**Highlights and Lowlights of Oral Advocacy**

by

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Oral advocacy is an art form, but one developed through careful preparation. The spontaneity of exchanges between the bench and bar can make for great theater, as well as shape the outcome of a case. When the advocate is well prepared, an oral argument can be a thing of beauty. When ill-prepared, the advocate can make egregious errors that can sink a case.

This article combines examples of the worst and best oral advocacy in the Supreme Court and courts of appeals. Extracted from *Supreme Court and Appellate Advocacy* (West 2011), the article uses examples from real cases to illustrate the worst – and best – of appellate advocacy. The idea is to present common mistakes and attributes of the best advocates to show by illustration the do's and don'ts of successful oral advocacy.

Every lawyer who makes an appellate argument can expect to make mistakes. The best advocates shrug them off and move on; the worst compound their errors with others. Supreme Court and appellate advocacy, like golf, is not a game of perfect. No advocate wants to have her mistakes publicized, particularly by an author who has made his own share. Unfortunately, the best examples of what *not* to do come from actual Supreme Court and court of appeals arguments. Regrettably, many mistakes are fairly common and avoidable. Before delving into attributes of the best advocates, this article begins with some of the lowlights of oral advocacy – those mistakes commonly made that can detract from a successful presentation.

## § 1 Speak With Too Much Passion or Rhetoric

Advocates not infrequently come to the Supreme Court or a court of appeals thinking they must be at their most eloquent. They concoct elaborately beautiful phrases and utter them with a kind of nineteenth century pomp. It is all very unnecessary and can be counterproductive. One of the most memorable examples of this error was by respondent's counsel in *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 112 S. Ct. 2395 (1992), which concerned whether a local ordinance was unconstitutional on its face because it imposed a fee of $1,000 for a parade permit. The county's attorney competently marched through his arguments, with few persons in the courtroom having an inkling of what was to come. Respondent Nationalist Movement was an extremist group that had sought the parade permit. Its counsel, Richard Barrett, began with the most extraordinary opening lines heard in recent years in the Supreme Court:

> MR. BARRETT: Mr. Chief Justice, if it please the Court:
>
> If the right of the people to peacefully assemble to petition the Government becomes only a privilege then the county becomes a kingdom. The courthouse is a castle and the citizen is a subject. The moat around this castle, if you will, is the $1,000 permit fee for those seeking to assemble on the steps, and there is no drawbridge for either the poor who have no fee to pay for the steps, or for the free, who refuse to kneel upon the steps.
>
> Here is the battering ram against the palace of privilege, it is the inalienable and universal rights of man, and here is the crossbow against the ramparts of tyranny. It is the First Amendment. And here are the keys to the kingdom: *[Murdock v. Pennsylvania*, 319 U.S. 105, 67 S. Ct. 870 (1943)] There can be no charge for the enjoyment of a right guaranteed by the Federal Constitution. [*Follett v. Town of McCormick*, 321 U.S. 573, 64 S. Ct. 717 (1944)] There may not even be a $1.00 per day fee to exercise rights under the First Amendment.

*Forsyth County v. The Nationalist Movement*, No. 91-538, 1992 WL 687825 at *27 (Mar. 31, 1992). At that point, the irritation among the justices was evident in the curt colloquy that interrupted Barrett's oratory:

> QUESTION: Mr. Barrett, do you think those cases overruled *Cox*? [*Cox v. New Hampshire*, 312 U.S. 569, 61 S. Ct. 762 (1941)].
>
> MR. BARRETT: *Cox* was adopted, Your Honor, at a time–
>
> QUESTION: Will you answer my question?

1992 WL 687825 at *27.

Barrett continued in that vein throughout his argument. Not long thereafter, he committed another sin of advocacy in the Supreme Court–getting too emotional. After he went on another rhetorical tear, he drew the ire of the Chief Justice:

> MR. BARRETT: * * * Since the county has already said in its brief that they regard this speech as deficient and they say that the only reason for the permit fee in their brief is to rid the public forum of unwelcome harassment, well, then this speech must be so nauseating that they would have to charge for more toilets for the public that is going to vomit at the assembly that is wanting to be put on.
>
> QUESTION: Mr. Barrett, I think you better calm down a little and address the issues. I think we have heard enough rhetoric.
>
> MR. BARRETT: It's an emotional issue based on humanity, Your Honor.
>
> QUESTION: I suggest you try to keep your emotions under control and try to discuss the merits of the case.

*Id*. at *37-*38. Most counsel rebuked in that way by the Chief Justice would proceed meekly. Barrett, however, gamely pressed on. Toward the end of his argument, another colloquy made clear that the justices had abandoned any hope that he might help them figure out how best to decide the case. Instead, when an opportunity arose to have fun at Barrett's expense, a justice took it. The colloquy started, however, with a perfectly serious question:

> QUESTION: But the facial challenge to the statute is it is invalid because it would require somebody to give a name to get a permit, that makes the whole thing bad, doesn't it?
>
> MR. BARRETT: If there is a valid exception where the confidentiality could be

> respected, Your Honor, then there would be no challenge. * * * But [the parade fee] is a tax, Your Honor, and I simply draw the court's attention in what meager abilities I have to Forsyth County or any county and ask what do we see here when this assembly takes place, and how valuable is that to America? I see Americana and I see the stump speech. I can't put a price on it, but I see the furrowed brow of labor listening. I see the tender graces of motherhood feeling. I hear the assertion of youth speaking out.
>
> QUESTION: I see the mother paying out in municipal taxes what she might be buying food for her child with.
>
> (Laughter.)
>
> MR. BARRETT: Balance that if you will, Your Honor, between perhaps the sharpening right there of democracy's rusty instruments. Can I speak of the spoken word and the sparks that come from it? Can I speak of reason and the glitter that lightens our minds? Can I speak of the shiny sword of reason that ousts tyranny from among us? Your Honor, they have spoken of money. May I speak of freedom? They have spoken of convenience. May I speak of happiness? Someone asked if I would pay a fee. Your Honor, write this epitaph, if you will, on my tomb: The road not taken, but not the speech not given. * * *
>
> QUESTION: How about the argument not made?
>
> (Laughter.) *Id*. at *47-*49.

Notwithstanding Barrett's performance, the Supreme Court held by a 5-4 vote that the county's ordinance permitting the administrator to vary the parade permit fee based on the estimated costs of maintaining public order was facially unconstitutional because it was not drawn in a sufficiently narrow manner and did not provide reasonably definite standards to guide how much should be charged as the fee.

### § 2 Read to the Court

Premier advocates for decades have advised against reading in appellate arguments. *See*, *e.g.*, Robert H. Jackson, "Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations," 37 A.B.A. J. 801, 865 (Nov. 1951); John W. Davis, "The Argument of an Appeal," 26 A.B.A. J. 895, 898 (Dec. 1940). Decades ago, or at least in the nineteenth century, it was much more common for the attorney to read the argument. That process must have been stultifying for all concerned. In today's argument environment, it is extremely rare for counsel to be given the opportunity to speak long enough without interruption to engage in any reading of prepared remarks. And even if presented with the opportunity, the advocate should not plan on taking it. A failure to make eye contact through obvious reading by the advocate will lead a judge to interrupt simply to break up the monotony of the presentation.

In *United States v. Microsoft Corporation*, 253 F. 3d 24 (D.C. Circ.) (en banc) (per curiam), cert. denied, 122 S. Ct. 350 (2001), Steven Holley, an attorney for Microsoft, launched into a prepared written argument that was delivered in a manner that made it obvious that he was reading to the court. Judge Sentelle interrupted to say to counsel, "[Y]ou might recall that our rules recommend against, really speak against, reading your arguments to the Court, Counsel." Oral Arg. Tr., *United States v. Microsoft Corp.*, Nos. 00-5212 & 00-5213 at *239-40 (Feb. 27, 2001). Notwithstanding that admonition, Holley continued to read his argument, even as the court visibly appeared to be tuning him out.

At the beginning of arguments, particularly with a prepared opening, it is a tempting crutch to look down at the written page for help. As important as those opening lines are, the advocate should try to have them memorized. With the first spoken sentences, the advocate is trying to

build credibility with a court that is at its most attentive. When an advocate completes, "May it please the Court," and then puts her head down to read the beginning lines of the opening, a natural reaction by any listener (and judges are no exception) is to lose interest in what the advocate is saying.

Reading to a court is a sign of insecurity and inexperience. It makes good eye contact impossible. It interferes with real communication with the court and prevents an attorney from making the most of what she perceives in the court, such as elaborating on an answer when an initial stab is greeted with the furrowed brow of incomprehension. An advocate making eye contact may also better accommodate a judge whose posture makes clear a desire to ask a question. An advocate may also use a sweeping eye contact with the court to move away from a judge who appears to be engaging in a one-on-one question-and-answer session that does not facilitate the advocate's development of her affirmative points. Those techniques are not available to the advocate whose head is stuck in a binder.

Even without reading, an advocate should try to look down at notes as infrequently as possible. Unless a question requires the advocate to scan notes or briefs for an answer, counsel should try to maintain focus on the questioner for several reasons. First, it is easy to lose the train of a question when the advocate is not looking the questioner in the eye. It is also rude to be asked a question and immediately to look away. Thus, even when the advocate knows she will have to look down, she should try to keep her focus on the questioner for as long as possible before doing so. One technique to avoid unnecessarily looking down is to set the tabs on the podium binder so that the advocate can simply feel for the tabs and know exactly where the answer to the question will be without having to look down until the last moment.

### § 3 Avoid Direct Answers to Questions

Few things irritate a judge or justice more than an answer that does not directly address the question. If a question calls for a "yes" or "no" answer, the court expects the answer to begin with one of those words. There are two common errors counsel make when confronted with a "yes" or "no" question. The first is answering the question with the explanation before getting to the "yes" or "no" part of the answer. The second is viewing the question as a trap from which the perceived successful escape is avoidance and obfuscation. Both approaches create far more problems than they solve. Indeed, the best advocates will begin their answers "yes, because _____" or "no, because _____." A judge wanting a straight answer will be more willing to give the advocate an opportunity to explain the answer if it begins along the lines of, "Yes, except in certain circumstances."

In *Reno v. Condon*, 528 U.S. 141, 120 S. Ct. 666 (2000), South Carolina Attorney General Charles Condon argued pro se on behalf of the respondent in a suit testing the constitutionality of the Driver's Privacy Protection Act, a law enacted by Congress under the Commerce Clause to ensure that states in receipt of driver's license information do not sell or otherwise transfer that information except in certain circumstances. Condon quickly found himself on the defensive. One colloquy illustrated–to the amusement of the courtroom spectators–the hazards of not directly answering a question:

> QUESTION: Do you agree that the wage and hour law, therefore, has got to be struck down in its application to the States?
>
> GENERAL CONDON: This Court has said that was a law of general applicability.

> QUESTION: But it has administrative burdens, so–
>
> GENERAL CONDON: And my point about administrative burdens is to get to the heart–
>
> QUESTION: –they're okay if they're distributed to States and to private entities? No matter what the administrative burden, it's okay as long as private entities also have administrative burdens?
>
> GENERAL CONDON: Again, in terms of trying to answer your question directly–
>
> QUESTION: Well, that would be yes or no.
>
> (Laughter.) *Reno v. Condon*, No. 98-1464, 1999 WL 1075199 at *28 (Nov. 10, 1999).

Obviously, an advocate aspires not to have the court poke fun at an answer. The line to draw between answering the question directly and getting an opportunity to give an adequate explanation can be a very fine one. It takes a great deal of preparation, self-assurance, and wherewithal to answer a question "yes" or "no," particularly when it involves a hypothetical. But an advocate who can get right to the point in answering the question and then offer an explanation will, far more often than not, avoid wasting time and frustrating the court.

### § 4 Use Ill-Considered Metaphors

The argument in *Reno v. Condon* also illustrated the hazards of answering a question with a poorly conceived metaphor. At one point, a justice asked Condon a hypothetical about state compliance with other federal directives: "I mean, suppose you sell hot dogs at the State park. Don't you have to comply with the food and drug laws?" *Id*. at *22. Condon's answer first betrayed his inexperience in dealing with hypotheticals. "Justice Breyer, * * * [w]e aren't selling hot dogs here." *Id*. Justice Breyer was fully aware of that, but graciously moved to a different

hypothetical involving state taxation of Internet transactions. But Condon seemed fixated on selling hot dogs. A few minutes later, he brought up on his own the hot dog hypothetical. When Justice Breyer evinced no interest in going back to that example, Condon nonetheless pressed on. After another colloquy, Condon again injected the hot dog hypothetical: "[A]nd again, if I could go back to the hot dog, because I like that one, if I could, we're not selling hot dogs here." *Id*. at *26. The persuasive value of reintroducing a hypothetical in which the justices themselves no longer expressed interest was lost on everyone.

Overuse of metaphors can also spark attempts at humor by the court at the advocate's expense. In *United States v. Salerno*, 505 U.S. 317, 112 S. Ct. 2503 (1992), Michael Tigar used the metaphor of trial counsel "opening the door" to the admission of evidence that might otherwise have been blocked. That metaphor, of course, is well known and was apt for the case. But Tigar took it too far, and then abruptly shifted to a different metaphor, which led to this exchange:

> QUESTION: Your position, Mr. Tigar, is that the Government opens the door when it begins cross-examination in the grand jury?
>
> MR. TIGAR: No, Justice Kennedy, we do not take that position.
>
> QUESTION: When does this door get opened?
>
> MR. TIGAR: The door is opened, one–and the court of appeals went through this in *Badahar* [*United States v. Badahar*, 954 F.2d. 821 (2d. Cir. 1992)], so I'm not making it up as I go along. It's in the record. * * *
>
> QUESTION: But the doctrine about opening the door [is] so that you don't take an inconsistent position before the same trier of fact. The jury never heard this testimony.
>
> MR. TIGAR: The inconsistent position * * * is that the Government indicted these defendants and said, members of the trial jury, there is a conspiracy here to rig bids. Now, at the same time they're telling the jury that, in the back room, they have lit a candle–the candle of the exculpatory testimony of these witnesses. And now they want from this Court the authority to put a basket over that candle so the light

> doesn't shine in the dark corners. That is–
> QUESTION: Well, I'm still having trouble opening the door. I haven't gotten to the candle yet.
>
> (Laughter.)
>
> MR. TIGAR: I apologize for the * * * metaphor, sir.
>
> QUESTION: I just– * * * I'm aware of no doctrine of opening the door other than to avoid taking an inconsistent position before a trier of fact, which confuses the trier of fact. That did not happen here. *United States v. Salerno*, No. 91-872, 1992 WL 687558 at *31-*33 (Apr. 20, 1992).

As experienced and excellent an advocate as he is, even Tigar appeared to be trying to devise metaphors at the expense of a simple articulation of his position. A metaphor is only powerful if the legal position it purports to illustrate is sound. But a metaphor cannot mask a weak argument.

### § 5 Use Tendentious Propositions

Counsel who make tendentious arguments before an appellate court soon find themselves in trouble. In *C&L Enterprises, Inc. v. Citizens Band Potawatomi Indian Tribe*, 532 U.S. 411, 121 S. Ct. 1589 (2001), the Supreme Court considered whether an Indian tribe had waived sovereign immunity and consented to be sued in a contract with an arbitration clause containing this language: "The award rendered by the arbitrators * * * shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." *See* 532 U.S. at 415, 121 S. Ct. at 1592-93. As the argument proceeded, counsel for the Tribe, Michael Minnis, first raised the ire of the court by calling that language "boiler plate" and attributing to it little meaning:

> MR. MINNIS: * * * I think this is boiler plate language. It simply made it clear–

> QUESTION: What does the fact that it's boiler plate language have anything to do with it?
>
> MR. MINNIS: Well, because it has–what it has to do with is the intention of the parties to waive sovereign immunity. And if it's a contract, it's not a contract tailored any way for a government, or any way for an Indian tribe, you're reading it and it seems like a party–
>
> QUESTION: Then, the answer is, is it not–it isn't a severely specific waiver. I don't see why the fact that it's boiler plate cuts one way or the other. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, No. 00-292, 2001 WL 300633 at *27 (Mar. 19, 2001).

It turned out that Minnis was arguing for a form of "gotcha": the Tribe had not waived its sovereign immunity, so the reference to an arbitral award being enforced in "any court" was unenforceable. When the justices figured that out, they unloaded on Minnis:

> QUESTION: Is it your position that you consent that you waive immunity in Tribal Court?
>
> MR. MINNIS: No.
>
> QUESTION: You don't think it even mean[s] Tribal Court, do you? I didn't understand your answer to Justice Breyer.
>
> MR. MINNIS: Well, I–what I tried to–
>
> QUESTION: You think it means any court that you can get me in without this agreement, which doesn't include any Tribal Court.
>
> MR. MINNIS: That's correct.
>
> QUESTION: Is it a court on the moon? I mean, what is–there are only to my knowledge Tribal Courts, federal courts, state courts, what else is there?
>
> MR. MINNIS: There are any courts that have jurisdiction. It begs the questions which court has–
>
> QUESTION: But, you say no court has jurisdiction because this isn't a waiver of tribal immunity.

> MR. MINNIS: That's correct.
>
> QUESTION: I thought your position was no court had jurisdiction.
> MR. MINNIS: That's correct.
>
> QUESTION: You're on the moon.
>
> MR. MINNIS: That's correct.
>
> QUESTION: So, the tribe in effect has asked the contractor to use a term which in fact is totally meaningless, utterly misleading, and apparently an act of intentional bad faith. Isn't that the consequence of your position?
>
> MR. MINNIS: No, Your Honor. The–every–
>
> QUESTION: It means any court having jurisdiction. A-ha, there isn't one of those. Too bad. We didn't mention that. That seems to be the argument.
>
> MR. MINNIS: That is the argument, Your Honor. * * * *Id*. at *31-33.

Unfortunately, it got worse. Even with that colloquy, some of the justices had not fully grasped the extent of the duplicity in Minnis' position.

> QUESTION: I'm asking you what your answer to Justice Ginsburg was, whether you didn't agree whether it was a deceptive contract?
>
> MR. MINNIS: I don't believe it's a deceptive contract as a matter of law because everyone is chargeable with knowledge of the law, which are that Indian tribes have sovereign immunity * * * unless they waive it. And they don't have a clear and unequivocal waiver here and therefore–
>
> QUESTION: So, the tribe brings this contract to the contractor. It says they agree to arbitration in any court having jurisdiction, but it really doesn't grant anything that way.
>
> MR. MINNIS: Absent from something from the tribe, that's correct, Your Honor. *Id*. at *37.

That is a sure way to lose a case, 9-0, in the Supreme Court. *See* 532 U.S. at 413, 121 S. Ct. at 1592. As soon as Minnis conceded that his client's position was based on a bad-faith interpretation of the contract that gave the opposing party to the contract no recourse, he

completely lost the court.

### § 6 Lead Off With a Proposition that Generates Questions

The opening moments of any appellate argument are critical for establishing the advocate's credibility before the court. The advocate must articulate the key theme she hopes to develop in the argument and create a bond with the court. The advocate can quickly get off track if the opening sentences of an argument spark questions or raise doubts about whether the court should have confidence in the advocate.

In *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416 (1997), the Supreme Court considered the second case addressing the parameters of the constitutional rule that officers must generally knock and announce their presence before executing a warrant. (The first was *Wilson v. Arkansas*, 514 U.S. 927, 115 S. Ct. 1914 (1995). In *Richards*, the Wisconsin Supreme Court had held that officers in drug cases did not need to knock and announce their presence because to do so would enable drug dealers inside the premises to destroy evidence. Petitioner's counsel, David Karpe, obviously sought a dramatic way to begin his argument that the Constitution should not permit a blanket exception to the rule announced in *Wilson v. Arkansas* that officers must knock and announce before executing a warrant. But the way he chose to be dramatic was ill-conceived. This excerpt shows just how quickly Karpe's argument degenerated:

> CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 96-5955, *Steiney Richards v. Wisconsin*. Mr. Karpe, you may proceed whenever you're ready.
>
> MR. KARPE: Mr. Chief Justice, and may it please the Court: This case presents the issue of whether the Fourth Amendment prohibits a blanket exception to the knock-and-announce rule in drug-dealing cases. This case turns on the sanctity of the home, the ultimate private place–

QUESTION: This fellow was actually in a motel room, wasn't he?

MR. KARPE: Mr. Chief Justice, I fully agree, and as one who has been a resident of a hotel room recently I would submit that it is the longstanding doctrine of this Court that a hotel room is a home for the purposes of the Fourth Amendment under *Stoner v. California* [376 U.S. 483, 84 S. Ct. 889 (1964)]–

QUESTION: Is there a case that says a motel room is a home?

MR. KARPE: I believe *Stoner v. California*, *United States v. Jeffers* [342 U.S. 48, 72 S. Ct. 93 (1951)], *United States v.*–

QUESTION: I agree with you those cases said that a hotel room is protected by the Fourth Amendment. I don't know that any of them ever said a hotel room is a home.

MR. KARPE: I–Mr. Chief Justice, I believe that those stand for the proposition that the hotel room has the same protection as a home. If it has four walls and a roof, it's a home.

QUESTION: I think that's probably correct, but to say–when you say that a motel room–we're talking here about the sanctity of the home. You're talking about something that is protected under the Four[th] Amendment in the same way that a home is.

MR. KARPE: Yes, Mr. Chief Justice.

QUESTION: The Fourteenth Amendment doesn't mention homes anyway, does it?

MR. KARPE: It mentions–

QUESTION: The right of people to be secure in their persons, houses, papers, and effects, so I guess the real issue is whether a hotel room is a house. Do you think it's a house?

(Laughter.)

MR. KARPE: Justice Scalia, I believe that the textual use of house is not referring to the–protecting the structure but rather what occurs inside the house. *Richards v. Wisconsin*, No. 96-5955, 1997 WL 143822 at *3-*4 (Mar. 24, 1997).

In fairness to Karpe, he won the case, with the court holding that there is no blanket exception in

drug cases to the general rule that officers must comply with the knock-and-announce rule. But the breakdown of his opening was completely foreseeable and preventable if he had considered how the justices would react to his invoking the "sanctity of the home" in a case involving a drug bust on a person in a motel room. All too often, an advocate's opening words can be so misdirected that the advocate is forced off balance before she barely gets started.

### § 7 Cite the Record Incorrectly

Citing the record incorrectly is completely inexcusable in any court proceeding, but to do so in the Supreme Court or court of appeals risks inviting judicial wrath at its most vocal. One of the most regrettable demonstrations of this mistake was in the case of *Shalala v. Whitecotton*, 514 U.S. 268, 115 S. Ct. 1477 (1995). The case concerned an interpretation of two provisions of the Vaccine Injury Act. Counsel for respondent, Robert Thomas Moxley, gave one of the least-prepared performances in recent memory. A reprint of large portions of his colloquy with the court illustrates how tough the questioning can become if counsel is not well prepared and cites portions of the record without being sure those citations are accurate. References to the "table" are to the schedule for payments of benefits to a person under certain criteria:

> QUESTION: That's one of your arguments. And alternatively you argue, under the table, that the seizure within 3 days, or whatever the period was, was the first symptom of serious aggravation.
>
> MR. MOXLEY: That is correct, Your Honor.
>
> QUESTION: So you have two alternative arguments.
>
> MR. MOXLEY: That is correct.
>
> QUESTION: Where did the finder of fact conclude as to that?

MR. MOXLEY: The finder–

QUESTION: I mean, surely that's a factual question.
MR. MOXLEY: The finder of fact found that we technically fit the table, but that maybe Congress did not intend for the table to be literally applied.

QUESTION: Can you point to the words in the finder of fact's findings that say what you've just summarized?

MR. MOXLEY: There is a footnote. One would have to look in the petition for writ, and have to look for the special master's decision. Page 27a of the petition for writ of certiorari. *Shalala v. Whitecotton*, No. 94-372, 1995 WL 116213 at *31-*32 (Feb. 28, 1995).

The problem was, the justices actually looked at page 27a of the petition appendix and did not find counsel's reference. A few minutes later, this colloquy ensued:

QUESTION: Mr. Moxley, may I come back to Justice Ginsburg's question about what the finder of fact had to say about aggravation? You referred us to page 27a, and footnote 4. I have read it now three times, and I find not a word about aggravation. It says nothing about aggravation.

MR. MOXLEY: The special master went into the question of comparing the ultimate condition, consistency of ultimate conditions.

QUESTION: This is the closest you can find to a finding by the special master that this was a significant aggravation–

MR. MOXLEY: No, Your Honor.

QUESTION: Page 27a.

MR. MOXLEY: No, Your Honor.

QUESTION: Well, give me another page.

MR. MOXLEY: That is the–

QUESTION: I don't find a mention of aggravation on page 27.

MR. MOXLEY: I agree. I–

QUESTION: Well then, why did you cite that page in response to Justice

Ginsburg's question?

> MR. MOXLEY: I believe that she was asking me if I was–if I could point out whether or not the court had addressed the issue of a table injury, Your Honor.
>
> QUESTION: I thought it was aggravation.
>
> MR. MOXLEY: I believe that–
>
> QUESTION: Well, I'll ask you. Aggravation. * * * Where did the finder of fact find an aggravation?
>
> MR. MOXLEY: The finder of fact used the *Massoci* test as articulated–as ostensibly argued in my brief, which was to compare the ultimate condition of the speculative–compare the ultimate condition to the outcome from the speculative organic brain syndrome. * * *
>
> QUESTION: I think what you're saying is, not at all.
>
> MR. MOXLEY: Not at all, properly. That is correct, Your Honor.
>
> QUESTION: Not at all, that the finder of fact did not find any aggravation.
>
> MR. MOXLEY: No. He addressed aggravation at page 36a. *Id*. at *37-*38.

Moxley's citation to page 27a might have been forgivable as an inadvertent error or misstatement. The problem was, aggravation was not addressed on page 36a, either:

> QUESTION: Where on 36a does the special master talk factually about aggravation?
>
> MR. MOXLEY: I don't believe the special master did. * * *
>
> QUESTION: Did the special master anywhere make any factual finding that there was an aggravation? Yes or no.
>
> MR. MOXLEY: No. He found that there was no aggravation. *Id*. at *37- *39. * * *

That colloquy exasperated the entire court. This exchange followed, which produced one of the harshest statements made in open court by a justice to an advocate:

> QUESTION: Mr. Moxley, we've been questioning you several times about findings of aggravation. You answered me just a moment ago that the special

> master made no finding. Now Justice Ginsburg points out that he made a very express finding. How can you stand up there at the rostrum and give these totally inconsistent answers?
>
> MR MOXLEY: I'm sorry, Your Honor. * * *
>
> QUESTION: Well, you should be.
>
> MR. MOXLEY: I don't mean to confuse the court.
>
> QUESTION: Well, you–perhaps you haven't confused us so much as just made us gravely wonder, you know, how well-prepared you are for this argument.
>
> MR. MOXLEY: Your Honor, it is our assertion that the onset of a residual seizure disorder in table time is a significant–
>
> QUESTION: Your time has expired. *Id*. at *39-*40.

No counsel ever wants to have that kind of tongue-lashing from any court, much less the Supreme Court of the United States. But an attorney certainly faces that risk by incorrectly citing the record, giving inconsistent answers, and demonstrating a complete lack of preparation.

### § 8 Use Sarcasm in the Courtroom

In the *Glickman* case mentioned above, respondent's counsel, Joseph Campagne, committed an infamous faux pas in the courtroom, which led to his being removed as counsel for the company and sued for malpractice after the government prevailed, 5-4. He was in the midst of a colloquy concerning whether the federally mandated generic advertising program improperly created the impression that all types of a particular fruit were the same, regardless of quality or their other characteristics.

> QUESTION: To what effect? To the effect that the advertising goes primarily or overwhelmingly to support the proposition that all California peaches are desirable?
>
> MR. CAMPAGNE: Are the same.

> QUESTION: Are the same?
>
> MR. CAMPAGNE: Yes. * * *
>
> QUESTION: And you object to that. You'd be here even if they weren't pushing the Red Jim or whatever this nectarine is.
>
> MR. CAMPAGNE: Absolutely, because that's not truthful. I want to tell * * * that you ought to buy green plums and give them to your wife, and you're thinking to yourself right now you don't want to give your wife diarrhea, but green plums–
>
> QUESTION: Green plums? I would never give my wife a green plum.
>
> (Laughter.) *Glickman v. Wileman Bros. & Elliott, Inc.*, 1996 WL 700569 at *53 (Dec. 2, 1996).

At that point, the argument completely disintegrated. Four justices simultaneously tried to speak. The justices were embarrassed that Campagne would suggest to Justice Scalia that his wife would get diarrhea from eating a green plum. Campagne's inability successfully to press his legal argument may well have contributed to his client's loss of the case, a conclusion supported in part by the court's decision in *United States v. United Foods, Inc*., 533 U.S. 405, 121 S. Ct. 2334 (2001), which involved a similar program of government-mandated funding of generic advertising for the mushroom industry. The government argued strenuously that the case was indistinguishable from *Glickman*, but a majority (principally composed of the dissenters in *Glickman* plus Justices Stevens and Kennedy) distinguished that case. Thus, *Glickman* may well have been a case that was lost at oral argument.

***  *  *  *  ***

By contrast with the foregoing errors, the best advocates have prepared their cases carefully and come to court equipped to handle the most difficult questions the members of the court can pose. They have a command in the courtroom that belies the fact that the court is running the

show. The respect they elicit from the members of the court is palpable–in the way they listen carefully to the advocate, take notes if the advocate makes a particularly telling point, and challenge the advocate to help them understand the complexities of the case and the implications of their ruling. This section describes the attributes of the best advocates and the moments in oral arguments over the past decade that best illustrate those attributes.

### § 9 Have a Mantra

The best advocates will have a simple mantra that reduces the case to its bare essence. In *Ohio* v. *Robinette*, 519 U.S. 33, 117 S. Ct. 417 (1996), the Supreme Court of the United States addressed whether, under the Fourth Amendment, an officer must tell a motorist at the end of a routine traffic stop whether she is free to leave and whether, if the officer fails to say so, any cooperation from the motorist is presumed to be involuntary. The Ohio Supreme Court had issued a per se blanket rule that, when an officer fails to tell a motorist she is free to leave, if the motorist answers any further questions or permits a search of the vehicle, such actions are presumed to be involuntary and the evidence obtained therefrom must be suppressed if the officer fails to give *Miranda* warnings. The case had broad implications for how traffic stops are conducted. Interestingly, it also arose the same term as *Maryland v. Wilson*, 117 S. Ct. 882, 519 U.S. 408 (1997), in which state and federal governments urged the Supreme Court to announce a per se rule that officers could order passengers out of a vehicle during a routine traffic stop to further the aim of officer safety. Thus, in *Robinette*, law enforcement interests wanted a totality-of-the-circumstances test to determine when a person was free to leave the scene of a traffic stop, while in *Wilson* they wanted a per se rule that officers could order passengers to exit the vehicle

regardless of the circumstances.

During his *amicus* argument, Assistant to the Solicitor General Irving L. Gornstein kept urging the court to adopt the traditional totality-of-the-circumstances test that marks much Fourth Amendment jurisprudence. From the initial questions put to him after the first sentence of his opening, he sought to drive home his point that whether a person would feel free to leave should be assessed by the totality of the circumstances.

> QUESTION: Supposing we disagree with that holding [that a per se rule applies requiring an officer to inform a motorist that he is free to leave], is it nevertheless true that we might affirm the judgment in this case?
>
> MR. GORNSTEIN: I think that * * * [i]t is possible, if you concluded that on the totality of the circumstances in this case the respondent would not have felt free to leave in light of the officer's conduct in this case, you could affirm the judgment. We would suggest that you go on and conclude, based on the totality of the circumstances, that he was free to leave at that point in time. *Ohio v. Robinette*, No. 95-981, 1996 WL 587659 at *20 (Oct. 8, 1996).

Gornstein thus neatly took the question, emphasized subtly that the Ohio Supreme Court had applied the wrong test, and argued that, under the correct test, its result was wrong. For the government's interest, getting the court to announce the correct rule–a totality-of-the-circumstances inquiry–was of paramount importance. But Gornstein also perceived that how that test was applied in this case would be important, hence his secondary focus on applying the proper test to these facts.

Gornstein then fielded a question from Justice Ruth Bader Ginsburg about whether it was conceded that the officer had ordered the motorist out of the car "so he could turn on the video tape in the police officer's car and have a video tape of what next transpired?" *Id*. at *23. Gornstein responded: "That is correct, but as I was just saying, Justice Ginsburg, it does not matter under the Fourth Amendment what the officer's subjective motivation was, it is what is a

reasonable conduct under the circumstances, and under this Court's decision in *Mimms*, [*Pennsylvania v. Mimms*, 434 U.S. 106, 98 S. Ct. 330 (1977)], as long as the business of that traffic stop was not completed, a reasonable officer can order a person out of the car to issue the warning." *Ohio v. Robinette*, 1996 WL 587659 at *23.

Gornstein was well over halfway into his argument before he was able to seize an opportunity to return to his opening and summarize his affirmative points. Here is what he said:

> "[T]he Ohio supreme court's *per se* test should be rejected, for three reasons. First, this Court has in a wide variety of contexts decided whether there is a Fourth Amendment seizure based on the totality of the circumstances. The relevant inquiry has always been whether under the totality of the circumstances an officer's conduct would have communicated to a reasonable person that he was not free to leave. That is the test that has been applied in street encounters, in airports, [and] on buses." *Id*. at *25-*26.

At that point, Justice John Paul Stevens asked Gornstein whether a person's testimony that he thought he was free to leave was irrelevant. Justice Stevens was setting a clever trap, which if Gornstein handled incorrectly would have the effect of conceding away the objectively based totality-of-the-circumstances test on which he had based his theory of the case. He had not long before answered questions to the effect that the officer's subjective intentions were irrelevant to the totality of the circumstances. But here, how could he possibly disagree with the notion that the motorist's subjective intention–his own understanding that he was free to leave–was irrelevant? Here is how Gornstein perceived Justice Stevens' trap, and used his mantra to avoid it:

> QUESTION: And under that test, is [the person's] testimony he was free to leave therefore irrelevant?
>
> MR. GORNSTEIN: I don't think it is entirely irrelevant, Justice Stevens. I think in this case an admission–
>
> QUESTION: His subjective motivation is relevant, but the officer's subject motivation is not relevant?

> MR. GORNSTEIN: Well, it tends to show whether–it's of some relevance, but then you have to go on from there and examine whether–what a reasonable officer would do. It is not dispositive. Similarly, the cases here, what this particular person thought is of some relevance. You still then have to go and conclude–
>
> QUESTION: Well, similarly, then, is what this particular officer thought of some relevance?
>
> MR. GORNSTEIN: It is of some relevance, but it ends up being–
>
> QUESTION: Not controlling.
>
> MR. GORNSTEIN: Not dispositive, because a reasonable officer could always conclude that it is reasonable to order somebody out of the car when you're going to have interaction and you haven't completed the work of the stop.
>
> QUESTION: Is there any difference between a consensual encounter, where the person has never been under detention, and a case where there has been a detention and then it's asserted that the detention ended and the rest was consensual?
>
> MR. GORNSTEIN: I would say that you apply the same totality of the circumstances test, but of course, in applying that test, you take into account in deciding whether at a later point in time something is consensual or a seizure, that at an earlier point in time there was a seizure. That is a relevant factor in deciding, but it does not change the ultimate inquiry, which is whether on the totality of the circumstances at the later point in time the officer's conduct would have communicated to a reasonable person that he was not free to leave. *Id*. at *26-*27.

Gornstein's use of this mantra–the totality-of-the-circumstances test applies when analyzing whether a person has been "seized" under the Fourth Amendment–helped him steer clear of a potentially case-dispositive concession to Justice Stevens. It also facilitated his ability to work through a subsequent difficult hypothetical and kept the court focused on the proper standard to apply in this case.

### § 10 Answer Questions Directly

The best advocates understand the relative impatience of the members of a court to get an answer to their questions. Virtually all great advocates answer questions with simple, dispositive answers. If a question calls for a "yes" or "no" answer, they give it. But the great advocates also perceive and appreciate when a member of the court is badgering them into making a "yes" or "no" concession that will be used in an incomplete or distorted way. There are a number of different approaches to dealing with this problem. First, if the advocate has answered a series of questions with a "yes" or a "no," she can realistically expect the court to give him some leeway if she suddenly puts a qualifier in the answer before saying "yes" or "no." Another approach is to say, "Yes, but not in all cases and here is why." Or, "Generally, yes." That method softens the harsh effect that can sometimes be produced with a "yes" or "no" answer.

An advocate who fights too hard to avoid giving the answer sought by the questioner simply wastes time and irritates the court. A few very experienced advocates knowingly violate this "rule," but they do so perhaps not appreciating how much it annoys the court. They can get away with it to a degree–judges tend to stop asking them direct questions–but the court also tends to tune them out. Such advocacy obviously violates the cardinal rule of advocacy that an advocate should not alienate the decision maker.

There are several reasons why an advocate will not answer a question directly. One is the lack of an answer. Advocates are not immune from attempting a filibuster if it helps them think through an answer to a question. A second is to avoid directly conceding something harmful to their case. A protracted response that does not get directly to the point can sometimes satisfy a court without necessarily providing a direct answer. A third reason for not responding directly to

a question is that it is phrased in a manner that may cause the advocate to answer in a potentially misleading way. A questioner seeking a concession will use the best of cross-examination techniques. The best advocates will know going into the argument who on the court is likely to be sympathetic and who is opposed to their case, so a likely opponent can be expected to ask questions designed to trip up the advocate. Listening carefully to the question and pausing before answering can be crucial in such circumstances, as can seeking a clarification from the questioner.

Unfortunately, the most common reason why an advocate fails to answer directly is simply a lack of confidence that "yes" or "no" is the correct answer. Except when the question is far afield from the case, the best advocates typically do not hesitate to give the direct response sought by the court.

### § 11 Fill "Air" Time

In almost every oral argument, after the members of the court have exhausted their questions, a moment will occur when the advocate realizes that he has the floor and must make arguments. The intensity of the questioning can make that moment an awkward one, but the best advocates will plan for how they want to fill this unexpected "air" time. In *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326 (2000), Solicitor General Seth Waxman argued for the preservation of the rule announced by the court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966), which the United States Court of Appeals for the Fourth Circuit had held could be supplanted by a congressional enactment. Waxman faced active questioning for the first 12 minutes of his argument time–so active, in fact, that he had been unable even to outline the three points that he hoped to make from his prepared opening. One of those points was that the case to

overrule *Miranda* had not been made. As he stated that point, no member of the court immediately interrupted again. Without hesitating, he launched into this argument, brilliant in its succinctness and persuasive appeal:

> Now, why do I say that in our view, because it is certainly–it may be very unusual, but it would not be improper for the Solicitor General of the United States to ask this Court to reconsider and overrule one of its precedents, although in this case we're talking about 34 years and, as the Chief Justice has mentioned, 50 precedents, but let me just list the four reasons why, in our view, the Court–the case has not been made to overrule *Miranda v. Arizona*. First, we think that stability in the law is important, and it is nowhere more important than in this case, given the Court's extremely unhappy experience with the law of confessions under the totality-of-the-circumstances, and the certainty that this Court has repeatedly recognized that *Miranda* provides.
>
> Second, in our view, *Miranda*, as it has been developed and tailored and refined by this Court, has proven workable, and its benefits to the administration of justice have been repeatedly emphasized by this Court and documented by the Court. Third, in its–all of its post-*Miranda* cases, this Court has reaffirmed *Miranda*'s underlying premise, that is that custodial interrogation creates inherently compelling pressures that require some safeguards. And finally, any reevaluation of *Miranda* must take account of the profoundly unhappy experience of this Court that impelled its adoption. Applying the totality-of-the-circumstances test in 36 cases over 30 years before 1966, the Court was simply unable to articulate manageable rules for the lower courts to apply. [*Dickerson v. United States*, No. 99-5525, 2000 WL 486733 at *14-*15 (Apr. 19, 2000).

As Waxman made that argument, it became clear to many in the courtroom that the court would not overrule *Miranda*. And it did not.

### § 12 Educate the Court

The best advocates view argument not just as an opportunity to make the points to sway members of the court, but also to educate them about the issues raised by the case. Although the phrase "educate the court" may seem presumptuous, that is in fact what the best advocates do.

The law is so vast and a federal court's docket so varied that each argument provides an opportunity to enrich the court's understanding of an area of law. The best advocates try to find something helpful to the case that creates an opportunity to educate the court. That form of educating, as Waxman demonstrated in *Dickerson*, can come in the context of stating affirmative points. When an advocate enlightens the court while also making affirmative points, she is elevating oral advocacy to an art form.

Former Deputy Solicitor General William Bryson understood the importance of educating the court. In fact, he was so skilled in this regard and so knowledgeable about criminal law that the justices occasionally asked questions outside the core of the case just to get the benefit of Bryson's knowledge. In *Evans v. United States*, 504 U.S. 255, 112 S. Ct. 1881 (1992), for example, the court considered whether the common law crime of official extortion was incorporated into the Hobbs Act by Congress's use of the words "under color of official right." Near the end of his argument, after he had addressed the justices' question about the core of the case, a justice put to Bryson this question:

> QUESTION: May I ask one other question, just as a matter of information? If we disagreed with your reading of the extortion statute, is there a provision of the criminal code that covers the knowing acceptance of money that the donor expects to be used to pay for a legislative vote or something like that?
>
> MR. BRYSON: I would think you would have to go to the Travel Act, which is the statute that governs interstate travel or transportation, the use of interstate facilities to effect a violation of State bribery or extortion laws. Then you would have to prove, of course, there was some–
>
> QUESTION: But there's no independent, just plain garden variety, like a bribe, that no separate crime other than extortion–Federal crime–for the receipt of a bribe?
>
> MR. BRYSON: Well, except with respect to official–Federal officials, of course. Federal officials would be covered, but with respect to State officials and local officials * * * they would not be covered. *Evans v. United States*, No. 90-6105,

1991 WL 636267 at *48-49 (Dec. 9, 1991).

The educating of the court should be respectful and contextual. Lecturing at the court rarely persuades, but when the advocate can provide useful information or perspective within the context of the issues presented, the members of the court are genuinely appreciative.

### § 13 Stick to the Black-Letter Law

Although the Supreme Court and the courts of appeal will announce decisions that may have broad policy implications, they generally disdain arguments that focus too heavily on such matters. The best advocates will "stick to the black-letter law," as Deputy Solicitor General Michael Dreeben puts it when advising less experienced advocates in arguing appellate cases. By that he means the advocate should ground the argument in the legal tests announced by the court that are analogous or otherwise applicable in particular settings, the statutory language enacted by Congress to address a particular situation, or case holdings from the court–in short, those principles of settled law to which the advocate hopes the court will draw analogies in announcing its decision.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130 (1992), then-Assistant to the Solicitor General Edwin S. Kneedler relentlessly invoked black-letter principles of the law of standing to argue that the organizations lacked standing to challenge regulations promulgated by the Department of the Interior. In nearly every answer he gave, Kneedler returned to a principle of settled law. The second question he fielded concerned whether abridgment of a right conferred by Congress could constitute the kind of injury Congress intended to be redressed by a lawsuit. Kneedler responded by conceding that if a statute "defines a statutory right and then says that a person may sue for a violation * * * then standing would result because Congress has defined the

right." *Lujan v. Defenders of Wildlife*, No. 90-1424, 1991 WL 636584 at *5-*6 (Dec. 3, 1991). But he then contrasted the statute at issue–the Endangered Species Act–by pointing out that "the citizens' suit provision does not define any substantive rights. Just as this Court said in *Valley Forge* [*Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 4646, 102 S. Ct. 752 (1982)], the [Administrative Procedure Act] provision, giving any person aggrieved a right to sue, does not define substantive rights, it simply creates a cause of action. So respondents would be required to look elsewhere in the Endangered Species Act for any substantive rights that they would seek to invoke in this case." *Id*. at *6.

At another point, Kneedler was asked whether "the citizens' suit provision would enable a citizen to sue because * * * a Federal agency had failed to consult?" His response was a perfect illustration of sticking to black-letter law:

> It would confer a right of action. But again, the article III standing requirements would have to be met. And as this Court has made clear, there are three essential standing requirements that, even under a citizens' suit, a plaintiff has to meet. First, the plaintiff must show that he has suffered some actual or threatened injury; second, he must show that that injury is fairly traceable to the challenged action; and third, he must show that that injury–there's a likelihood that that injury will be redressed by a decision in his favor. *Id*. at *8-*9.

Kneedler's focus on settled principles of law–stated with unerring accuracy–proved very powerful.

### § 14 End on a Powerful Note

Controlling the ending of an argument is extremely difficult. But, if possible, an advocate should try to finish on a powerful note. Indeed, the best advocates will think through the very best way to end an argument and focus on how to get to that point as time is expiring. Solicitor General Theodore Olson, for example, will try to transition from the point he is making to the point

on which he wants to end when a minute is remaining in his allotted time. In his view, it is far better to end on a strong note than to use up all of his time.

In *INS v. Doherty*, 502 U.S. 314, 112 S. Ct. 719 (1992), then-Deputy Solicitor General Maureen Mahoney demonstrated this principle. She was seeking to overturn a court of appeals decision holding that the Attorney General had abused his discretion in denying Joseph Doherty's motion to reopen his deportation hearing. Doherty, believed to be a member of the Irish Republican Army, sought asylum in the United States or deportation to some country other than the United Kingdom, where he had been convicted in absentia for murdering a British officer in Northern Ireland. Mahoney sought to paint Doherty as especially dangerous, as contrasted with other aliens whose immigration cases sometimes made their way to the Supreme Court. Thus, she ended her argument in this way:

> MS. MAHONEY: * * * The facts surrounding the May '80 events that Mr. Doherty admitted were that his group hijacked a van, held the driver captive, forcibly seized a private residence in a residential neighborhood, held the family captive, and waged a gun battle with automatic weapons from the family's living room. The Attorney General found that that conduct was precisely the type of conduct that endangered innocent civilians and could not–and had to be regarded as serious nonpolitical offenses. I see my time is up. Thank you. *INS v. Doherty*, No. 90-925, 1991 WL 636238 at *48 (Oct. 16, 1991).

Mahoney's effectiveness in persuading the court of Doherty's dangerousness was evidenced not only in the court's decision, which ruled that the Attorney General had not abused his discretion in refusing to reopen the deportation proceedings, but also in a colloquy she had a month later in a different immigration case. In *INS v. Elias-Zacarias*, 502 U.S. 478, 112 S. Ct. 812 (1992), Mahoney urged the Supreme Court to reverse a court of appeals decision holding that an 18-year-old alien's fear that he would be kidnapped by guerrillas to serve in their military in Guatemala made him eligible for asylum. During the argument, Justice Blackmun pointedly asked Mahoney

how old Zacarias was.

> MS. MAHONEY: Your Honor, I believe he was 18.
>
> QUESTION: He's no [Joe] Do[h]erty, is he?
>
> MS. MAHONEY: No, Your Honor, he is no [Joe] Do[h]erty, and the Government has never said otherwise. [*INS v. Elias-Zacarias*, No. 90-1342, 1991 WL 636277 at *19 (Nov. 4, 1991)]

It is extraordinary for a justice to refer in one argument to another pending case, but Justice Blackmun's reference signaled how successfully Mahoney had persuaded the justices of Doherty's dangerousness.

### § 15 Speak in a Conversational Tone, But With Professional Sincerity

Counsel's first instinct arguing in a large courtroom might be to speak in a big voice to fill up the room. That is not necessary. The best advocates maintain a low-key, conversational tone with the justices. They speak in what Robert Jackson, the former Supreme Court justice and Solicitor General, referred to as a conversational tone, with "professional sincerity." Robert H. Jackson, "Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations," 37 A.B.A. J. 801, 863 (Nov. 1951). As E. Barrett Prettyman, Jr., one of the finest Supreme Court advocates of the last third of the twentieth century, once wrote, "it should be a joy for the Court to hear you, not just its duty." E. Barrett Prettyman, Jr., "Supreme Court Advocacy: Random Thoughts In a Day of Time Restrictions," 4 LITIGATION 16, 19 (1978). Attorneys who speak too loudly get admonished, as do attorneys who do not talk into the microphone and who mumble. (Yes, there are such attorneys and they do argue in the Supreme Court and the courts of appeals.)

In most appellate forums, and the Supreme Court is no exception, the more animated a

speaker becomes, the more foolish she tends to look. A calm and cool demeanor works best in most appellate arguments because the members of the court look at oral argument as an opportunity to have a conversation with counsel to help solve the legal puzzle presented by the case. It is not a place, like the floor of the House of Representatives or Senate, for rhetoric and more impassioned speech. That said, the advocate must demonstrate "professional sincerity." An advocate has to care about the case, the client, and the cause he is arguing. That sincerity gets communicated by a politely insistent tone that conveys a controlled passion about the case. Of course, some cases and legal positions lend themselves more readily to somewhat more passion, and the advocate's tone must adjust to the equities presented by the case. An advocate speaking more passionately to defend sovereign immunity against a victim of a hideous tort may well cause offense; a respectful, but firm, tone that the position is simply required by the law will be much more effective. The nature of the legal issue thus can affect the advocate's tone.

### § 16 Be Respectful, But Not Obsequious

An advocate's tone is important in an appellate argument. The best advocates are respectful without being either arrogant on the one extreme or obsequious on the other. Just because it is a court does not justify the kinds of stylistic genuflections some less-experienced attorneys are prone to give. Counsel is there to represent a client who has every right to have the court–even the highest court of the land–hear its case. The court's job is to decide it. Judges will not respect an advocate who is too submissive. An advocate should politely, but firmly, disagree with a proposition put by the court if the advocate disagrees with it. As Justice Jackson once advised, "Be respectful, of course, but also be self-respectful, and neither disparage yourself nor

flatter the Justices. We think well enough of ourselves already." Jackson, "Advocacy Before the Supreme Court," 37 A.B.A. J. at 802.

### § 17 Use Humor in an Appropriate Manner

Using humor can often fail. But the best advocates appreciate that occasional levity can be healthy in the courtroom. The general rule, however, is that humor is for the members of the court and not the advocates. The advocate serves as the setup man for the judge's wit. Never should an advocate say something humorous at the expense of a member of the court. If a judge or justice makes a dig at the advocate, the best course is to maintain a composed, self-deprecating air. Theodore B. Olson, prior to becoming Solicitor General, had earned a reputation as a fine Supreme Court advocate through his thorough preparation and facile mind at argument. In *Rice v. Cayetano*, 528 U.S. 495, 120 S. Ct. 1044 (2000), he also demonstrated a nice self-deprecating wit:

> QUESTION: If that kind of legislation were expanded to allow any group of American Indians to, whether they're tribal or not to run a casino but nobody else.
>
> MR. OLSON: I'm not sure I'm understanding the question. * * *
>
> QUESTION: The question's very easy.
>
> MR. OLSON: It's the answer that's hard, perhaps.
>
> (Laughter.) No. 98-818, 1999 WL 955376 at *12 (Oct. 6, 1999).

Every now and then an advocate can use humor to affirmative advantage. In his argument in *United States v. Scheffer*, 523 U.S. 3030, 118 S. Ct. 1261 (1998), Michael Dreeben pulled off a use of humor rarely seen in a Supreme Court case. Dreeben was defending the constitutionality of a military rule of evidence that precluded the admission of polygraph results. He had to deal

with the inconsistency between the United States government's use of thousands of polygraphs each year and its desire to keep the results of polygraphs from being admitted into evidence in military courts-martial. Dreeben found an exceedingly clever way to draw a line between the partial utility of polygraphs and the reasons why they could be precluded from admission into evidence:

> MR. DREEBEN: In investigations, the polygraph is an extraordinarily productive interrogation tool. An enormous amount of confessions are given when a suspect either fails a polygraph or believes that a polygraph is about to smoke him out. I have to say that in that sense there are examiners who believe that it is entirely reliable in this respect, and that it's a great interrogation tool because it's accurate. There are other people who will say that, well, it's a great placebo.
>
> There is a story of a police interrogation in a State system where the police put a colander on a suspect's head and wired it up to a Xerox machine, and then pressed a button that produced a picture, a little copy that said, you're lying, every time the suspect answered.
>
> (Laughter.)
>
> MR. DREEBEN: The suspect confessed.
>
> (Laughter.)
>
> MR. DREEBEN: So if a suspect believes that the polygraph is accurate and is about to catch him, then it will be very useful to do that.
>
> QUESTION: It's the tainted morsel of the 20th Century.
>
> (Laughter.) *United States v. Scheffer,* No. 96-1133, 1997 WL 689299 at *18 (Nov. 3, 1997).

Dreeben's use of that example was exceedingly well thought out. That story was recounted in an article discovered during the research on the case. While considering how and whether it could be fitted into his argument, Dreeben went to the trouble of tracking down the law enforcement officer who had used the colander and photocopying machine. He was not about to

use that story unless he was absolutely sure that it was true. In the argument itself, he waited to gauge the pulse of the court. He would not have used that example if the questioning by the justices had been overwhelmingly hostile to the government's position. And he waited until he received a question about the government's investigative uses of the polygraph before attempting to use it. For the humor to work most effectively, the context had to be just right.

### § 18 Demonstrate Flexibility

Few things can be as irritating for an advocate who is on the brink of making an important point as an interruption from the bench. There are times when the advocate wants to make a point, but is precluded from doing so by questions. And a member of the court hostile to a party's position will recognize when the advocate is about to make a persuasive point and interrupt to ask a difficult question. Few advocates have been able to deal with the court as gracefully as Seth Waxman. In his argument as Solicitor General in *Dickerson v. United States*, Waxman announced from his opening sentence that the government's position was based on three principles, but he was able to state only the first before being interrupted by questions. Well into his argument, he took the opportunity of a question to tell the court that his response was going to be the second point he wanted to make. Just as he finished the fragment of that thought, he was interrupted. This colloquy followed:

> GENERAL WAXMAN: The second premise I was going to address, which is that–
>
> QUESTION: Before you get into detail on that, tell us the third one and then argue the second.
>
> (Laughter.)
>
> GENERAL WAXMAN: Okay. The third one is that we don't believe that the

> showing required to overrule *Miranda* has been made. The second, which really does precede the third one, is that Section 3501 [of Title 18 of the United States Code] in our view cannot be reconciled with *Miranda* and therefore could be upheld by this Court only if the Court were to be prepared to overrule *Miranda*. *Dickerson v. United States*, 2000 WL 486733 at *14.

A skilled advocate will move nimbly from point to point, making the arguments best tailored to the moment. Rather than tell the court to be patient and wait, Waxman went right with the flow of the questioner without missing a beat.

When he was a prominent advocate in the Supreme Court bar, Judge John G. Roberts, Jr. was another advocate who demonstrated that type of flexibility. In *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479, 118 S. Ct. 927 (1998), the court addressed both whether banks had standing to challenge the NCUA's administrative regulations and the merits of the agency's implementation of statutory language that defined how credit unions could form their memberships. Virtually all of then-Acting Solicitor General Seth Waxman's argument had addressed standing. Roberts had only 10 minutes, and, when most of his time also was spent on standing, some justices began to chafe that the merits of the case had not yet been addressed. Here is the colloquy that redressed that problem:

> QUESTION: Mr. Roberts, I–I know you're still trying to address standing, but, so far, nobody has even talked about the merits.
>
> MR. ROBERTS: Well, I'll turn to that right now, Your Honor. The test is that the banks must show that Congress unambiguously expressed its intent on the precise question at issue. The precise question at issue is, may the multiple groups in a Federal credit union each have their own common bond or must they share a common bond? The language simply says: Federal credit union membership shall be limited to groups having a common bond. There is no way to tell from that, as a matter of common parlance or technical grammar, whether each group must have its own common bond or whether all of the groups in a Federal credit union must share the same common bond. It is simply ambiguous language. *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, Nos. 96-843 & 96-847, 1997 WL 611828 at *35-*36 (Oct. 6, 1997).

Roberts moved from the law of standing to the merits without missing a beat in a few concise sentences that articulated the black-letter law and then applied it to the statutory language at issue. Roberts made no attempt to make one last point on standing. He took the suggestion to move on to the merits and did so without hesitating or losing his train of thought. And when he stated the merits issue, he formulated the points with precision.

### § 19 Handle Antagonistic Questions

Every great advocate will develop a particular style for dealing with hostile questions from the bench. Depending on the case, and how persuasive they found the position being advocated, any judge will have an urge to put tough, challenging questions to the advocate. Thus, expressing disagreement with the court can be an important skill for an advocate. In the *Coors Brewing Co.* case, Bruce Ennis demonstrated how an advocate can stand up to a Supreme Court justice with a firm, but respectful, disagreement:

> QUESTION: I'm sorry, you think a statute survives judicial attack if Congress makes findings which it would not survive if Congress didn't, so we're telling Congress to legislate in a certain fashion?
>
> MR. ENNIS: No, no, not at all, Justice Scalia.
>
> QUESTION: Don't we assume that the necessary findings sustain any congressional statute? Isn't that the assumption?
>
> MR. ENNIS: No, Justice Scalia, it's not. As this Court pointed out in the *Sable* case [*Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 109 S. Ct. 2829 (1989)], it was precisely the absence of any congressional findings of fact that resulted in the striking down of that law under the First Amendment. The only point I'm trying to make is that in terms of deference–
>
> QUESTION: This would be valid if there were findings of fact–

> MR. ENNIS: No.
>
> QUESTION: –but since Congress did not make findings of fact it's invalid?
>
> MR. ENNIS: No. If Congress had made findings of fact, then there would be an argument that the courts should show some deference to those congressional findings of fact. It should never–
>
> QUESTION: But otherwise a statute could be valid, could be invalid, we don't assume that the findings were there?
>
> MR. ENNIS: You simply apply the *Central Hudson* test [*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 100 S. Ct. 2342 (1980)]. There's no congressional finding to which the Court should defer.
>
> QUESTION: That's not my understanding. I think every piece of legislation comes to us with a presumption of validity, with a presumption that * * * it's not a conclusive presumption, but certainly we take it that going in, Congress did its job.
>
> MR. ENNIS: That's why statutes are subjected to judicial review under the *Central Hudson* test, and on applying the *Central Hudson* test, the Court [of Appeals] found there was no evidence–no evidence that in fact accurate disclosure of alcohol content on beer labels would result in strength wars. And to return to your question, Chief Justice Rehnquist, those concurrent findings of fact by two lower courts should be binding here. The Government is inappropriately attempting to reargue the very same evidence it argued in the lower courts. *Bentsen v. Coors Brewing Co.*, No. 93-1631, 1994 WL 714632 at *9-*10 (Nov. 30, 1994).

Note how Ennis kept up his disagreement with Justice Scalia, explained the theory behind his disagreement, and then came back to a related point suggested in a question by the Chief Justice as a means of moving to a topic from which he could make an affirmative point.

An antagonistic colloquy can also tend to raise the ire of a justice, causing the justice to speak more loudly, emphatically, and quickly. Richard Seamon, a longtime Assistant to the Solicitor General before becoming a law professor, had a very clever way of dealing with justices who got louder and more animated as their frustration with Seamon's position increased. Rather than matching them decibel for decibel, or increasing the pace of his delivery, he did the opposite:

the more exercised a justice got in questioning him, the calmer Seamon got. It was an amazingly effective technique for disarming the court. Seamon had a way of calming the court, showing that he would not be pushed into a corner by the justices, and earning their respect by his professional demeanor.

### § 20 End, if Possible, Before Time Expires

The best advocates appreciate what Justice Breyer once said in a speech is "the value of silence." In other words, if the court is not asking questions, the advocate should make the pertinent points and end the argument. Some advocates go so far as to suggest trying to complete the argument before time expires simply as a signal to the court of the strength of the advocate's position. In one of his arguments, Mark L. Evans had such confidence in his argument and his ability to read the court was so good that he ended his opening presentation in a 30-minute argument after just 12 minutes. *South Central Bell Tel. Co. v. Alabama*, No. 97-2045, 1999 WL 32890 at *3-*13 (Jan. 19, 1999). Just because it is the Supreme Court does not mean that the advocate has to use all of the time allotted. If the advocate has made the most important points, he should sit down. The more the advocate talks when the justices are not asking questions, the more likely the advocate is to say something that will raise questions, which may, in turn, have the effect of weakening his case. In this respect, an advocate's attention to visual cues can be very important: if the members of the court stop asking questions and stop making eye contact, they are probably trying to signal that the advocate need not say anything more. As Justice Jackson nicely put it, "Time has been bestowed upon you, not imposed upon you. It will show confidence in yourself and in your case, and good management of your argument, if you finish before the

signal stops you." Jackson, "Advocacy before the Supreme Court," 37 A.B.A. J. at 861.

### § 21 Maintain Personal Credibility

Every advocate will encounter the situation of having a client ask him to push the outer limit of what is reasonable. Without some challenge to existing law, there would be no advancement or development in the law. But the advocate facing a hostile bench must know the limits of how far he is willing to push an argument without losing personal credibility. An attorney who argues well in the Supreme Court or the courts of appeals enjoys a special reputation in the bar. No case or client is worth endangering that reputation. An advocate must sometimes make concessions or not press arguments that will strike the court as unreasonable. The finest advocates are those who have talked their client out of making losing arguments and who have come to court prepared to make necessary concessions to advance the client's ultimate interests.

* * * * *

The greatest appellate advocates each have a distinctive style, but each share common characteristics of flexibility, mental agility, preparedness, and toughness in the face of incessant questioning. They recognize that they are in a forum over which they have little real control, but through diligent advanced work and skill in the moment they establish control through the respect they win from the court. The best advocates demonstrate to the court that their command of the case is so comprehensive that the judges can trust the answers given and know that the advocate will actually help them decide the case. Those advocates practice at the highest levels of the legal profession and make an important contribution to the law.