incomprehensible—when spoken. The tape recorder is effective in revealing what kind of rhetoric “gets across” through the oral medium.

Since nearly every oral argument is punctuated with intense questioning, the argument is not under counsel’s complete control. It is essential, therefore, to plan an argument that expands or contracts depending upon the amount of questioning from the bench. Needless to say, the three or four most important points should be identified in advance. And the oral argument outline should be clearly marked to show which matters are dispensable if questioning becomes intense.

III. THE SUBSTANCE OF ORAL ARGUMENT

Although the text, history, and purpose of the Constitution and federal legislation are the most important factors in analyzing legal issues, there is no doubt that the Supreme Court, sitting as a tribunal of last resort, is a body which declares public policy. To be effective, therefore, counsel must convince the Court that his or her position is sensible, good for the nation, and fair and reasonable for all persons affected by the Court’s decision.

Most of the cases which reach the Supreme Court are doubtful, and respectable opinions could be written to justify either affirmance or reversal. In this situation, technical legal reasoning will not suffice. The Supreme Court is called upon to render wise decisions which serve the welfare of the entire nation. Its decisions, if erroneous, are extremely difficult to correct through the process of legislative revision or constitutional amendment. The Court is well aware of this. It accordingly is most receptive to arguments which demonstrate that counsel’s legal theory is beneficial to the public, administratively feasible, and consistent with the teaching of past experience.

Overall, the oral argument must address the reason “why” counsel’s position makes good sense—not merely the technical aspects of the case which are discussed in the briefs. This means that counsel should not depend heavily on case authority. During the course of oral argument, it ordinarily is inappropriate to refer to more than two or three decisions. And those should be Supreme Court decisions. The Court is unimpressed with arguments that depend on decisions of lower federal courts or state courts.

A few observations about the structure of the oral argument also may be useful. Every good salesman knows that the first few minutes of an oral presentation are important. In the Supreme Court, this also is the case. The introduction should orient the Court so that it can easily follow the subsequent development of the argument.

In a few sentences, counsel should tell the Court how the case reached it, what kind of case it is, what counsel's submission is, and what subjects he or she plans to cover in the allotted time. For example, after being recognized by the Chief Justice, the petitioner might begin as follows:

Thank you Mr. Chief Justice, and may it please the Court. This case is here on the State of Illinois' petition for certiorari to the Illinois Supreme Court. The State contends that the court below erred when it required suppression of relevant evidence. After briefly summarizing the facts, I would like to explain why the court below misconceived this Court's decisions in the *Aguilar* and *Spinelli* cases, and then explain why, in any event, the evidence should be admitted in view of the good faith of the arresting officers.

Respondent, in turn, might begin as follows:

Mr. Chief Justice, and may it please the Court. Respondent submits that the decision below was compelled by the holding and logic of this Court's decisions in *Aguilar* and *Spinelli*, and that the purposes of the fourth amendment require adherence to those precedents. After describing several essential facts that have been overlooked by petitioner, I would like to summarize the important fourth amendment goals that are served by the suppression order in this case.

Some cases, of course, require more factual development than others. For example, in *Illinois v. Gates*,⁵ the state of Illinois obtained a substantial tactical advantage by dwelling on the facts of record, which, Justice Rehnquist has stated, "reeked of probable cause."⁶ Even in such a case, however, the facts must be distilled and simplified. The spoken word will not bear the burden of many detailed facts. While the eye can take in such detail, the ear cannot. In most instances, therefore, it is advisable to limit the preliminary statement of the facts to five minutes or less. The Justices, of course, have a clear view of the facts from the briefs and opinions below, and are free to ask questions pertaining to the facts as the argument progresses. Moreover, during the course of arguing the substantive issues,

5. 103 S. Ct. 2317 (1983).

6. Address by Hon. William H. Rehnquist on Oral Argument in the Supreme Court (Oct. 18, 1983).

counsel can weave in the facts as they become relevant. The danger inherent in an extended preliminary discussion of the facts is that counsel is very likely to become bogged down on peripheral questions relating to the record, only to find that most of his or her argument time has elapsed before the affirmative points needed to win the case have been introduced.

In structuring the argument, the advocate should attempt to "go for the jugular" by leading off with the most persuasive point. Critical points should not, of course, be lost in the shuffle by reserving them for the end. To the extent possible, however, counsel should attempt to end the argument on a high note, just as he or she has opened it on a high note. Trial lawyers know that opening and closing remarks are the most memorable part of any courtroom communication, and this holds true of oral argument in the Supreme Court. The argument will stick in the Justices' memory if it both begins and ends on a strong point.

The first point ordinarily will be the point which has to be gotten across to win the case. Counsel must grab the bull by the horns and give his most convincing argument on this critical issue. It is a mistake to lead off the analysis with an argument of lesser persuasiveness, or an argument that is unnecessarily provocative or dubious. Such an argument will generate friction with the Justices and cast a pall of skepticism over the entire presentation.

In preparing the oral argument, counsel should bear in mind the terms of Supreme Court Rule 38, which states that "oral argument should undertake to emphasize and clarify the written argument appearing in the briefs"⁷ This means that the argument should give "flesh and blood" to the detailed legal arguments contained in the brief. It does not mean that the brief should be merely summarized or paraphrased. Indeed, Rule 38 advises counsel "that all Members of the Court have read the briefs in advance of argument."⁸ The rule thus directs counsel to go to the heart of the case in common sense terms, rather than repeating the technical points set forth in the briefs on the merits.

The points made during oral argument should be positive, not merely negative retorts to points made by one's opponent or by the court below. Counsel must, therefore, give the Court a better alternative than his or her opponent has offered. The alternative must be a fair solution to a real world problem, not just a technical legal argument. The solution proposed must reasonably accommodate competing interests, must be practical from an administrative point of view, and must have desirable practical conse-

7. SUP. CT. R. 38 (1982).

8. *Id.*

quences. As Deputy Solicitor Geller has observed, an effective argument convinces the Court that "the world will be a better place" if counsel's submissions are accepted.⁹

The argument advanced by one's opponent also may be dealt with briefly, but the refutation should be straightforward and easy to comprehend. Frequently, a discussion of the adverse practical effects of the opponent's argument is sufficient to demonstrate its weakness. For example: "If petitioner's expansive jurisdictional theory were accepted, that would mean that companies which sell their products on a nation-wide basis could be sued in *any* State, regardless of the residence of the parties and the witnesses and regardless of the place of the tort. A New York case could be dragged into the courts of Hawaii or Alaska for no better reason than the plaintiff's desire to avoid the statute of limitations in New York. This would invite forum shopping on the grandest scale."

A few hints about some of the narrower points of oral argument also may be helpful. Counsel should not read *at length* from statutes, cases, or legislative history. This is a terrible bore and a waste of time. At the same time, however, one must come to grips with, and *briefly* quote, the plain language of any statute or constitutional provision that is controlling. As the Supreme Court stated in *Ernst & Ernst v. Hochfelder*,¹⁰ the starting point in every case of statutory construction is the text of the statute itself. Indeed, in cases involving questions of statutory construction, the Court is highly skeptical of policy arguments that are not firmly rooted in the controlling statutory language.¹¹

The question sometimes arises whether counsel may go beyond the record during oral argument. In making an affirmative contention, one should adhere closely to the record. In response to a specific question, however, counsel may transcend the bounds of the record. He or she should first inform the Court that the answer to the question is beyond the record, then provide the answer, and finally state the source of his or her information. In particular, the Court expects lawyers for governmental units to be able to provide information about the government's own operations.

The style of the argument must, in all respects, be simple and hard hitting. Nothing detailed, subtle, or rhetorical ever gets across during oral argument. For example, lengthy citations of statistics are nearly indigest-

9. Remarks by Kenneth S. Geller, Conference on Supreme Court Advocacy (Oct. 18, 1983).

10. 425 U.S. 185, 197 (1976).

11. *See, e.g.*, *TVA v. Hill*, 437 U.S. 153, 172-73, 194-95 (1978).

ible, as are chapter and verse citations to cases. Long sentences and windy paragraphs are nearly impossible to comprehend. As previously noted, one must at all times bear in mind the inherent limitations of the spoken word.

Finally, the advocate should remember that the greatest barrier to an effective argument is boredom. It is imperative that the argument be vivid and striking. This does not result, of course, from exaggeration or from irrelevant emotional appeals. Counsel should never attempt to harangue the Justices or to speak in the florid and emotional style cultivated by some trial attorneys. Counsel's speech should, however, be varied, with changes in inflection, volume, and pace. An occasional appropriate metaphor also may be relied upon to facilitate communication. The style of the presentation should fall approximately half way between a formal speech and a personal conversation. It must be clear, forceful, and emphatic, without any element of stilted oratory or artificial rhetoric.

IV. THE MECHANICS OF DELIVERING ORAL ARGUMENT

The technique for delivering an oral argument varies from attorney to attorney. There is no single technique which all experienced attorneys follow. A few general observations, however, are applicable even in this area. Initially, as the Supreme Court's rules admonish in italicized words: "*The Court looks with disfavor on any oral argument that is read from a prepared text.*"¹² Reading from a prepared text is sure to put any audience to sleep, and the favorable personal impression required of the successful advocate cannot be achieved without continuous eye contact.

This does not mean, however, that counsel should approach the lectern with no oral argument notes or outline. Although a few advocates are able to present effective arguments without reliance on notes, most find that an outline or list of points is essential to assure continuity in the argument, to permit quick returns to important subjects after sharp debates with the Court, and to avoid delays while counsel gropes for the next point to be covered.

Many attorneys bring with them to the lectern a one or two page outline of key points and phrases or quotations. Robert L. Stern observes that he frequently writes out his arguments in advance in order to think through each point clearly, and then distills the written text to an outline containing key headings, words and phrases.¹³ A glance at the outline permits him to recall the substance of the points he wishes to convey.

12. See SUP. CT. R. 38, *supra* note 7.

13. R. STERN, *supra* note 1, at 390-91.

Other attorneys bring with them a text, which they do not read, but which they use to refresh their recollection by glancing at the familiar points set forth in the text. Still others use note cards, arranged in proper sequence, to remind them of points and authorities. If counsel has not yet decided which of these techniques is most effective, it is advisable to experiment with different techniques during moot court sessions prior to the argument in the Supreme Court.

No matter what form the outline, notes, or text ultimately may take, counsel should indicate in dark ink the portions of the argument that are most important and the portions that are expendable in the event of intense questioning. Likewise, when facts, quotations, or cases are to be discussed during oral argument, the correct page references should be noted in the margin for citation to the Court if it requests such information. Detailed record citations also may be placed on note cards for ready reference in the event that the Court seeks specific citations.

When approaching the lectern,¹⁴ counsel should be equipped with all of the basic materials needed for responses to detailed questioning. Next to him at counsel table or lodged in the hands of an assistant, he should have copies of all petitions, briefs, and appendices filed in his case in the Supreme Court. Likewise, he should be armed with copies of any record materials that are relevant to the argument, copies of any portions of legislative history that could be pertinent, and copies of the most significant cases. It is not advisable, however, to carry to the lectern the entire record, although an assistant may have the most important portions ready at hand. All such materials should be tabbed so that counsel can get to relevant portions in a moment. The object, of course, is to have close at hand anything that might be quoted to the Justices, or anything that might be needed to answer a question or to respond to the argument of the opponent.¹⁵

As the argument commences, counsel should jot down the time that appears on the large clock behind the bench in the courtroom. This permits a quick determination at any point during the argument of how much time

14. The height of the lectern is adjustable to accommodate both the near-sighted and far-sighted practitioner. The necessary adjustment should be made before counsel begins the oral argument.

15. Occasionally, a new statute or regulation may come to counsel's attention shortly before the argument. The Supreme Court's rules permit the filing of a supplemental memorandum addressed to such matters. However, if the matter is important and must be referred to during argument, the attorney may lodge ten copies of the statute or regulation with the Clerk with a request that each Justice receive a copy, and should simultaneously make service upon opposing counsel. New matters of significance should not be raised for the first time during oral argument.

has elapsed and allows counsel to decide "on the fly" how much of the argument outline can be covered and how much must be abandoned.

Obtaining assistance from an associate at counsel table is permissible, but, if repeated, can create the negative impression that one is poorly prepared. If the Court asks an important question that counsel cannot answer, he may turn briefly to an assistant for the requested information.¹⁶ It is important to settle in advance what to do about the passing of notes from assistants. Ordinarily, a stream of notes containing bright ideas is an enormous distraction, and should be forbidden. It is not possible to pay attention to the questions asked by the Justices and the arguments of the opponent while attempting to decipher handwritten notes of an assistant. Note passing should be permitted only in a real emergency, or when the oral advocate *requests* written assistance.

Much advice has been given about effective public speaking in the Supreme Court. The nub of it is straightforward: the advocate should speak clearly, stand straight at the lectern, and deliver an argument with a controlled cadence. Long pauses while groping for the next point, or while flipping through the record for a page reference, must be avoided. The correct balance of volume is a matter that requires experimentation and the advice of moot court observers. Counsel should not bellow at the Justices.¹⁷ Neither should he or she mutter or mumble during oral argument. The impression to be conveyed through volume, tone, and gesture is that of confidence, sincerity, and respect before the Court. This precludes exaggerated gestures, pointing at the Justices, wandering from the lectern, and other forms of distracting behavior.

Courtesy toward the Court is, of course, an all important element. Justices should be referred to as "Mr. Chief Justice," "Justice ——," or "your Honor." Justices never should be referred to as "Judge"; still more clearly, no present or past Justice ever should be referred to by last name only, without the preceding title "Justice ——." In speaking to the Justices, counsel always should display the kind of courtesy and respect used in communicating with a senior partner or superior in the government. This means that even if, in the heat of argument, the Court is not "unfailingly courteous" toward counsel, counsel must be "unfailingly courteous" toward the Court.

This does not imply that counsel should be timorous or overawed. It is

16. In rare cases, the Chief Justice may grant leave to file a concise supplemental memorandum addressed to the point in question.

17. The close proximity of the bench to the lectern, and the sensitive voice amplification equipment used in the courtroom, make loud declamation unbearable to the Justices and to observers in the courtroom.

never appropriate to "buckle under" just because an individual Justice seems displeased with one's position. Colonel Wiener correctly characterized the proper frame of mind, and the proper form of address, as that of "respectful intellectual equality."¹⁸

V. QUESTIONS FROM THE BENCH

Questions from the bench come in all forms and varieties. They range from the difficult to the obvious, from the subtle to the whimsical. The variety, rapidity, and unpredictability of questioning from the bench is perhaps the distinguishing hallmark of oral argument before the nine Justices of the Supreme Court. Counsel should not be unnerved or surprised by this outpouring of questions. They call, however, for a snap judgment concerning the scope and nature of the response. Speaking quite generally, questions from the bench fall into the following categories, and call for the indicated types of replies:¹⁹

a) *Questions that go to the heart of the case.* As previously noted, some Justices ask questions which go to the central issue in the case. The answer to such a question may well determine the vote of the Justice asking the question and also may affect the judgment of other Justices who share the same point of view. Obviously, counsel should spend the most time with this category of questions. These critical questions also can be used as a springboard for development of related substantive points that counsel intends to cover during the argument.

b) *Background questions.* Many questions during argument simply require a clarification of some record fact. Other questions manifest curiosity about matters such as relevant geography, the identity of the judges below, or the votes cast by the judges below. Counsel should give a quick and accurate answer to such questions and move on without delay.

c) *Fencing or debating questions.* The Justices sometimes engage in extended debates with counsel, which may or may not relate to central matters in the case. Of course, counsel cannot cut off such debates, despite his belief that the matter is tangential. Nonetheless, one must avoid getting bogged down too long on a peripheral point. It is essential in this instance to give the best possible answer, and find a tactful way to get back to the main points.

18. F. WIENER, *supra* note 1, at 299.

19. The range of questions asked by the Court is ably discussed in Prettyman, *Supreme Court Advocacy: Random Thoughts in a Day of Time Restrictions*, 4 LITIGATION 16 (Winter 1978). For a brief description of the questioning style of each Justice, see Mann, *Prepping for the Justices*, 4 AMER. L. 97 (Nov. 1982).

d) *Humorous questions or observations*. Counsel should enjoy the remark and then get back to business. While it is not uncommon for the Court to offer a humorous observation or question, attorneys ordinarily should refrain from introducing humorous observations of their own. As often as not, attempts at humor fall flat, and in all instances are a waste of counsel's limited argument time.

e) *Irrelevant questions*. It is not uncommon for counsel to hear questions which he believes are related only remotely to the dispositive issues in the case. In fact, however, the matter of relevance is personal and relative, and one should never display irritation over questions that appears to be beside the point. Counsel should give a polite answer and avoid any withering glance or trace of sarcasm. He should give a brief response and then explain why the present case raises a "somewhat different issue."

f) *Hostile questions*. Counsel should assume from the very beginning that some of the Justices will present hostile or unfriendly questions, manifesting their disagreement with his position. This is no occasion to be unnerved or disappointed. Hostility frequently is a sign of frustration that the questioner is in the minority. Counsel should remember that, while one or more Justices may seem dissatisfied with his positions or answers, a majority of the Court may well be on his side. In dealing with hostile questions, counsel should give a polite but firm response and get back to his main contentions.

The cardinal rule in dealing with all questions from the bench is to give a direct, nonevasive response. Inexperienced attorneys frequently antagonize the Court by evading questions—responding, for example, by saying "that presents a different case," or "that really isn't what this case is about." The Court is well aware that its questions call for analysis of a point different from the point counsel is pressing. It nonetheless expects a direct answer.

All answers must be concise and clear. Ordinarily, counsel will find it impossible to include more than one or two short sentences in a response. The Justices will interpose a different question if counsel drones on too long. It is inappropriate, however, to be so anxious to get back to a planned speech that questions receive a "back-of-the-hand" answer. If the Court has raised an important point, and is willing to hear an extended response, counsel should not hesitate to provide it.

Another potent source of annoyance is any attempt by counsel to postpone an answer to a question from the bench. One cannot say "I have not yet come to that point in my argument." The answer from the bench is likely to be: "You certainly have, and it is time to answer." In some in-

stances, it is advisable to interrupt the course of the oral argument in order to give a full-blown response to the Justice who has raised the question. This is particularly true if the point is an important one. In other instances, it is possible to give a more concise answer on the point, and then assure the Court that the answer will be elaborated after laying the necessary foundation. If you promise to return to a question, be very sure that you actually do so.

It is critically important to listen carefully to each question presented from the bench. The object is not to blurt out a response to the question before it is finished, in the manner of a high school quiz show. Counsel should make sure that he or she understands exactly what the Court is asking. If a question is unclear, the Justice will rephrase it. The Court is justifiably annoyed by attorneys who waste argument time by responding to questions which the Court has *not* asked.

One should not expect, of course, to have an uninterrupted interlude for presentation of arguments, or even for giving extended answers to questions. It is not uncommon for the Justices to begin propounding questions shortly after counsel says "Mr. Chief Justice, and may it please the Court." This calls for flexibility. Counsel cannot be so wedded to a prepared outline that he or she is unable to hop quickly from question to question and to get back to affirmative points promptly after dealing with questions.

The intensity of the questioning varies considerably from case to case. Sometimes, counsel's position is so strong or so weak that questioning is largely superfluous. In other instances, however, the argument is "hot." That means that counsel gets nothing but questions for a thirty-minute period.²⁰ Frequently, the questioning process will be dominated by those Justices who disagree with the position being presented. It is essential in this situation not to let the argument break down into a series of unrelated responses. The argument should not become a cross-examination in which counsel is forced to give a string of unfavorable concessions before the red light goes on. He must attempt to retain control over the argument in at least this sense: after answering the question presented by the Justice, counsel should weave in the affirmative points that are necessary to win the case. In other words, the advocate must have clearly in mind the main points that must be presented no matter how intense the questioning becomes. And, with a little dexterity, the questions from the Court can be

20. Justice White recently observed that oral argument is an occasion for the Justices "to clarify their own thinking and perhaps that of their colleagues. Consequently, we treat lawyers as a resource rather than as orators who should be heard out according to their own desires." White, *The Work of the Supreme Court: A Nuts and Bolts Description*, 54 N.Y. St. B.J. 346, 383 (1982).

used as stepping stones to make these essential points. For example: "The answer to your Honor's question is _____. And in this connection, I would emphasize"

Occasionally, counsel will face a "cold" argument in which the Justices ask very few questions. This possibility requires one to have a prepared presentation which will extend for twenty to twenty-five minutes, which is interesting, and which is known well enough to be presented without supporting dialogue. This is not to say that all available time must be used. If the essential points can be communicated in less time, the Justices will greatly appreciate counsel's brevity. Beyond this, there is a substantial tactical advantage in conveying the impression that the case is so simple and straightforward that there is no need to dwell at length upon it. At the end of such a "cold" argument, counsel may simply say: "Unless the Court has further questions, I will reserve the balance of my time for rebuttal."

Occasionally, the bench may appear to be so cold that it is virtually ignoring counsel's argument. Some Justices may talk among themselves during argument, read materials before them, and even briefly leave the courtroom during the course of the argument. Counsel should not be unnerved by this. Frequently, the Justices are conferring about some aspect of the case before them. It is usually best simply to forge ahead and try to make the oral presentation lively and interesting. A short pause for emphasis also may bring attention back to the lectern.

Not all questions, of course, are hostile or unfriendly. If an attorney is having a hard time, a sympathetic Justice may intervene with a friendly question, or a restatement of the attorney's position, which is intended to place his case in a favorable light. Ordinarily, such helpful reformulations should be acknowledged and accepted: "Justice _____, you have accurately summarized our central contention" On occasion, however, a Justice may ask a question that is not quite accurate in its friendly implication. The best response is to accept the help but politely point out the mistake. For example: "I would agree with your Honor's approach, but I think the main support in this situation comes from" It is not advisable merely to accept the help if it rests on a mistaken premise; the other Justices promptly will identify the fallacy and embarrass counsel for failing to do so.

Hopefully, counsel will be so well prepared for argument that he or she will be able to respond to all questions presented from the bench. However, one also must consider the possibility that a question will be raised to which the answer is unknown. If the Court asks a question concerning the record which counsel cannot answer, it is permissible to turn briefly to an

assistant for the information. If the point is really an important one, counsel can offer promptly to file a short supplemental memorandum. If this is not appropriate because the matter is a minor one, it is permissible simply to say: "I regret that I cannot supply that information. My recollection is, however, that the subject is discussed in the testimony of ——."

It is not possible to dodge questions calling for a legal judgment. Legal, hypothetical, or policy questions must be answered on the spot to the best of one's ability. It is permissible to say "I have not considered that variant of our situation," but counsel then should proceed to indicate what factors are pertinent and give his best analysis of the proper outcome.

One need not worry about encountering the conventional law school question—"give me the facts in the *Drybones* case." This never arises. Counsel should, however, know enough about all of the cases cited in his brief to be able to deal with questions about them and their relevance. Indeed, some attorneys have been surprised by highly specific questions from the Court, such as: "You rely on the *Johnson* case, but didn't the Court explicitly say in footnote 19 that it was not reaching your issue?" The possibility of this kind of question requires not only great care in drafting the brief, but also a clear recollection of significant cited cases.

There should be no need to add that counsel never should bluff about cases he has not read. If counsel receives a point-blank question about a case that he does not know, he should admit it and state: "If your Honor would refresh me concerning the holding in that case, I will try to answer the question directly." This should not occur, of course, if the case is a relevant one. Thorough argument preparation will encompass all such cases.

The Justices frequently ask attorney's to make concessions during the course of oral argument. It is essential to use utmost care in responding to such questions, since concessions made in open court can be used against counsel in deciding the case on the merits.²¹ On the other hand, one cannot run away from concessions that must be made. This is particularly true of factual matters. For example, if a Justice inquires "isn't it true that your client testified ——," an answer must be given in the affirmative if that is the case. In dealing with a question calling for a concession, it is

21. On rare occasions, counsel may realize, after completion of the argument, that he or she has made an improvident concession on a point of major significance. In such an instance, it may be appropriate to send a concise letter to the Justices through the Clerk, with 10 extra copies, which refers to the question and clarifies the response in a suitable manner. Service upon opposing counsel also should be made. Needless to say, there is no assurance that the Justices will honor this kind of retraction. See generally *Rose v. Mitchell*, 443 U.S. 545, 573-74 (1979); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 170 (1972).

essential to *first answer the question*, and only then to explain why the conceded matter is not dispositive. If a Justice is disturbed that you are not making a concession that you must make, simply say "I do acknowledge your Honor's point. The record shows ———. That, however, is not dispositive here because"

Even greater care must be exercised in dealing with questions calling for a concession of law. For example, it is common for the Justices to ask questions such as: "Wouldn't you agree that your position should be rejected if the facts were ———." If you are willing to stand on the distinction between your case and the variation described by the Justice, you should simply answer "yes." On the other hand, if it is not crystal clear that the distinction is a dispositive one, or if your case is not greatly different from the hypothetical case, it is best not to concede the point at all. It is permissible to respond: "I wouldn't concede that the variation would produce a different result. Your Honor has, of course, described a far less favorable case for applying the principle we rely on, but it still would control because"

Since the Justices must anticipate the future consequences of their decisions in a wide variety of cases arising throughout the nation, they are highly concerned with the breadth of legal principles they announce and their potential application to other situations. Counsel therefore must be ready for the question: "How far do you carry that principle? Would you, for example, apply it in the following instance . . . ?" Hypothetical questions such as this are a central feature of oral argument in the Supreme Court, and they require substantial preparation and analysis in advance. Counsel should bear in mind that every principle has a breaking point. Stated otherwise, every principle meets a contrary principle at some point. Counsel, therefore, must be wary of presenting arguments that sound radical because principles are extended too far. In distinguishing a hypothetical situation, it also is essential to remember that it is not sufficient merely to say "that is a different case." The Justices know that. They want to know what principle separates the two instances.

During the heat of debate on an important issue, counsel may find that one or more Justices are especially persistent in questioning and appear unwilling to relent. This may be the case when a Justice is making known his or her views in an emphatic manner, and is determined to expose the weaknesses in counsel's arguments. Often, another Justice will divert this colloquy by posing a different question that permits counsel to shift back to a more fruitful line of argument. In the absence of such relief, however, counsel must give his best answer firmly and politely; he then should at-

tempt to steer the argument back on course by weaving in affirmative points. If the hostile Justice returns to the same point, counsel may wish to say: "Justice ———, I regret that I cannot improve on the answer I previously gave the Court on that point." Counsel never should express exasperation with the Court for persistent examination. And if it is necessary to disagree at the end of a colloquy, counsel should do so courteously: "With great deference, your Honor, we see that case in a very different light. In our view,"

Counsel may generate goodwill not only by answering questions in a forthright and accurate manner, but also by returning briefly to important questions asked of his opponent who has provided wrong or inadequate information. For example: "Justice ——— asked Mr. ——— whether ———. He answered ———. In fact, however, the Joint Appendix, at page ———, discloses a quite different answer on this important question."

VI. RESPONDENT'S ARGUMENT, REBUTTAL, AND AMICUS CURIAE ARGUMENT

The general rules described above apply to the arguments of both petitioner and respondent. However, the respondent is required to exercise even more flexibility than petitioner. The same is true, of course, of the appellee, who addresses the court after the appellant has concluded his argument. Counsel for respondent should approach the lectern with the same materials—including argument outline, briefs, and appendices. He also should have in mind the main points that he wishes to make. Counsel should not use his argument time simply to complain about mistakes that his opponent has made; he must make his own affirmative case. In short, it is essential for lawyers on both the "topside" and "bottomside" to give the Justices the intellectual and emotional basis for ruling in favor of their clients.

Counsel for respondent should not, however, proceed with the argument as if he or she was not seated in the courtroom during the preceding half hour. It is essential to refocus the planned presentation to make it relate to what has happened during the topside debate. If one is well prepared, there should not be many surprises. It is a good practice to bring along a magic marker to annotate the argument outline as counsel for petitioner speaks, noting the major points that will be added in light of what petitioner's counsel and the Court have said.

If an important exchange between the Court and counsel for petitioner has taken place, and if it goes to the heart of the case, counsel for respondent may wish to begin with the substance of that colloquy and weave his

whole argument into the issues that thus have been raised. After making an affirmative point, it frequently is helpful to turn to related questions previously asked by the Court of petitioner's counsel and provide corrected responses. In this way, counsel for respondent can make the affirmative points that are essential to victory and also disarm the advocacy of his opponent.

The guiding rules for rebuttal are straightforward. Counsel for petitioner should, of course, attempt to reserve enough time during the topside argument to permit an adequate rebuttal. Ordinarily, no more than four or five minutes will be required. But counsel should make every effort to reserve at least *some* time for rebuttal. The existence of rebuttal time has a salutary restraining effect on respondent's counsel, who realizes that any overstatement or unsupported contention will be exposed at the end of the argument.

The amount of time reserved for rebuttal is not entirely under counsel's control. If the Court propounds many questions at the end of the argument, rebuttal time may vanish. If this appears to be occurring, counsel politely may remind the Court that he wishes to reserve a moment or two for rebuttal. Ordinarily, the Court will honor this request, or, in the alternative, give petitioner's counsel a minute of rebuttal even if the red light has flashed on at the end of his argument.

The rebuttal should be planned during the course of respondent's argument; it never should be prepared in advance. No matter how much time is left over for rebuttal, counsel should make only three or four important points. It is not appropriate to compile a long list of your opponent's errors and then touch upon every one of them during rebuttal.

Rebuttal can be quite effective if respondent's counsel has made a statement that is directly contradicted by the record or by some controlling authority. In either event, counsel on rebuttal should be prepared to give the Court the dispositive citation. When the red light goes on, counsel should thank the Court and sit down. However, one may finish answering a question from the Court, and may answer any new question presented by the Court, after the red light has flashed on.

Counsel should be forewarned that the Court is visibly impatient with rebuttal. This means that any rebuttal must be snappy and good. Indeed, it can be quite effective, after an opponent has made an unimpressive argument, simply to stand up and say with confidence: "Unless the Court has questions, we will waive rebuttal."

With the exception of the Solicitor General and his staff, few attorneys have occasion to present oral argument as *amicus curiae*. Occasionally,

representatives of state governmental bodies, or other substantial organizations, will be permitted, on motion, to present oral argument as *amicus curiae*. This, however, is the rare exception.

An attorney appearing as *amicus curiae* ordinarily will have only ten or fifteen minutes, as prescribed in the Court's order permitting *amicus* participation. This rigid time restriction calls for special condensation and dexterity. There is no occasion to spend any time on the facts. Counsel should give a quick introduction summarizing his position and the ground to be covered during the allotted time. Then he should embark immediately upon the two or three main points that must be addressed. One must be skillful at weaving main points into answers to questions, and steering the argument back into meaningful channels, when only ten or fifteen minutes are available. If, of course, the Court keeps counsel on his or her feet after expiration of the allotted time with additional questions, he or she should not hesitate to remain at the lectern. However, if the red light flashes on and there are no additional questions, counsel should thank the Court and promptly sit down. Unlike some courts of appeals, the Supreme Court does not permit any attorney to "wind up" his argument after the red light has flashed on.

VII. COMMON MISTAKES

It is often observed that, although it is difficult to *win* a case through oral argument, it is easy to *lose* the case during argument. Although, personally, I am more optimistic about the positive potential of the argument process, I have not the slightest doubt that mistakes during oral argument have the potential seriously to undermine counsel's position on the merits.²² The potential pitfalls and missteps during argument are so numerous that no catalogue could suffice. However, some mistakes occur with such frequency that it is appropriate to set them forth as examples.

The following errors have the potential to affect adversely counsel's affirmative presentation:

— Leading off the argument with a dubious or unnecessarily provocative contention that generates friction at the outset.

22. Justice Rehnquist recently has observed:

Oral advocacy is probably more important in the Supreme Court of the United States than in most other appellate courts [T]he time set for oral argument is the only opportunity that you will have to confront face to face the nine Members of the Court who will ponder and decide your case. The opportunity to convince them of the merits of your position is at its high point.

W. Rehnquist, *Oral Advocacy: A Disappearing Art*, 32-33, Brainerd Currie Lecture, Mercer University School of Law (Oct. 20, 1983).

— Sticking inflexibly to a prepared speech when the Justices express interest in other areas.

— Using hyperbole, overstatement, or exaggeration in describing record facts.

— Using emotional rhetoric, high-flown oratory, or irrelevant lines of argument intended to excite emotional responses.

— Bellowing at the Justices in a stentorian tone of voice, or, conversely, mumbling and muttering.

— Inflicting long and boring delays while groping for page references, cases, or notes.

— Wandering around the lectern, slouching over the lectern, rocking back and forth before the lectern, using awkward gesticulations, pointing at the Justices, jiggling keys or delaying proceedings while drinking water at the podium.

— Using dry, monotonous speech, without any variation in pitch, pace, or volume.

— Displaying lack of respect toward the bench, including flippancy or over-familiarity.

— Relying on lower court authorities, dissenting opinions, or law review articles.

— Failing to come to grips with the plain language of statutory or constitutional provisions.

— Reading from the text of an oral argument script, or reading at length from legislative history, opinions, statutes, regulations, or the trial record.

— Rearguing factual points which have been resolved adversely by both courts below.

— Arguing about the correctness of the lower court's disposition of an issue of state law.²³

— Referring to matters outside the record (such as newspaper articles) in presenting affirmative arguments.

— Using distracting physical exhibits.²⁴

23. In almost every instance, the Supreme Court will treat a state court's construction of state law as final. In most instances, the Court likewise will defer to the construction placed on local law by the lower federal courts, who presumably are more familiar with local law.

24. This almost always is a bad idea. Substantial amounts of time are wasted while physical evidence is examined, passed around, or stared at in the courtroom. All too frequently, the use of exhibits is perceived as a stunt. If some document must be specially examined—such as a newly promulgated statute or regulation—counsel should notify the Clerk well in advance and ask him to distribute copies to all of the Justices prior to argument. If counsel insists on using a large chart or some similar form of physical evidence

— Mischaracterizing the Court's institutional role. For example, arguing in a constitutional case that "this Court requires . . ." as opposed to arguing that "the Constitution, as construed by this Court, requires"

— Arguing to a particular Justice that "your Honor has held in the *Jones* case that" It is the *Court* that has so held, in an opinion written by a particular Justice.

— Continuing to talk after the red light has flashed on without any invitation for further argument in the form of additional questions.

Perhaps the most harmful errors of all are made by counsel while responding to questions. Some of these mistakes are matters of substance; others are matters of style. All of them have the potential to throw a bath of cold water on counsel's presentation. These common mistakes include:

— Failing to listen carefully to a question from the bench, and answering some other question that the Justice has *not* asked.

— Evading questions by stating "that's a different case . . ." or by failing to give a direct, simple, and comprehensible answer.

— Refusing to give a "yes" or "no" answer when the Justice so requests and when it is possible to do so.

— Attempting to postpone answers to questions, or promising to cover matters that are never covered adequately later.

— Giving long-winded, multiple-paragraph answers to straightforward questions, or relying on complex and incomprehensible factual descriptions in responding to questions.

— Failing to accept or acknowledge helpful observations or reformulations of argument suggested by a Justice.

— Bluffing about knowledge of a case, statute, or trial transcript.

— Indulging in repeated conferences with lawyers at counsel table prior to answering questions.

— Giving fearful or timorous responses to overbearing questions, or displaying disappointment when questioning is hostile.

— Attempting to answer questions by propounding other questions back to the Court.

— Attempting to respond to a Justice by name, but using the wrong name.

— Referring to a Justice as "judge" or referring to present or past Justices only by last names and without the proper title. It is essential to say

during the argument, he should notify the Clerk at least two weeks in advance and obtain the Court's permission.

“Mr. Chief Justice,” “Justice ——,” or “Your Honor.” Bear in mind that Justice O’Connor does not wish to be called “Madam Justice.”

One final suggestion may be in order. Attorneys arguing for the first time in the Supreme Court should not worry about nervousness. Even experienced lawyers are nervous before their arguments. Nervousness melts away quickly, however, once the argument begins. Prior to argument, it is helpful to think positively and gratefully about the experience: you are appearing before nine people who want you to do a good job, and if you are determined to do so, you certainly will. Remember, too, that thorough preparation is the best cure for buck fever. Once you have mastered your case, you will know it far better than the Justices and will be able to guide them to a correct understanding of it.

In the end, it may be the case that no list of abstract suggestions can provide much help to attorneys preparing for a first argument in the Supreme Court. Perhaps it is impossible to improve on the straightforward advice of Judge Robert Bork: “Stand up straight; speak clearly; and try to sound intelligent.”²⁵ If further embroidery is necessary, I would only reiterate the suggestion that counsel experience firsthand the atmosphere of the courtroom prior to oral argument—an atmosphere in which severe time constraints and rough-and-tumble questioning are the order of the day.

25. Remarks of Hon. Robert H. Bork, Conference on Supreme Court Advocacy (Oct. 18, 1983).

